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PLEADING AND PRACTICE
OF THE
HIGH COURT OF CHANCERY.

BY THE LATE
EDMUND ROBERT DANIELL,
BARRISTER-AT-LAW.

FIFTH AMERICAN EDITION.

WITH NOTES AND REFERENCES TO AMERICAN DECISIONS; AN APPENDIX OF
PRECEDENTS; AND OTHER ADDITIONS AND IMPROVEMENTS,
ADAPTING THE WORK TO THE DEMANDS OF

AMERICAN PRACTICE IN CHANCERY.

BASED ON THE FOURTH AMERICAN EDITION

By J. C. PERKINS, LL.D.

By W. F. COOPER, LL.D.

VOL. I.

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PREFACE.

THE work, a new edition of which is now offered to the public, has an established reputation, and fills a place in the professional library, occupied by no other book. It contains, it is true, much that is purely local to the practice of the English High Court of Chancery, and even more based on recent British legislation and Orders of Court, all of which may be said to have little or no application to the American equity system. But it is precisely because the work is thus complete, giving us the old English practice in Chancery, with the modern changes, that it is indispensable to the Judge, the practitioner, and the diligent student. It is impossible to thoroughly master a difficult point of practice, or even to apply with intelligence a well-settled point, without understanding its origin, and tracing it through all its changes, legislative and judicial. From no other work can the necessary information be obtained except the "learned and accurate" treatise of Mr. Daniell, as adapted to the American practice by the late Judge Perkins.

The main duty of the present editor has been to bring the annotations down to the present day by a citation of the English and American authorities since the publication of the last edition. To do this thoroughly, he has been compelled to examine nearly a thousand volumes of reports, and has digested and cited about twenty-five hundred cases. The Chancery reports proper, both English and American, have generally been examined case by case. He has particularly directed his attention to questions of practice which have come into prominence within the last decade, such as those relating to injunctions, especially in tax and bond cases, receivers, cross-bills, consolidation of causes, &c. He has aimed to make the citations complete and accurate, with such a statement of the ruling as, not only to illustrate the subject under consideration, but to enable the reader to see at once whether any

particular case bears upon the point he is investigating. He has recast the old notes in many instances with a view to the recent decisions, and to bring out clearly the points ruled. Of course, in so voluminous a work, prepared in the intervals of active judicial duty, there will be errors of omission and commission, and the editor can only hope that, as these defects cannot mar the original work nor the labors of his predecessor, they will not be found sufficient to seriously interfere with the practical utility of the additions.

Perhaps he should add that he has cited the English decisions since the Judicature Act of 1873 went into effect without using the letters L. R. as a prefix, and has invariably used R. as the abbreviation of railroad, and Ry. for railway. He has also, occasionally, for the benefit of students, called attention to the fact that particular chapters, or parts of chapters, were local or statutory, and not applicable to the American Chancery practice. The table of cases and the indexes have been revised so as to cover all additions. The side paging, and the numbering of the notes follow the last edition, with which the profession have become familiar, and are always referred to.

W. F. C.

NASHVILLE, TENN.,
Sept. 6, 1879.

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PLEADING AND PRACTICE
OF THE
HIGH COURT OF CHANCERY.

THE PRACTICE OF THE HIGH COURT OF CHANCERY.

CHAPTER I.

THE COMMENCEMENT OF A SUIT.

THE practice of the Court of Chancery, and of its various offices, is regulated by rules laid down in Acts of Parliament, in the General Orders of the Court, passed or promulgated from time to time, in the Regulations of the Judges for the conduct of business in their chambers, and of the Registrars of the Court respecting the transaction of business in their office; and by custom or usage, to be ascertained generally from former decisions of the Court;¹ the decisions of the Court are also important in determining the construction to be put upon the Acts of Parliament, General Orders, and Regulations.

It will be the object of this Treatise to explain the practice of the Court, in reference to its equitable jurisdiction.²

¹ "Ancient and uniform practice constitutes the law of the Court, as much as a positive order," per Lord Eldon, 2 Mer. 2.

["Great care is necessary," says Mr. Justice Clifford, "in Equity suits, in following closely the rules of the Court and the settled course of practice, otherwise the bar would become confused, and the Court find itself involved in difficulties far greater than need be if the regular course of practice is pursued." *Union Sugar Ref. v. Mathiesson*, 3 Cliff. 146.]

² [By the original Judiciary Act, and now by the U. S. Revised Statutes, § 913, the forms and modes of proceeding in suits of Equity in the Courts of the United States, shall be according to the principles, rules, and usages which belong to Courts of Equity. And the settled doctrine of the Supreme Court of the United States is, that the remedies in Equity are to be administered according to the practice of Courts of Equity in England, the parent country from which we derive our knowledge of them. *Robinson v. Campbell*, 3 Wheat. 222; *Boyle v. Zacharie*, 6 Pet. 658; *Clark v. Keyburn*, 8 Wall. 323; *Smith v. Burnham*, 2 Sumn. 612, 625. And by Rule 90

of the Rules of Practice, prescribed in 1842 by the Supreme Court of the United States for the Courts of Equity of the United States, it is provided that where those rules or the rules of the Court itself do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, "so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

In the States of the Union, the old rules of English Chancery practice are recognised as the basis of their Chancery practice. *West v. Paige*, 1 Stockt. 203; *Morris v. Taylor*, 8 C. E. Green, 134; *Newark and N. Y. R. Co. v. Mayor of Newark*, 8 C. E. Green, 517; *Burrall v. Eames*, 5 Wis. 260. "Not," as said by Wilde J. in *Saunders v. Frost*, 5 Pick. 272, "indiscriminately, but only as they appear reasonable and conformable to the spirit of our system of jurisprudence and general rules of practice."

Rules of Court are designed for the general

*2 * A suit on the Equity side of the Court of Chancery, on behalf of a subject, is ordinarily commenced by preferring a petition, containing a statement of the plaintiff's case, and praying the relief which he considers himself entitled to receive.¹ This petition is called in the old books an *English Bill* by way of distinction from the proceedings in suits within the ordinary or common-law jurisdiction of the Court,² which, till the statute of 4 Geo. II. c. 26, were entered and enrolled, more anciently in the French or Norman tongue, and afterwards in Latin; whereas bills in Chancery were, from very early times, preferred in the English language.³ The bill is addressed to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal;⁴ unless the seals are in the Queen's hands, or the holder thereof is himself a party,⁵ in which case the bill is addressed to the Queen herself, in her Court of Chancery.⁶

If the suit is instituted on behalf of the Crown, or of those who partake of its prerogative, or whose rights are under its particular protection, such as the objects of a public charity, the matter of complaint is offered to the Court, not by way of petition, but of information,⁷ by the proper officer, of the rights which the Crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted.⁸ This proceeding * is then styled an *Information*. The rules of practice incidental to these two

guidance of suitors, but the Chancellor may make an order in a particular case altering or departing from a rule of Court. *Greene v. Harris*, 11 R. I. 5, citing *Rhode Island v. Massachusetts*, 14 Pet. 210, 257; *Rowley v. Seales*, 1 S. & S. 511; *Tare Lyons*, 1 Dr. & W. 327, 333; *Dicas v. Lord Brougham*, 6 C. & P. 249; *Burrell v. Nicholson*, 6 Sim. 212. See also *Marshall Crawford*, 1 Swan, 116, and compare *Maulsby v. Cartv*, 11 Hum. 361.]

¹ As to the value of the subject-matter, see Ord. IX. 1.

² As to the procedure on the common-law side of the Court, see 12 & 13 Vic. c. 109; and Orders of 29 Dec. 1848, and 3 Aug., 1849, *Chitty's Arch.*, 1741: and *post*, Chap. XXXIX. § 7, *Receivers*.

³ See *Ld. Red. 8*; 1 *Spence Eq. Jur.* 368; *Story Eq. Pl. § 7*. There are some bills in early times in the French language: See *Cal. Proc. Chan.*, printed by Public Rec. Com., 1827, cited *Ld. Red. 8. n. (o)*.

⁴ *Ld. Red. 7, 8*: As to Lords Commissioners, see *Hardy's Life of Ld. Langdale*, vol. 2. p. 258, *et seq.* [In the United States, suits are commenced by bill or petition addressed to the Chancellor, Judge, or Judges presiding in the particular Court, either by name or official designation. *Infra* 357, n. 1; *Story Eq. Pl. § 26*; *Barb. Ch. Pr. 35*.]

⁵ See *Lord Keeper v. Wyld*, 1 *Vern.* 139; *Coop. Eq. Pl. 23*.

⁶ *Ld. Red. 7*. In Massachusetts, cases in Equity may be commenced by bill or petition, with a writ of *subpoena*, according to the usual course of proceedings in Equity, or inserted

in an original writ of summons, or of summons and attachment, or by a declaration in an action of contract or tort, as the case may be, with or without an order for the attachment of the property or arrest of the defendant. If a discovery is sought, it may be by such bill or petition, or by being made part of such declaration, or by interrogatories. *Genl. Sts. c. 113, §§ 3, 4*. "Had the statute omitted to prescribe any form of process, or to give any authority to the Court to make one, the bill as used in England in Chancery proceedings, and the proceedings under it as there practised, would necessarily have been adopted here; for it would be presumed that the Legislature, having given jurisdiction, intended it should be exercised according to the most approved forms in that country which had been the source from which this and other States in the Union had derived their principles and practice in the administration of justice; and it was without doubt expected that the Court here, on prescribing writs and processes to carry into execution this new jurisdiction, would conform to those which had been established in England, as near as would be consistent with that prompt administration of justice which it was desirable to attain." *Per Parker C. J. in Commonwealth v. Sumner*, 5 *Pick.* 365, 366. An action of contract, praying for relief in Equity, is to be treated as a suit in Equity. *Topliff v. Jackson*, 12 *Gray*, 565; *Irvin v. Gregory*, 13 *Gray*, 215.

⁷ *Ld. Red. 7*.

⁸ *Ld. Red. 22*; *Story Eq. Pl. § 8*.

methods of instituting a suit in Equity differ so little from each other that, in the ensuing Treatise, what is said with respect to the one may be considered as applicable to both, unless where a distinction is specifically pointed out.

Where, however, the relief sought to be obtained is the administration of the estate of a deceased person, a summary and inexpensive practice has been established by the Act to Amend the Practice of the Court of Chancery,¹ which provides that, in cases of this description, without either formal pleading, or any direct application to the Court itself, a summons may at once be obtained at the chambers of the Master of the Rolls, or of a Vice-Chancellor, and an order be made on the hearing thereof to administer the estate. Where, also, it is sought to obtain the appointment of a guardian for an infant, or an allowance out of his property for his maintenance, the application may be made by summons.²

Again, under an Act of Parliament,³ for which the public are indebted to the Lord Justice Turner, a very convenient form of application to the Court has been provided for cases where the parties, agreeing upon the facts that form the foundation of their claims, are desirous of obtaining a judicial decision upon the construction of an instrument, or upon almost any point of law resulting from the admitted facts. In cases of this description, the parties are enabled, without going through any forms of pleadings, at once to submit the case that they have agreed upon for the decision of the Court.

The several forms of proceeding enumerated above relate to the original jurisdiction of the Court, and are different means by which the suitor may call into exercise some portion of that original jurisdiction in his behalf. There are a great number of Acts of Parliament — many of them of recent enactment — under which statutory powers are conferred upon the Court. Many of these Acts point out the particular mode by which relief thereunder is to be sought from the Court; and it may be stated, as a general rule, that a person seeking the aid of the statutory jurisdiction must commence by presenting a petition, which differs in some important particulars from the bill above mentioned, and is not regarded as the commencement of a formal suit.⁴

¹ 15 & 16 Vic. c. 86, §§ 45, 47.

² See *post*, Ch. XXIX., § 2, *Proceedings in the Judges' Chambers (Infants)*.

³ 13 & 14 Vic. c. 35, §§ 1-18.

⁴ [*Infra* Ch. XLIV.] The general Equity jurisdiction in Massachusetts is conferred upon the Supreme Judicial Court, which has original and exclusive jurisdiction of every original process, whether by bill, writ, petition, or otherwise, in which relief in Equity is prayed for, except where some different provision is made by law, and may issue all general and special writs and processes required in proceedings in Equity to Courts of inferior jurisdiction, corporations, and individuals, when necessary to secure justice and equity. Genl. Sts. c. 113, § 1. Cases in

Equity, and motions and other applications therein, whether interlocutory or final, shall in the first instance be heard and determined by one justice of the Supreme Judicial Court. In New York, the jurisdiction of Equity, part of which was to exercise its powers at all times, has devolved upon the Supreme Court. A justice of that Court, then, may hear a petition in Chambers in those matters where the usage of the Chancellor was so to do. *Wilcox v. Wilcox*, 14 N. Y. 575.

In regard to the jurisdiction of the Court of Chancery, in Vermont, see *Cheever v. R. & B. R. R. Co.*, 39 Vt. 654. In Maine, see *Androscoggin & Kennebec R. R. Co. v. Androscoggin R. R. Co.*, 49 Maine, 392.

[By the "Supreme Court of Judicature

*4 *All these different methods of originating applications to the Court of Chancery lead to somewhat different proceedings in the subsequent stages of the case, and which it will be the object of this Treatise to explain. As a preliminary step, however, it will be convenient to point out the peculiarities of practice incident to different descriptions of persons appearing, either as plaintiffs themselves to obtain relief from the Court, or as defendants to resist the applications of others.

Act" of 1873, it is now provided in England, that all suits which have hitherto been commenced by bill or information in the High Court of Chancery shall be instituted in the High Court of Justice established by that Act, by a proceeding to be called an action. By the same Act it is also provided that "suit" shall include "action," and "action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court, and shall not include a criminal proceeding by the Crown; and "cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown; "matter" shall in-

clude every proceeding in the Court not in a cause. L. R. 8 Stat. 349, 350.

This Act also provides, in effect, for the administration of equitable relief to either plaintiff or defendant in all cases in which such relief would have been given by a Court of Equity. L. R. 8 Stat. 317.

See, as to the Equity jurisdiction of the Courts of the United States where the distinctions between the pleadings and modes of procedure in Common-Law actions and Equity suits are abolished. *Basey v. Gallagher*, 20 Wall. 670; *Bank v. Labitat*, 1 Woods, 11. See also when, in such case, a legal suit becomes equitable, *Hagan v. Patterson*, 10 Bush, 441.]

PERSONS BY WHOM A SUIT MAY BE INSTITUTED.

SECTION I. — *The Queen's Attorney-General.*

It is a general rule, subject to very few exceptions, that there is no sort or condition of persons who may not sue in the Court of Chancery, and this rule extends from the highest person in the State to the most distressed pauper.

The Queen herself has the same right which a subject has to institute proceedings in her own Courts for the assertion of any right which she claims, either on behalf of herself or others; and the same principles which entitle a subject to the assistance of a Court of Equity to enable him to assert his legal rights, are equally applicable to the Sovereign. Thus a suit has been instituted on behalf of the Queen to have the benefit of a discovery, from persons charged to be aliens, of the place of their birth, in order to assist her in a commission to inquire into their lands, with the view of seizing them into her hands by inquisition.¹ For the same reason, where an office cannot be found for the Crown without the aid of a Court of Equity, the Court will, at the suit of the Crown, interfere to restrain the commission of waste in the mean time.²

It has been said, that the Queen is not bound to assert her rights in any particular Court, but that she may sue in any of her Courts which she pleases, without reference to the question whether the subject-matter of her suit is such as comes within the peculiar jurisdiction of such Court.³ Thus she may have a *quare impedit* in the Queen's Bench,⁴ or she may elect to sue either in a Court of Common Law, or in a Court of Equity.⁵ Upon an accurate examination, however, of the cases that have given rise to these general assertions of the rights of the Crown, it appears that equitable grounds were alleged in each case for instituting the proceedings in Chancery. It seems, nevertheless, to be true, that the Queen may proceed, in questions relating to * the *6 property to which she is entitled in right of her Crown, either in a Court of Law or in a Court of Equity; and that where she has caused

¹ *Du Plessis v. Attorney-General*, 1 Bro. P. C. ed. Toml. 415, 419.

² *Attorney-General v. Du Plessis*, 2 Ves. 286. As to office found, see now 22 & 23 Vic. c. 21, § 25.

³ 11 Rep. 68 B; *ib.* 75 A; Plowden, 236, 240, 244.

⁴ 11 Rep. 68 B.

⁵ *The King v. Countess Dowager of Arundel*, Hob. 109; *Attorney-General v. Vernon*, 1 Vern. 277, 370; 2 Ch. R. 353; 1 Eq. Ca. Ab. 75, pl. 1; 183, pl. 16; and see the cases cited 8 Beav. 283, and the Judgment, p. 287.

a Court of Equity to be informed that an intrusion has been committed on her land, although no matter of equitable jurisdiction has been stated, yet the information has been entertained: but in such cases, if any question of law arises, the Court will put it in the course of trial by a Court of Law, and retain the information till the result of such trial is known.¹

As a general rule, suits on behalf of the Crown are instituted in the Court which, by its constitution, is most properly adapted to the case, and the Court of Exchequer being the general Court for all business relating to the Queen's revenue or property, the practice has been to institute there all proceedings relating to the property of the Crown. By the 5 Vic. c. 5, § 1, however, it is enacted, "that on the 15th day of October, 1841, all the power, authority, and jurisdiction of her Majesty's Court of Exchequer at Westminster as a Court of Equity, and all the power, authority, and jurisdiction which shall have been conferred on or committed to the said Court of Exchequer by or under the special authority of any Act or Acts of Parliament (other than such power, authority, and jurisdiction as shall then be possessed by, or be incident to, the said Court of Exchequer as a Court of Law, or as shall then be possessed by the said Court of Exchequer as a Court of Revenue, and not heretofore exercised or exercisable by the same Court, sitting as a Court of Equity), shall be, by force of this Act, transferred and given to her Majesty's High Court of Chancery, to all intents and purposes, in as full and ample a manner as the same might have been exercised by the said Court of Exchequer, if this Act had not passed."

The construction of the Act afterwards came before Lord Langdale M. R. in the case of *The Attorney-General v. The Corporation of London*,² when his Lordship said he thought "the almost unavoidable construction of the Act made it so operate, as to leave to the Court of Exchequer every thing that was not exercised or exercisable by that Court as a Court of Equity, and to transfer to the Court of Chancery all that was exercised or exercisable by the Court of Exchequer as a Court of Equity." It appears, as the result of that case, that, in the opinion of Lord Langdale, in all matters affecting the rights, property, and revenue of the Crown, the Court of Exchequer, sitting on the Equity side,

had, before the Act, a jurisdiction, notwithstanding the Crown
 *7 might, in the particular * cases, have had a legal remedy, and that this jurisdiction has by the Act been transferred to the Court of Chancery; and that, by virtue of that transfer, the Crown is now enabled, in matters of revenue dependent upon legal rights, to sue in the Court of Chancery, even though there would be no jurisdiction in similar cases between subject and subject. The decision in this case was

¹ Attorney-General to the Prince of Wales v. Sir J. St. Aubyn, Wightw. 167, and the

cases there cited; see also Attorney-General v. The Mayor of Plymouth, *id.* 134.

² 8 Beav. 270, 285.

affirmed by the House of Lords; but their lordships carefully avoided determining this question, as to which they expressed great doubt.¹ In whatever way this question may be ultimately decided, it has been held by the Court of Exchequer that it still retains an equitable jurisdiction in matters of revenue.² Where the Court of Chancery would have jurisdiction, as between subject and subject, it seems clear that the Crown may file an information in that Court for an account.³

In all cases where the rights of the Queen, or of those who partake of her prerogative, are the subject of the suit, the name of the Queen is not made use of as the party complaining, but the matter of complaint is offered to the Court by way of information given by the proper officer. That officer, if the information is exhibited in any of the Superior Courts at Westminster, is the Attorney-General, or if the office of Attorney-General should happen to be vacant, the Solicitor-General.⁴

Besides the cases in which the immediate rights of the Crown are concerned, the Queen's officers may, in some cases, institute proceedings on behalf of those who claim under the Crown, by grant or otherwise; or, more correctly speaking, those who claim under the Crown may make use of the Queen's name, or of that of her proper officer, for the purpose of asserting their right against a third party. Thus a *chose in action* may be assigned to the Queen, and may also be granted or assigned by her to another person; and, in the latter case, the grantee may either sue for it * in his own name, or in that of *8 the Queen;¹ but if he sues in his own name, he must make the Attorney-General a party to his suit. Thus, where A., having outlawed B., brought a bill against C., a trustee for B., with respect to an annuity, to subject this annuity to the plaintiff's debt; and the Court held, that forasmuch as by the outlawry all the defendant's interest, as well equitable as legal, was vested in the Crown, the plaintiff must not only get a grant thereof from the Crown, but must make the Attorney-General a party to the suit.²

¹ 1 H. L. Ca. 440.

² Attorney-General v. Halling, 15 M. & W. 687, 700; Attorney-General v. Hallett, *id.* 97; 8 Beav. 288, n. But see Attorney-General v. Kingston, 6 Jur. 155, Eq. The procedure in suits by information in the Court of Exchequer relating to the revenues of the Crown is now regulated by "The Crown Suits Act, 1865" (28 & 29 Vic. c. 104), and Reg. Gen. Exch. 14th March, 1866; L. R. 1 Ex. 389; 12 Jur. N. S. P. II. 182.

³ Attorney-General v. Edmunds, L. R. 6 Eq. 381, 392, V. C. G.: and see Attorney-General v. Corporation of London, 1 H. L. Cas. 440; see also the case of York Building Company.

⁴ *Ld. Red. 7*, 21, 22; Wilkes's case, 4 Burr. 2527; Story Eq. Pl. § 49.

Rights purely public are to be enforced in the name of the State, or the officer intrusted with the conduct of public suits. Smith v. Comm. of Butler County, 6 Ohio, 101.

While the office of Attorney-General was

abolished in Massachusetts, most of the duties of that officer, which were not required to be performed by him personally, having been distributed among and vested in the District Attorneys, as the local prosecuting officers, Mr. Chief Justice Shaw said he was "strongly inclined to the opinion that the filing of an information in Equity was not a duty which the Attorney-General was required to do personally; that duty would have vested in a Solicitor-General, if there had been one; it was necessarily incident to the office of Attorney-General, and was vested in the District Attorneys in their respective districts." Parker v. May, 5 Cush. 340.

¹ Dwyer, 1 Pl. 7, 8; Keilw. 169; 5 Bac. Ab. tit. Prerog. F. 3; Miles v. Williams, 1 P. Wms. 249, 252; Earl of Stafford v. Buckley, 2 Ves. S. 170, 181.

² Balch v. Wastall, 1 P. Wms. 445; Hayward v. Fry, *id.* 446; see also Rex v. Fowler, Bunb. 38.

Informations may also be exhibited by the Attorney-General, or other proper officer, in support of the rights of those whose protection devolves upon the Crown as supreme head of the Church. Thus, the Queen, as supreme head of the Church, is the proper guardian of the temporalities of the bishoprics; and an information may, therefore, be brought by the Attorney-General to stay waste committed by a bishop.³

In like manner, the Attorney-General may exhibit informations on behalf of individuals who are considered to be under the protection of the Crown as *parens patriæ*: such as the objects of general charities,⁴ idiots, and lunatics.⁵ Moreover, this privilege of the Attorney-General is not confined to suits on behalf of charities, strictly so called, but has been held, in many instances, to extend to cases where funds have been made applicable to legal and general purposes.⁶ The rule in such cases appears to be, "that where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the Crown should be entitled to intervene by its officer, for the purpose of asserting, on behalf of the public generally, that public interest and that public right which probably no individual could be found willing effectually to assert, even if the interest were such as to allow it."⁷

*9 * Suits on behalf of idiots and lunatics are usually instituted

by the committees of their estates; but sometimes, where there has been no committee, or where the interest of the committee was likely to clash with that of the persons whose estates were under his care, informations have been exhibited on their behalf by the Attorney-General, as the officer of the Crown.¹ Where informations have been filed on behalf of persons found lunatic, but who have had no committee appointed, the Court will proceed to give directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee.² Persons incapable of acting for themselves,

³ Knight v. Mosely, Amb. 176; Wither v. D. & C. of Winchester, 3 Mer. 421, 427; Jefferson v. Bishop of Durham, 1 Bos. & Pull. 129, 131.

⁴ See Attorney-General v. Clergy Society, 8 Rich. Eq. (S. C.) 190; Wright v. Trustees of Meth. Epis. Church, 1 Hoff. Ch. R. 202; 2 Kent, 235-238, 4 *id.* 507.

⁵ See Norcom v. Rogers, 1 C. E. Green (N. J.), 484.

⁶ Attorney-General v. Brown, 1 Swanst. 265; Attorney-General v. Corporation of Shrewsbury, 6 Beav. 220, 227; Evan v. Corporation of Avon, 29 Beav. 144; 6 Jur. N. S. 1361; 11 Hare, 205; 17 Jur. 801; Attorney-General v. Mayor of Wigan, Kay, 268; 5 De G. M. & G. 52; 18 Jur. 299; Attorney-General v. West Hartlepool Improvement Commissioners, W. N. (1870) 107; 18 W. R. 685, V. C. G.; L. R. 10 Eq. 152.

⁷ Per Sir J. L. Knight Bruce V. C. in Attorney-General v. Compton, 1 Y. & C. C. 417, 427. In Massachusetts under Genl. Sts. c. 14, § 20, the Attorney-General is required to enforce the due application of funds given or appropriated to public charities within the State, and prevent breaches of trust in the administration thereof. The power of the Attorney-General or public prosecutor to institute a proceeding for the enforcement of a public charity, is a common-law power, incident to the office. Parker v. May, 5 Cush. 336, 338, per Shaw C. J. See Wright v. The Trustees of the Meth. Epis. Church, 1 Hoff. Ch. R. 202; and Code of Tennessee, § 3409, *et seq.*

¹ Attorney-General v. Parkhurst, 1 Cha. Ca. 112; Attorney-General v. Woolrich, *id.* 153; Attorney-General v. Tyler, 1 Dick. 378; 2 Eden, 230; Norcom v. Rogers, 1 C. E. Green (N. J.), 484.

² Attorney-General v. Howe, Ld. Red. 30, n. (m).

though not coming under the description of idiots or lunatics, have been permitted to sue by their next friend, without the intervention of the Attorney-General.³

It seems that when an information is filed on behalf of a lunatic, he must be named as a party to the suit, and that merely naming him as a relator will not be sufficient; ⁴ a distinction, however, appears to be taken between cases where the object of the suit is to avoid some transaction of the lunatic, on the ground of his incapacity, and those in which it is merely to affirm a contract entered into by him for his benefit, or to assert some claim on his behalf.⁵ In the former case it was held, that the lunatic ought not to be named as plaintiff, because no man can be heard to stultify himself; if he is named, however, it will be no ground for demurrer.⁶ The reason for making a lunatic a party in proceedings of this nature appears to be, that as no person can be bound by a decree in a suit to which he, or those under whom he derives title, are not parties, and as a lunatic may recover his understanding, the decree will not have the effect of binding him unless he is a party to the suit; and upon the same principle it is held, that where a suit is instituted on behalf of the lunatic by his committee, the committee must be named as a co-plaintiff, in order that the right which the committee acquires in the lunatic's estate, by virtue of the grant from the Crown, may be barred.⁷ The * same reason does not apply to *10 cases of idiots, because in contemplation of law they never can acquire their senses; they are, therefore, not considered necessary parties to the proceedings on their behalf.¹

In all cases of informations which immediately concern the rights of the Crown, its officers proceed upon their own authority, without the intervention of any other person; ² but where the informations do not immediately concern the rights of the Crown, they generally depend upon the relation of some person whose name is inserted in the information, and who is termed the *Relator*.³ This person in reality sustains

³ *Liney v. Wetherley*, Ld. Red. 30, n. (n); *Light v. Light*, 25 Beav. 248; *West v. Davis*, Rolls, 1863, W. No. 83; and see *post*, Chap. III. § 7, *Idiots and Lunatics (Plaintiffs)*. *Infra* 86, n. 1.

⁴ *Attorney-General v. Tyler*, 1 Dick. 378; *Ridler v. Ridler*, Eq. Ca. Ab. 279. See *Story Eq. Pl.* § 64; *Gorham v. Gorham*, 3 Barb. Ch. R. 24.

⁵ *Attorney-General v. Parkhurst*, 1 Cha. Ca. 112; *Attorney-General v. Woolrich*, id. 153.

⁶ *Ridler v. Ridler*, 1 Eq. Ca. Ab. 279, pl. 5; and see *Tothill*, 130. See *infra* 83.

⁷ *Norcom v. Rogers*, 1 C. E. Green (N. J.), 484. Under the 16 & 17 Vic. c. 70, the custody of the estate is usually committed to the committee by an Order of the Lord Chancellor or Lords Justices, which, however, by § 63, has the same force and validity as a grant under the great seal. For form of Order, see *Elmer's Prac.* 126.

¹ *Attorney-General v. Woolrich*, 1 Cha.

Ca. 153; and see *post*, Chap. III. § 7, *Idiots and Lunatics (Plaintiffs)*.

² Ld. Red. 22; *Attorney-General v. Vernon*, 1 Vern. 277, 370; *Attorney-General v. Crofts*, 1 Bro. P. C. ed. Toml. 136.

[The Attorney-General cannot bring a bill or information to redress a private wrong; as, for example, to restrain a city council from making a water-rate merely nominal, under a statute which required the revenues to be appropriated to keep down the interest on the debt created for the erection of the waterworks, and to the creation of a sinking fund to meet the principal. *Attorney-General v. Salem*, 103 Mass. 140. Or, to restrain a private trading corporation from doing acts not authorized by its charter. *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239.]

³ Ld. Red. 22; 1 Ves. J. 247, n. See *The Attorney-General v. The Proprietors of the Meeting-house in Federal-street, in the Town of Boston*, 3 Gray, 1; *Attorney-General v. Merrimack Manufacturing Co.*, 14 Gray, 586.

and directs the suit, and he is considered as answerable to the Court and the parties for the propriety of the proceedings, and the conduct of them :⁴ but he cannot take any step in the cause in his own name, and independent of the Attorney-General.⁵ Where, therefore, in the case of the *Attorney-General v. Wright*,⁶ notice of motion was given on behalf of a relator, and an objection was made that it ought to have been on behalf of the Attorney-General, Lord Langdale M. R. decided that the notice was irregular, and said that “relators should know that they are not parties to informations, and have no right of their own authority to make any application to the Court. The Attorney-General is the only person whom the Court recognizes in such cases.” And in the *Attorney-General v. Barker*,⁷ which was an information and bill, Lord Cottenham refused to hear the relator and plaintiff in person on behalf of the Attorney-General, and said he could not separate the information from the bill, so as to hear him as the plaintiff in the bill. It sometimes happens that the relator has an interest in the matter in dispute, of the injury to which interest he is entitled to complain. In this

case, his personal complaint being joined to, and incorporated *11 with, the information given to the Court by the * officer of the Crown, they form together an information and bill, and are so termed. In some respects, however, they are considered as distinct proceedings; and the Court will treat them as such, by dismissing the bill and retaining the information, even though the relief to be granted is different from that prayed. Thus, where the record was both an information for a charity and a bill, and the whole of the relief specifically prayed was in respect of an alleged interest of the relator in the trust property, which he did not succeed in establishing, although the bill was dismissed with costs, the information was retained for the purpose of regulating the charity.¹ It is, moreover, necessary that the person joined as plaintiff should have some individual interest in the relief sought to be obtained by the suit; and where persons were made plaintiffs who asked nothing for themselves, and did not show that they were individually entitled to any thing, a demurrer to the whole record was allowed; but as there appeared to be a case for relief, leave to amend, for the purpose of converting the record into an information only, was given, and the Court directed that the plaintiffs should remain on the record in the character of relators, in order that they might be answerable for costs.²

Although it is the general practice, where the suit immediately concerns the rights of the Crown, to proceed without a relator, yet instances

⁴ *Ld. Red. 22; Attorney-General v. Vivian*, 1 Russ. 226, 236.

⁵ *Parker v. May*, 5 Cush. 337, per Shaw C. J.; see *Commissioners v. Andrews*, 10 Rich. Eq. (S. C.) 4; [*State ex rel. v. White's Creek Turnpike Co.*, 3 Tenn. Ch. 163.]

⁶ 3 Beav. 447; and see *Attorney-General v. The Haberdashers' Company*, 15 Beav. 397; *Attorney-General v. Wyggeston's Hos-*

pital, 16 Beav. 313; *Attorney-General v. Sherbourne Grammar School*, 18 Beav. 256, 18 Jur. 636; *Parker v. May*, 5 Cush. 336, 337.

⁷ 4 M. & C. 262.

¹ *Attorney-General v. Vivian*, 1 Russ. 226, 233, 235.

² *Attorney-General v. The East India Company*, 11 Sim. 380, 386.

have sometimes occurred where relators have been named. In such cases, however, it has been done through the tenderness of the officers towards the defendant, in order that the Court might award costs against the relator if the suit should appear to have been improperly conducted: it being a prerogative of the Crown not to pay costs to a subject.³

It has been said, that as the Queen, by reason of her prerogative, does not pay costs to a subject, so it is beneath her dignity to receive them; but many instances occur, in the course of practice, in which the Attorney-General receives costs. Thus, when collusion is suspected between the defendants and the relators, the Attorney-General attends by a distinct solicitor, and always receives his costs. In *Attorney-General v. Lord Ashburnham*⁴ Sir John Leach V. C. said, in reference to the asserted principle that the Crown can neither pay nor receive costs, "I find no such principle in Courts of Equity. The Attorney-General constantly receives costs, where he is made a defendant in respect of legacies given to charities,⁵ and even where he is made a defendant in respect of the immediate rights of the Crown in cases of intestacy; * and where charity informations have been *12 filed by the Attorney-General, costs have been frequently awarded him in interlocutory matters independently of the relator."¹ And in the case of the *Attorney-General v. The Corporation of London*,² Lord Cottenham said, "the principle that the Attorney-General never receives nor pays costs may be modified in this way; namely, that the Attorney-General never receives costs in a contest in which he could have been called upon to pay them, had he been a private individual." By the 18 & 19 Vic. c. 90, however, provision is made for the payment of costs by or to the Crown, in proceedings instituted, after the passing of the Act, on its behalf, in matters relating to the revenue.³ In an information by the Attorney-General without a relator, costs may be ordered to be paid by one defendant to another defendant; and where in a charity case some of the defendants supported the contention of the Attorney-General, they were allowed costs as between solicitor and client, to be taxed and paid out of the fund. Such costs as between party and party to be repaid by the defendant who opposed the proceedings.⁴

The propriety of naming a relator for the purpose of his being an-

³ See 3 Bl. Com. 400; 2 Mad. Prin. & Pr. Ch. (3d Lond. ed.) 203 and note; 1 Smith Ch. Pr. (2d Am. ed.) 99; Story Eq. Pl. § 8.

⁴ 1 S. & S. 394, 397.

⁵ *Moggridge v. Thackwell*, 7 Ves. 36, 88; *Attorney-General v. Lewis*, 8 Beav. 179.

¹ See, however, *Burney v. Macdonald*, 15 Sim. 6, 16.

² 2 M.N. & G. 247, 269, 271, 273. See also, on this point, S. C. before the M. R. 12 Beav. 171, and on demurrer before House of Lords, 1 H. L. Cas. 471, and *l.d.* Cottenham's comments on the case 2 M.N. & G. 271; *Attorney-General v. Drapers' Co.*, 4

Beav. 305; *Ware v. Cumberlege*, 20 Beav. 510; *Kane v. Maule*, 2 S. & G. 331; S. C., on appeal, *nom.* *Kane v. Reynolds*, 4 De G., M. & G. 565, 569; 1 Jur. N. S. 148.

³ *Attorney-General v. Hanmer*, 4 De G. & J. 205; 5 Jur. N. S. 693; *Attorney-General v. Sittingbourne & Sheerness Railway Co.*, 35 Beav. 268, 272; L. R. 1 Eq. 636, 640; and see *Bauer v. Mitford*, 9 W. R. 135; see also 24 & 25 Vic. c. 92, § 1, in cases as to succession duty; and 23 & 24 Vic. c. 34, §§ 11, 12, in proceedings by petition of right.

⁴ *Attorney-General v. Chester*, 14 Beav. 338; *Attorney-General v. Mercers' Co.*, 18 W. R. 448, V. C. J.

swerable for costs, and the oppression arising from a contrary practice, were particularly noticed by Baron Perrot, in a cause in the Exchequer, *Attorney-General v Fox*,⁵ in which case no relator was named; and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute. The introduction of a relator, however, in cases in which the information is merely concerning the rights of the Crown, is a mere act of favor on the part of the Crown and its officers; and it appears to have been the opinion of Lord Eldon that, even in informations concerning charities, the introduction of a relator was an indulgence on the part of the Crown, which, though usual, might be withheld. Thus, in *The Matter of the Bedford Charity*,⁶ in speaking of informations concerning charities, his Lordship said, "there is no doubt, that though a relator is commonly required for the purpose of securing costs, the Attorney-General may, if he pleases, proceed without a relator." This *dictum* appears to be

*13 at variance with the opinion of Lord Thurlow, * in the *Attorney-General v. Oglander*,¹ in which case his Lordship is reported to have expressed his belief that an information without a relator would not do; and the opinion of Lord Thurlow upon this point appears to have been adopted by Lord Redesdale.² Upon the whole, therefore, it seems, that although in cases of informations for charities, the general and almost universal practice is to have a relator for the purpose of answering the costs, yet the rule is not imperative; and the Attorney-General, as the officer of the Crown, may, in the exercise of his discretion, exhibit such an information without a relator. In confirmation of this it is to be observed, that in informations under the former statutes,³ for giving additional facilities in applications to Courts of Equity regarding the management of estates or funds belonging to charities, it was not the practice to have a relator.

All persons who are not under any of the legal disabilities after mentioned may be relators in informations; ⁴ but a written authority, signed by them, permitting their names to be used, must be filed with the information.⁵ A corporate body may be a relator⁶ or a relator and plaintiff.⁷

⁵ Ld. Red. 23, n. (g).

⁶ 2 Swanst. 520.

¹ 1 Ves. J. 246.

² Ld. Red. 99; and see *Attorney-General v. Smart*, 1 Ves. S. 72; *Attorney-General v. Middleton*, 2 Ves. S. 327; *Attorney-General of the Duchy of Lancaster v. Heath*, Prec. in Ch. 13.

³ 59 Geo. III. c. 91; continued and extended by 2 & 3 Will. IV. c. 57. See, however, *Attorney-General v. Boucherett*, 25 Beav. 116.

⁴ 1 Smith Ch. Pr. (2d Am. ed.) 99.

⁵ 15 & 16 Vic. c. 86, § 11. For form of authority, see Vol. III. In an injunction case, the authority was allowed to be filed the day after the information. *Attorney-General v. Murray* 12 W. R. 65, V. C. K. Where the

solicitor had given the relator an indemnity against the costs, the information was ordered off the file, with costs to be paid by the relator and solicitor. *Attorney-General v. Skinners' Co.*, C. P. Coop. 7.

⁶ See *Attorney-General v. Wilson*, C. & P. 1; *Attorney-General v. Cambridge Consumers' Gas Co.*, L. R. 6 Eq. 282, V. C. W.

⁷ See *Attorney-General v. Conservators of the Thames*, 1 H. & M. 1; 8 Jur. N. S. 1203; *Attorney-General v. Metropolitan Board of Works*, 1 H. & M. 298. *Attorney-General v. Greenhill*, 33 Beav. 193; 9 Jur. N. S. 1307; *Attorney-General v. Mayor of Kingston-on-Thames*, 11 Jur. N. S. 596; 13 W. R. 880, V. C. W.; *Attorney-General v. Richmond*, L. R. 2 Eq. 306; 12 Jur. N. S. 544, V. C. W.

It has not been deemed necessary that relators should be interested in the charities concerning which they institute proceedings;⁸ and the Court was in the habit, in the times when a much stricter system of practice prevailed than at present, of relaxing several of its rules on behalf of charities. Thus, where the relief sought was erroneous and refused, the Court still took care to make such decree as would best answer the purposes of the charities.⁹

It appears, on reference to the old cases, that where a relator himself claims an interest in the subject-matter of the suit, and proceeds by bill as well as by information, making himself both *plaintiff 14 and relator, the suit abates by his death. Where, however, the suit is merely an information, the proceedings can only abate by the death or determination of interest of the defendant.¹

If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies, the suit is not abated. It is, however, irregular for the solicitors of a relator to proceed in a charity information after the death of the relator; and the Court will not permit any further proceedings till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly; otherwise there would be no person to pay the costs of the suit, in case the information should be deemed improper, or for any other reason should be dismissed.² Where, however, a relator dies, the application for leave to name a new relator must be made by the Attorney-General, or with his consent, and not by the defendant; otherwise the defendant might choose his own prosecutor.³

With respect to informations on behalf of idiots and lunatics, it seems that it is not only necessary that the lunatic should be a party, but also that there should be a relator who may be responsible to the defendant for the costs of the suit. Thus, in the case of the *Attorney-General v. Tyler*, mentioned in the note to Lord Redesdale's Treatise,⁴ it appears that the lunatic had been made the relator, but that on a motion being made that a responsible relator should be appointed, Lord Northington directed that all further proceedings in the cause should be suspended, until a proper person should be named as relator in his stead. This appears to be the same cause which has been before referred to as reported in Mr. Dickens's Reports,⁵ in which, upon the hearing, it was objected that the lunatic was not a party to the suit, although he was

⁸ *Attorney-General v. Vivian*, 1 Russ. 226, 236. See, however, *Attorney-General v. Bucknall*, 2 Atk. 328; *Corporation of South Molton v. Attorney-General*, 5 H. L. Ca. 1.

⁹ *Attorney-General v. Bucknall*, 2 Atk. 328; *Attorney-General v. Whiteley*, 11 Ves. 241, 247; *Attorney-General v. Oglender*, 1 Ves. J. 246; *Attorney-General v. Middleton*, 2 Ves. S. 327; *Attorney-General v. Brereton*, *id.* 425; *Attorney-General v. Mayor of Stamford*, 2 Swanst. 501; *Attorney-General v. Parker*, 1 Ves. S. 43.

¹ *Waller v. Hanger*, 2 Bulst. 134; *Ld. Red.* 100.

² *Ld. Red.* 100; *Attorney-General v. The Haberdashers' Company*, 15 Beav. 397.

³ *Ld. Red.* 100, n. (e); *Attorney-General v. Harvey*, 1 Jur. N. S. 1062; *Attorney-General v. Plumtree*, 5 Mad. 452; 2 *Mad. Prin. & Pr. Ch.* (3d Lond. ed.) 203, 204.

⁴ *Ld. Red.* 29; 2 *Eden*, 230.

⁵ *Ante*, p. 9.

named as relator; and the cause was consequently ordered to stand over, with liberty to amend by adding parties, and, if so advised, to change the information into a bill.

The object in requiring that there should be a relator, in informations exhibited on the part of the Attorney-General, is, as we have seen,⁶ that there may be some person answerable for the costs, in case they should have been improperly filed. Thus, in the case of *Attorney-General v. Smart*,⁷ before referred to, where the information was held

*15 to have been unnecessary, and in contradiction to the right, the costs were ordered to be paid by the *relator. But in the case of *Attorney-General v. Oglander*,¹ before referred to, where the relator insisted upon a particular construction of the will of the person by whom the charity was founded, and in which there was considerable ambiguity, although he failed in satisfying the Court that his construction was the right one, and the information was consequently dismissed, the Court did not make him liable to the costs of the defendant, although it refused to permit the costs to be paid out of the funds of the charity. And in general, where an information prays a relief which is not granted, but the Court thinks proper to make a decree according to the merits, so that the information is shown to have had a foundation, although the relief is not such as the relator prayed, the relator will not be ordered to pay the costs.²

Where relators conduct themselves properly, and their conduct has been beneficial to the charity, they will usually be allowed their costs;³ and it seems that, in some cases, the costs of relators will be taxed as between solicitor and client, on the principle that otherwise people would not come forward to file informations;⁴ and in special cases they will be allowed their charges and expenses, in addition to the costs of the suit.⁵ But where they incurred expenses without the sanction of the Master, in obtaining information for the purpose of preparing a scheme, they were only allowed their expenses actually out of pocket;⁶ and where a petition would have done, instead of an information, the relators were refused their costs.⁷

In the case of *Attorney-General v. Kerr*,⁸ an order was in the first instance made to refer it to the Master to tax and settle the costs, charges, and expenses of the relator, of, incidental, and preparatory to the cause, properly incurred; to be paid by the trustees of the hospital of St. Thomas for the time being, or the treasurer thereof, out of the

⁶ *Ante*, p. 12.

⁷ 1 Ves. S. 72; *Attorney-General v. Parker*, 3 Atk. 570, 576; 1 Ves. S. 43.

¹ 1 Ves. J. 246.

² *Attorney-General v. Bolton*, 3 Anst. 820.

³ *Beames on Costs*, 14; *Attorney-General v. The Brewers' Company*, 1 P. Wms. 376.

⁴ *Attorney-General v. Taylor*, cited in *Osborne v. Denne*, 7 Ves. 424; see also *id.* 425; *Attorney-General v. Carte*, 1 Dick. 113; *Beames on Costs*, App. No. 2, 229; *Mog-*

gridge v. Thackwell, 7 Ves. 36, 88; affirmed by H. L., see 13 Ves. 416; *Attorney-General v. Kerr*, 4 Beav. 297, 303; but see *Attorney-General v. The Fishmongers' Company*, 1 Keen. 492, where party and party costs only were allowed.

⁵ *Attorney-General v. Kerr*, *ubi sup.*

⁶ *Attorney-General v. The Ironmongers' Company*, 10 Beav. 194, 196.

⁷ *Attorney-General v. Berry*, 11 Jur. 114.

⁸ 4 Beav. 257, 301, 302.

funds belonging to the hospital. To this order two objections were made: first, that the decree was wrong, so far as it gave the relator the extra costs, charges, and expenses incidental and preparatory to the cause, properly incurred; secondly, that these extra costs ought not to be charged on the whole property of the hospital generally, but only on the property which was the subject of the information. Lord Langdale M. R. said "on considering the cases which have occurred, it appears that the relator in a charity information, where there is nothing to impeach * the propriety of the suit, and no special *16 circumstances to justify a special order, is, upon obtaining a decree for the charity, entitled to his costs as between solicitor and client, and to be paid the difference between the amount of such costs and the amount of the costs which he may recover from the defendants, out of the charity estate. There may be special cases in which the relator may be entitled to charges and expenses, in addition to his costs of the suit as between solicitor and client; but it appears to me that such cases must depend upon their peculiar circumstances, to be brought forward and established by evidence on proper occasions.¹ Upon the second point, I find that there are several cases in which the costs to be paid by the trustees of a charity have been ordered to be paid out of the funds of the charity generally; but the trustees objecting, it appears to me more regular and proper, in the first instance at least, to charge the costs which fall upon the charity estate on the fund recovered by the information, or on the estate which is the subject of the suit." The decree was accordingly varied, and the relator, instead of being allowed his costs, charges, and expenses of, incidental, and preparatory to the cause, properly incurred, was only allowed his costs as between solicitor and client; and the costs and sums which were to be paid by the defendants the trustees, instead of being directed to be paid out of the funds of the hospital, were made a charge on the property which was the subject of the suit, and ordered to be raised by sale or mortgage thereof.²

As the principal object in having a relator is, that he may be answerable for the costs of the proceedings, in case the information shall appear to have been improperly instituted or conducted, it follows, as a matter of course, that such relator must be a person of substance, and if it is made to appear to the Court that the relator is not a responsible person, all further proceedings in the information will be stayed, till a proper person shall be named as relator.³

¹ Attorney-General v. Kerr, 4 Beav. 297, 303; but see Attorney-General v. The Skinners' Company, Jac. 629, 630: Attorney-General v. Corporation of Manchester, 3 L. J. Ch. 64.

² This was the practice before the Charitable Trusts Act, 1853, 16 & 17 Vic. c. 137. Under that Act, no proceeding can be taken without the consent of the Charity Commissioners, except by the Attorney-General

acting *ex officio*, or by adverse claimants; see § 17, and *post*, Chap. XLV. § 2, Charitable Trusts Acts.

³ Attorney-General v. Tyler, 2 Eden, 230; see also Attorney-General v. Knight, 3 M. & C. 154. It is presumed, that the same rules for determining who is a "person of substance," apply here as in the case of next friends of married women; as to whom, see *post*, Chap. III. § 8. There is a reported case,

An information by the Attorney-General without a relator cannot be dismissed for want of prosecution; it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator, is subject to be dismissed for want of prosecution with costs.

It seems to have been considered by Lord Thurlow as a doubtful point, whether the sovereign of a foreign State could sue in the municipal courts of this country, or whether the claims of such a person were not matter of application from State to State.¹ The point, however, has now been determined in the affirmative.² Thus, a bill was filed on behalf of the King of Spain, and of two other persons resident in London, claiming some property which had been received by one of the defendants, under a treaty between France and Spain, and which, it was alleged, was the property of the King of Spain. To this bill a general demurrer was put in; and amongst other grounds of demurrer, it was contended, that the King of Spain, being a foreign absolute sovereign, was not capable of maintaining a suit in a Court of Equity here, or at least, that he was not capable of maintaining a suit for the enforcement of alleged rights belonging to him only in his royal character. This demurrer was allowed by Lord Lyndhurst, but upon a different ground, namely, that the parties who had been joined with the King of

in which a relator was required to give security for costs, see *Attorney-General v. Skinners' Co.*, C. P. Coop. 1, 5; and see *Attorney-General v. Knight*, 3 M. & C. 154.

¹ *Barclay v. Russell*, 3 Ves. J. 424, 431; see also the *Nabob of the Carnatic v. East India Company*, 1 Ves. J. 371, where the authorities upon this point are collected.

² *The King of Spain v. Machado*, 4 Russ. 225, 236; *Hullett v. King of Spain*, 2 Bligh, N. S. 31; S. C. 7 Bligh, N. S. 359; see also *City of Berne v. Bank of England*, 9 Ves. 347; *Dolder v. Bank of England*, 10 Ves. 352; *Dolder v. Lord Huntingfield*, 11 Ves. 283; *King of the Two Sicilies v. Willcox*, 1 Sim. N. S. 301, 332; *United States of America v. Prioleau*, 2 H. & M. 559; 11 Jur. N. S. 792; *United States of America v. Wagner*, L. R. 3 Eq. 724; S. C. L. R. 2 Ch. Ap. 582; *Prioleau v. United States and Andrew Johnson*, L. R. 2 Eq. 659; *United States of America v. McRea*, L. R. 3 Ch. Ap. 79.

The doctrine that the sovereign of one State may maintain a suit in the Courts of Equity of another State, is now established in affirmance of the right, upon very satisfactory principles. See *Story Eq. Pl. § 55*; *Brown v. Minis*, 1 M'Cord, 80. A foreign sovereign State adopting the republican form of government, and recognized by the government of her Majesty the Queen of England, can sue in the Courts of her Majesty in

its own name so recognized. *United States of America v. Wagner*, L. R. 2 Ch. Ap. 582. If a State were to refuse permission to a foreign sovereign to sue in its Courts, it might become a just cause of war. *Story Eq. Pl. § 55*; *King of Spain v. Mendazabel*, 5 Sim. 596; *Edwards, Part. in Eq.* 33, 34, 35; *Calvert, Parties*, ch. 3, § 27, pp. 310, 311.

By the Constitution of the United States, foreign States are expressly authorized to sue in the Courts of the United States. Const. U. S. Art. III. § 2. One of the States of the Union may appear as plaintiff in the Supreme Court of the United States, against either another State, or the citizens thereof. Const. U. S. Art. III. § 2; *Governor of Georgia v. Aladrado*, 1 Peters, 110; *U. States v. Peters*, 5 Cranch, 115; *U. States v. Blight*, 3 Hall, Law Journ. 197; *U. States v. Percheman*, 7 Peters, 51; *New York v. Connecticut*, 4 Dallas, 1; *New Jersey v. New York*, 5 Peters, 284; *Rhode Island v. Massachusetts*, 13 Peters, 23; S. C. 14 Peters, 210; 3 Story Const. U. S. §§ 1675-1683; *Nabob of the Carnatic v. East India Co.*, 1 Sumner's Ves. 371, note (a). One State, as a corporation, may sue in the Courts of another State. *Delafield v. State of Illinois*, 2 Hill (N. Y.), 159; S. C. 8 Paige, 527; *Hines v. State of North Carolina*, 10 Sm. & M. 529.

Spain as co-plaintiffs had no interest in the subject-matter of the suit;³ and after the allowance of the demurrer, the King of Spain alone filed another bill against the same defendants, for the same purposes as before, and the defendants demurred again; but * the *18 demurrer was overruled by Lord Lyndhurst,¹ and his Lordship's judgment was confirmed by the House of Lords on appeal.² In giving judgment upon that occasion, Lord Redesdale observed, "This is one of the clearest cases that can be stated. I conceive that there can be no doubt that a sovereign may sue. If he cannot, there is a right without a remedy; for it is only by suit in Court that the respondent can obtain his remedy: he sues, as every sovereign must sue, generally, either on his own behalf, or on behalf of his subjects." But it seems that the right of a foreign sovereign to sue in the municipal Courts of this country is confined to those cases in which it is sought to enforce the private rights of the sovereign or of his subjects; and that the infringement of his prerogative rights does not constitute a ground of suit.³

To entitle a foreign government to sue in the Courts of this country, it is necessary that it should have been recognized by the government here. This point appears to have been first discussed in the case of *The City of Berne, in Switzerland, v. The Bank of England*,⁴ which arose from the application of a person describing himself as a member of the common council chamber of the city of Berne, on behalf of himself and of all others the members of the common council chamber and the burghers and citizens of that city, to restrain the Bank of England and South Sea Company from permitting the transfer of certain funds standing in the names of trustees, under a purchase by the old government of Berne before the revolution; the application was opposed on the ground that the existing government of Switzerland, not being acknowledged by the government of this country, could not be noticed by the Court; and Lord Eldon refused to make the order: observing that it was extremely difficult to say that a judicial Court can take notice of a government never recognized by the government of the country in which the Court sits; and that whether the foreign government was recognized or not, was matter of public notoriety. The recognition of a foreign government by the government of this country is conclusive, and the Court cannot listen to any objection to its title.⁵

The fact of a foreign government not having been recognized by the

³ King of Spain *v.* Machado, 4 Russ. 225, 236.

¹ 4 Russ. 560; see also the *Columbian Government v. Rothschild*, 1 Sim. 94; *King of Hanover v. Wheatley*, 4 Beav. 78.

² 2 Bligh, N. S. 60; and see *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; 2 H. L. Ca. 1; and *post*, Chap. IV., § 4, on the liability of foreign States to be sued.

³ *Per* L. J. Turner in *Emperor of Austria v. Day*, 3 De G., F. & J. 217, 251, 252; 7 Jur. N. S. 639, 644; see also *United States of*

America v. Prioleau, 2 H. & M. 559; 11 Jur. N. S. 792; *U. States of America v. Wagner*, L. R. 3 Eq. 724, V. C. W.; L. R. 2 Ch. Ap. 582, L. C. & L. JJ.; *U. States of America v. McRae*, L. R. 4 Eq. 327, V. C. W.; L. R. 3 Ch. Ap. 79, L. C.

⁴ 9 Ves. 347; and see *Dolder v. Bank of England*, 10 Ves. 353; *Dolder v. Lord Huntingfield*, 11 Ves. 283.

⁵ *Emperor of Austria v. Day*, 2 Giff. 628; 7 Jur. N. S. 483; 3 De G., F. & J. 217; 7 Jur. N. S. 639.

government of this country must be judicially taken notice
 *19 * of by the Court, even though there is an averment introduced into the bill that the government in question has been recognized.¹ Thus, when, in order to prevent a demurrer, it was falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent State, and a demurrer was nevertheless put in, Sir Lancelot Shadwell V. C. allowed the demurrer; observing, that if the plaintiff makes the fact that this is an independent government recognized by the government of this country, where it is not so, the foundation of his case, the Court must judicially take notice of what is the truth of the fact, notwithstanding the averment on the record; because nothing is taken to be true except that which is properly pleaded, and that when a fact is pleaded which is historically false, and which the judges are bound to take notice of as being false, it cannot be said to have been properly pleaded merely because it is averred, and the Court must take it just as if there had been no such averment on the record.² And, upon the same principle, it has been held, that the Courts of this country will not entertain a suit for matters arising out of contracts entered into by individuals with the governments of foreign countries, which have not been acknowledged by the government of this country.³

A foreign sovereign or State sues by the name by which he or it has been recognized by the government of this country, and is not bound to sue in the name of any officer of the government, or to join as co-plaintiff any such officer upon whom process may be served, or who may be called upon to give discovery upon a cross-bill.⁴ And
 *20 where a foreign State comes voluntarily as a suitor into *a Court of Law or Equity in England, it becomes subject, as to all mat-

¹ *Taylor v. Barclay*, 2 Sim. 213, 220-223.

² *Ibid.*

³ *Thomson v. Powles*, 2 Sim. 194, 210.

⁴ In *United States of America v. Wagner*, L. R. 2 Ch. Ap. 582, it was held that a foreign sovereign State adopting the republican form of government is not bound to sue in the name of any officer of the government, or to join as co-plaintiff any such officer on whom process may be served, and who may be called upon to give discovery upon a cross-bill; reversing the order of Sir W. Page Wood (Lord Hatherley) in S. C. L. R. 3 Eq. 724. In the above case (L. R. 2 Ch. Ap. 589, 590) Lord Chelmsford L. C., referring to the remarks of Sir John Leach, in *The Columbian Government v. Rothschild*, 1 Sim. 94, said, "now I do not understand this to be a decision that the State of Columbia could not be plaintiffs in a suit instituted for the recovery of the property of the State, much less that they could not sue unless they appointed some public officer, having himself no interest in the subject in litigation, to represent their rights. The Vice-Chancellor, by the words, 'It must sue in the names of some

public officers who are entitled to represent the interests of the State,' must have referred to some persons or body in whom the interests of the State were vested, and who were, therefore, entitled to represent it in a suit." In regard to the distinction claimed to exist between a monarchical and a republican government in this respect, Lord Justice Turner in the above case (L. R. 2 Ch. Ap. 592) said: "In the cases referred to, the form of government was monarchical; and I take it that, in such cases, the public property of the State, so far as it is not by the Constitution of the State otherwise destined, vests in the sovereign, subject to a moral obligation on his part to apply it for the benefit of his subjects; and when he sues in respect to the public property, he sues, not as the mere representative of the State, but as the person in whom the property is vested for the benefit of the State. In the case of a republic, the public property of a State remains in the State, and the State, therefore, and not any mere officer of the State, is the proper party to sue for it." Similar remarks were made by the Lord Chancellor and Lord Cairns in

ters connected with that suit, to the jurisdiction of a Court of Equity; ¹ and a bill filed by it may be dismissed with costs.² An ambassador, or minister plenipotentiary, of a foreign State, does not properly represent that State in a Court of justice.³

It seems that a colonial government, existing by letters-patent, which is in some degree similar to a corporation possessing rights in England, may sue here, and ought to be regulated by the law of England, under which it has existence; ⁴ thus, in *Penn v. Lord Baltimore*,⁵ Lord Hardwicke made a decree at the suit of the governor of a province in America, claiming under letters-patent, by which the district, property, and government had been granted to his ancestors and his heirs. The suit was for the specific performance of articles, executed in England, respecting the boundaries of the two provinces of Maryland and Pennsylvania, in North America; and Lord Hardwicke, although he admitted that the original jurisdiction, in cases relating to boundaries between provinces, was in the King in council, made a decree: founding the jurisdiction upon articles executed in England under seal, for mutual considerations, which he considered as giving jurisdiction to the King's Courts, both of Law and Equity, whatever the subject-matter might be.

SECTION III. — *Corporations and Joint-Stock Companies.*

The right to sue is not confined to persons in their natural capacities: the power to sue and be sued in their corporate name is a power inseparably incident to every corporation, whether it be sole or aggregate.⁶

As a corporation must take and grant by their corporate name, so by that name they must, in general, sue and be sued; ⁷ and they *may sue by their true name of foundation, though they be better *21 known by another name. Thus, the masters and scholars of the

the same case. See *President of the United States of America v. Drummond*, 33 Beav. 449. But the Court may stay proceedings in the original suit until the means of discovery are secured in the cross-suit: *United States of America v. Wagner*, L. R. 2 Ch. Ap. 582, per Lord Chancellor and Lord Cairns L. J.; [*Republic of Peru v. Weguelin*, L. R. 20 Eq. 140; and may dismiss the suit if its order be not properly obeyed: *Republic of Liberia v. Roya*, 1 App. Cas. 139. But the complainant will not be allowed to select the officer of the foreign government to be made co-defendant with a view to discovery, and to stay proceedings until such person has appeared and answered. *Republic of Costa Rica v. Erlanger*, 1 Ch. Div. 171.]

¹ *Rothschild v. Queen of Portugal*, 3 Y. & C. Ex. 594; *King of Spain v. Hullett*, 7 Bligh, N. S. 359; 1 Cl. & Fin. 333; and cases ante 17, n. 2.

² See *U. States of America v. McRae*, L. R. 8 Eq. 69, 77, V. C. J.; *Queen of Spain v. Parr*, 18 W. R. 110, 112, V. C. J.

³ *Schneider v. Lizardi*, 9 Beav. 461, 466; *The Columbian Government v. Rothschild*, 1 Sim. 94.

⁴ *Barclay v. Russell*, 3 Ves. 424, 434.

⁵ 1 Ves. S. 444, 446.

⁶ 1 Bla. Com. 475; *Hotchkiss v. Trustees, &c.* 7 John. 356; *Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412; *Chambers v. Bap. Edu. So.*, 1 B. Mon. 216; *Le Grand v. Hampden Sidney College*, 5 Munf. 324; *Trustees of Lexington v. McConnell*, 3 A. K. Marsh. 224; *Central Manuf. Co. v. Hartshorne*, 3 Conn. 199; *Bank of Orleans v. Skinner*, 9 Paige, 305.

⁷ A corporation can be called upon to answer only by its proper name. *Binney's case*, 2 Bland, 99. So a corporation can sue only by the name and style given to it by

Hall of Valens Mary, in Cambridge, brought a writ by that name, which was the name of their foundation, though they were better known by the name of Pembroke Hall, and the writ was held good.¹

As a corporation by prescription may have more than one name, they may sue by the one name or the other, alleging that they and their predecessors have from time immemorial been known, and been accustomed to plead, by the one or by the other.²

A suit by a corporation aggregate, to recover a thing due to them in their corporate right, must not be brought in the name of their head alone, but in their full corporate name, unless it appear that the Act of Parliament or charter by which they are constituted enables them to sue in the name of their head. Yet, though it appear that the head of a corporation is enabled to sue in his own name for any thing to which the corporation is entitled, this will not preclude it from suing by its name of incorporation; thus, where an action of debt was brought in the name of the President and College of Physicians, to recover the penalty of 5*l.* per month, under the stat. 14 Hen. VIII. c. 15, for practising physic in London without a license: on demurrer to the declaration, this objection, among others, was taken, that the action ought to have been brought in the name of the College only, or of the President only, the words of the patent being "*quod ipsi per nomina Presidentis Collegii seu communitatis facultatis medicinæ London,*" should sue and be sued. To this it was answered, that they were incorporated by the name of President and College, and had, in consequence of that, a power to sue and be sued by that name; and that this power was not taken away by the additional affirmative power which was given them.³

It has been determined, that where an Act of Parliament grants any thing to a corporation, the grant shall take effect, though the

*22 *true corporate name be not used, provided the name actually used be a sufficient description of the corporation; though it

law. *Porter v. Neckerviss*, 4 Rand. 359. See *Minot v. Curtis*, 7 Mass. 444. In *Winnipisogee Lake Co. v. Young*, 40 N. H. 428, Bell C. J. said: "The practice, we think, is nearly universal, that a corporation is described in its bill by its corporate name, with the addition of the fact that it is a corporation duly established by law in such a State, and having its place of business at such a place; and a corporation defendant is described in the same way. In the case of public corporations created by public laws the Court is officially to take notice of the corporate character." See *Withers v. Warner*, 1 Str. 309. [And a law creating a bank, with authority to issue circulating notes intended to constitute the currency of the country, is a public law, and need not be given in evidence. *Williams v. Union Bank*, 2 Hum. 339.] "But in the case of private corporations, created by charters or private Acts the Court is not merely not bound to take notice of the corporate names as such, but they cannot officially take such notice. The party is bound to allege it,

as a fact to be proved, if he would avail himself of it." See also *Union Fire Ins. Co. v. Osgood*, 1 Duer. 707; *State v. Mead*, 27 Vt. 722; *State v. Central Railroad Co.*, 28 Vt. 584; *State v. Same*, 28 Vt. 583; *Camden, &c. v. Rower*, 4 Barb. 127; *The Bank v. Simon-ton*, 2 Texas, 531.

[A corporation may acquire a name by usage, as by retaining its original name after a legislative change, and an adjudication in bankruptcy made against it by the name so acquired, is valid. *Alexander v. Berney*, 1 Stew. Eq. 90.]

¹ 44 Ed. III. 35; 1 Kyd on Corp. 253; and see, as to title by which municipal corporations must sue and be sued, *Corporation of Rochester v. Lee*, 15 Sim. 376; *Attorney-General v. Corporation of Worcester*, 2 Phil. 3; 1 Coop. t. Cott. 18.

² See 9 Ed. IV. 21; 13 Hen. VII. 14; 16 Hen. VII. 1; and 21 Hen. VI. 4, which last seems *contra*.

³ 2 Salk. 451.

may be doubtful whether, in suing to enforce its claim under that Act, it can use the name therein mentioned.¹

In the case of *The Attorney-General v. Wilson*,² which was a joint bill and information, and in which the corporation of Leeds was both plaintiff and relator, an objection was made that a corporation being a body whose identity is continuous, could not be heard to impeach transactions carried into effect in its own name by its former governing body. The objection was overruled by Lord Cottenham, who thought that the true way of viewing this was to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and that if such agents exercised those functions for the purpose of injuring its interests, and alienating its property, the corporation ought not to be estopped in this Court from complaining, because the act done was ostensibly an act of the corporation.

We have seen above, that a corporation cannot, unless specially authorized by its constitution, sue by its head alone; so neither can a corporation aggregate which has a head sue or be sued without it, because without it the corporation is incomplete.³ It is not, however, necessary to mention the name of the head,⁴ nor is it necessary, in the case of corporations aggregate, to name any of the individual members by their proper christian and surnames;⁵ but if, in a suit in Equity by the members of a corporation in their corporate capacity, they are mentioned by their names, the suit will not become defective by the death of some of the members, *although it would have abated if *23 the suit had been by them in their individual characters. Thus, where the warden and fellows of Manchester College filed a bill for

¹ 10 Mod. 207, 208; 1 Kyd on Corp. 256. A declaration, upon a promissory note, that it was made to the Medway Cotton Manufactory, a corporation, &c., by the name of R. M. & Co. was held good on demurrer. *Medway Cotton Manufactory v. Adams*, 10 Mass. 360. See *Charitable Association v. Baldwin*, 1 Met. 359; *Commercial Bank v. French*, 21 Pick. 586. If, in a contract with a corporation, its name be so given as to distinguish it from other corporations, it is sufficient to support an action in the true corporate name. *Hagerstown Turnpike v. Creeger*, 5 Har. & J. 122; *S. P. Inhabitants of Alloway Creek v. Strong*, 5 Halst. 323; *Berks and Dauphin Co. v. Myers*, 6 S. & R. 16; *Woolwich v. Forrest*, Penning. 11; *First Parish in Sutton v. Cole*, 3 Pick. 232; *Mil. and Chil. Turnpike Co. v. Brush*, 10 Ohio, 111.

[A misnomer of a corporation in a grant or obligation will not prevent a recovery in the true name, the latter being shown by proper averments. *Bank of Tenn. v. Burke*, 1 Coldw. 623.]

Contracts made by mere servants or agents of corporations may be sued in the name of the corporations. *Binney v. Plumley*, 5 Vt.

500. See *Proctor v. Webber*, 1 Chip. 371; *African Society v. Varick*, 13 John. 38.

A town may sue by the description of A. & B., and the rest of the inhabitants of such town, instead of using the corporate name merely. *Barkhamstead v. Parsons*, 3 Conn. 1. [And a county in Tennessee may sue in the name of the Justices composing the County Court. *Maury County v. Lewis County*, 1 Swan, 236.]

² C. & P. 1, 21, 24.

³ 2 Bac. Ab. tit. Corp. E. 2.

⁴ 1 Kyd on Corp. 281.

⁵ 2 Inst. 666. "The corporation itself is regarded as a distinct person; and its property is legally vested in itself, and not in its stockholders. As individuals, they cannot, even by joining together unanimously, convey a title to it, or maintain an action at Law for its possession, or for damages done to it. Nor can they make a contract that shall bind it, or enforce by action a contract that has been made with it." *Chapman J. in Peabody v. Flint*, 6 Allen, 55, 56. See *Kennebec & Port. R. R. Co. v. Port. & Kennebec R. R. Co.*, 54 Maine, 173.

tithes in their corporate capacity, but in their proper names, wherein a decree was pronounced, from which both the plaintiffs and defendants appealed, and pending the appeal two of the fellows died, and two new fellows were elected in their place, an objection was taken, on the ground that the new fellows were not parties; but Lord Eldon held that there was no defect of parties, and directed the appeal to proceed.¹

A sole corporation, suing for a corporate right, having two capacities, a natural and a corporate, must always show in what right he sues.² Thus, a bishop or prebendary, suing for land which he claims in right of his bishopric or prebend, must describe himself as bishop or prebendary; and if a parson sue for any thing in right of his parsonage, he ought to describe himself as parson. In this respect a sole corporation differs from a corporation aggregate, because the latter having only a corporate capacity, a suit in its corporate name can be only in that capacity.³ It also differs from corporations aggregate, in that by the death of a corporation sole a suit by him, although instituted in his corporate capacity, becomes abated,⁴ which is not the case, as we have seen, with respect to suits by corporations aggregate.

It is to be observed, that in cases of abatement by the death of a corporation sole, there is a material distinction with regard to the right to revive. If the plaintiff was entitled to the subject-matter of the suit for his own benefit, his personal representatives are the parties to revive; but if he was only entitled for the benefit of others, his successor is the person who ought to revive. Thus, if the master of an hospital, or any similar corporation, institute proceedings to recover the payment of an annuity and die, his successors shall have the arrears, and not his executors, because he is entitled only as a trustee for the benefit of his house: but it is otherwise in the case of a parson; there the executors are entitled, and not the successor, because he was entitled to the annuity for his own benefit.⁵ On the same principle, if a rent due to a dean and chapter be in arrear, and the dean die, there is no abatement, because the rent belongs to the succeeding dean and chapter; but if the rent be due to the dean in his sole corporate capacity, it shall go to his executors, and they must revive.⁶

Although corporations aggregate are entitled to sue in their corporate capacity, the Court will not permit parties to assume a corporate character to which they are not entitled; and where it appears sufficiently on the bill that the plaintiffs have assumed such a character without being entitled to it, a demurrer will hold.¹ Thus, where a bill was filed by some of the members of a lodge of freemasons against others, for the delivery up of certain specific chattels, in which

¹ Blackburn v. Jepson, 3 Swanst. 132, 138.

² 2 Bac. Ab. tit. Corp. E. 2; Weston v. Hunt, 2 Mass. 500.

³ *Ibid.*

⁴ [But see *contra*, Polk v. Plummer, 2 Hum. 500; Felts v. Mayor of Memphis, 2 Head,

650; Ezell v. Justices, 3 Head, 586; Anonymous, 1 Hayw. 144.]

⁵ 1 Kyd on Corp. 77.

⁶ 1 Kyd on Corp. 78.

¹ Story Eq. Pl. § 497; see Livingston v. Lynch, 4 John. Ch. 573, 596.

bill there was great affectation of a corporate character in stating their laws and constitutions, and the original charter by which they were constituted, a demurrer was allowed: because the Court will not permit persons who can only sue as partners, to sue in a corporate character; and, upon principles of policy, the Courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant them.²

A suit may be supported in England by a foreign corporation, in their corporate name and capacity,³ and in pleading, it is not necessary that they should set forth the proper names of the persons who form such corporation, or show how it was incorporated,⁴ though, if it is denied, they must prove that by the law of the foreign country they were effectually incorporated.⁵

*In *Lloyd v. Loaring*, *supra*, the plaintiffs were given leave to *25 amend their bill, by striking out their present style as plaintiffs, and suing as individuals on behalf of themselves and the other persons interested.¹ Ever since that period it has been held, that where all parties stand in the same situation, and have one common right and one common interest, two or three or more may sue in their own names for the benefit of all; and upon this principle, large partnerships or associations in the nature of joint-stock companies, although not incorporated, have been permitted to maintain suits instituted in the name

² *Lloyd v. Loaring*, 6 Ves. 773; *Womersley v. Merritt*, L. R. 4 Eq. 695, 696, V. C. M.

³ A foreign corporation may sue in its corporate name in Chancery, as well as at Law. *Silver Lake Bank v. North*, 4 John. Ch. 372; *Story Eq. Pl. § 55*; *Society for Propagating the Gospel v. Wheeler*, 2 Gall. 105; *Society for Propagating the Gospel v. New Haven*, 8 Wheat. 464; *South Carolina Bank v. Case*, 8 B. & C. 427; *Bank of Scotland v. Kerr*, 8 Simm. 246; *Collins Co. v. Brown*, 3 K. & J. 423; *Pringle v. United States*, L. R. 2 Eq. 668; *The Bank v. Simonton*, 2 Texas, 531. See *Mechanics' Bank of N. York v. Goodwin*, 2 Green, 439. A corporation chartered in one State may sue in the Courts of another State. *Williamson v. Smoot*, 7 Martin (Lou.) 31; *Lucas v. Bank of Georgia*, 2 Stewart, 147; *New York Fire Ins. Co. v. Ely*, 5 Conn. 560; *Cape Fear Bank v. Stinemetz*, 1 Hill, 44; *Bank of Michigan v. Williams*, 5 Wend. 478; 7 Wend. 539; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Taylor v. Bank of Alexandria*, 5 Leigh, 471; *Bank of Edwardsville v. Simpson*, 1 Missou. 184; *Lothrop v. Commercial Bank of Scioto*, 8 Dana, 114; *New Jersey Protection and Lombard Bank v. Thorp*, 6 Cowen, 46; *Pendleton v. Bank of Kentucky*, 1 Monroe, 171; *Taylor v. Bank of Illinois*, 7 Monroe, 584; *Bank of Marietta v. Pindall*, 2 Rand. 465; *Reed v. Conococheque Bank*, 5 Rand. 326; *Bank of Augusta v. Earle*, 13 Peters, 519; *Stewart v. U. S. Ins. Co.*, 9 Watts, 126; *Bank of Washtenaw v. Montgomery*, 2 Seam. 422; *Guaga Iron Co.*

v. Dawson, 4 Blackf. 202; *Mechanics' Bank of New York v. Goodwin*, 2 Green, 239; *Lewis v. Bank of Kentucky*, 12 Ohio, 132. A State is a corporation, and may sue as such in another State. *Delafield v. The State of Illinois*, 2 Hill (N. Y.), 159; *S. C. 8 Paige*, 527; *Hines v. The State of North Carolina*, 10 Sm. & M. 529.

⁴ *Angell & Ames Corp. § 632*.

⁵ *Dutch West India Co. v. Van Moyses*, 2 Ld. Ray. 1535. As to the necessity of proving the corporate existence of a foreign corporation, see *School District v. Blaisdell*, 6 N. H. 198; *Lord v. Bigelow*, 8 Vt. 445; *Society, &c. v. Young*, 2 N. H. 310; *The Guaga Iron Co. v. Dawson*, 4 Blackf. 203; *Portsmouth Livery Co. v. Watson*, 10 Mass. 92; *The Bank v. Simonton*, 2 Texas, 531.

In case of foreign corporations, the plaintiffs, under the general issue, are bound to show their corporate capacity, but the Court will take notice, *ex officio*, of the capacity of corporations created in Ohio to sue in that State. *Lewis v. Bank of Kentucky*, 12 Ohio, 132; see *Agnew v. Bank of Gettysburg*, 2 Har. & G. 478; *Portsmouth Livery Co. v. Watson*, 10 Mass. 92; *Eagle Bank of New Haven v. Chapin*, 3 Pick. 180; *Carmichael v. Trustees of School Lands*, 3 Howard (Miss.), 84; *Williams v. Bank of M.*, 7 Wend. 539; *Bank of Waterville v. W. W. Bk.*, 13 How. Pr. 270; *Zion Church v. St. Peter's Church*, 5 W. & S. 215; *Winnipisogee Lake Co. v. Young*, 40 N. H. 420, 428.

¹ 6 Ves. 779; and see *Womersley v. Merritt*, L. R. 4 Eq. 695, 696, V. C. M.

of a few or more individuals interested, on behalf of themselves and the other partners in the concern.²

By the statute 7 Will. IV. & 1 Vic. c. 73, the sovereign is empowered to grant letters-patent, establishing companies, and providing that the companies so established shall be able to sue and be sued by their public officer; and many joint-stock companies or associations for insurance, trading, and other purposes, have from time to time been established by special Acts of Parliament, which, although they have not formed them into corporations, have still conferred upon them many privileges, in consequence of which such companies have acquired something of a corporate character; amongst other privileges so conferred, may be reckoned that of suing and being sued in the name of their public officer.³ The history of these companies or associations, and of the provisions which have from time to time been introduced into Acts of Parliament creating or regulating them, has been detailed at considerable length by Lord Eldon in *Van Sandau v. Moore*; ⁴ and his Lordship's observations may be useful to those upon whom the duty may devolve of framing suits on behalf of, or against, persons connected with the different classes of joint-stock companies there enumerated. It will suffice, however, for our present purpose, to observe, that where any members of a company wish to sue the directors or others who are members as well as themselves, they may maintain such a suit in their own individual capacities; either suing by themselves, and making the rest of the company *defendants, or suing on behalf of themselves and the other members of the association.¹ Although the rights and duties of the public officer are chiefly to sue and be sued

² See *Chancey v. May*, Prec. in Ch. 592; *Good v. Blewitt*, 13 Ves. 397; *Cockburn v. Thompson*, 16 Ves. 321, 325; *Pearce v. Piper*, 17 Ves. 1; *Blain v. Agar*, 1 Sim. 37, 43; *Gray v. Chaplain*, 2 S. & S. 267, 272; 2 Russ. 126; *Van Sandau v. Moore*, 1 Russ. 441; *Lund v. Blanchard*, 4 Hare, 290, 292; *Womersley v. Merritt*, L. R. 4 Eq. 695, V. C. M.; and see *post*, Chap. V. § 1, *Parties*.

³ As to abatement by death of a public officer, see 7 Geo. IV. c. 46, § 9, and *Burmester v. Baron von Stenz*, 23 Beav. 32. For form of order to substitute a new officer, see *Meek v. Burnley*, M. R. 12 Jan. 1863, Reg. Lib. B. 6; and *Seton*, 1173. [*Ante* 23, n. 4.]

⁴ 1 Russ. 441, 458.

¹ *Hichens v. Congreve*, 4 Russ. 562; [*Wallworth v. Holt*, 4 M. & C. 619, 635;] *Colman v. Eastern Counties Railway Co.*, 10 Beav. 1; *Bagshaw v. Eastern Counties Railway Co.*, 7 Hare, 114; *Heath v. Ellis*, 12 Met. 601; *Allen v. Curtis*, 26 Conn. 456; *Putnam v. Sweet*, 1 Chand. (Wis.) 286; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Cunliffe v. Manchester and Bolton Canal Co.*, 1 M. & R. 131, note; *Manderson v. Commercial Bank*, 28 Penn. 379; *Balt. & Ohio R. R. Co. v. City of Wheeling*, 13 Gratt. 40.

Peabody v. Flint, 6 Allen. 52; *Robinson v. Smith*, 3 Paige, 222; see *Hersey v. Veazie*, 24 Maine, 9; *Smith v. Poor*, 40 Maine, 415;

Schley v. Dixon, 24 Geo. 273; *Kean v. Johnson*, 1 Stockt. 401; *Binney's case*, 3 Bland, 142; *Revere v. Boston Copper Co.*, 15 Pick. 351; see *Durfee v. Old Colony, &c.*, R. R. Co., 5 Allen, 230.

[Ordinarily, where the act complained of is capable of confirmation by the corporation or company, redress should be first sought through the company. *Foss v. Harbottle*, 2 Hare, 461; *Mozley v. Alston*, 1 Phil. 790; *McDougall v. Gardner*, 1 Ch. Div. 14; *infra*, p. 243. But if the action of the corporation is controlled by stock procured by the fraud complained of, the bill by one shareholder on behalf of himself and all other shareholders will be sustained. *Atwool v. Merryweather*, L. R. 5 Eq. 494, note. And see *Hodges v. New England Screw Co.*, 1 R. I. 312; *March v. Eastern R. Co.*, 40 N.H. 567. So if the act complained of is *ultra vires* of the corporate powers. *Clinch v. Financial Corporation*, L. R. 5 Eq. 450; S. C. 4 Ch. App. 117; *Gray v. Lewis*, L. R. 8 Eq. 526; and see *infra* 243, note 8. Or, if the act is intended to prevent the shareholder from exercising his legal right to vote. *Cannon v. Trask*, L. R. 20 Eq. 669; *Pender v. Lushington*, 6 Ch. Div. 70. Or, where the majority of an incorporated company propose to benefit themselves at the expense of the minority. *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. App. 350. Or,

on behalf of the company, in matters arising between the company on the one hand, and strangers or persons who are not partners on the other, yet it has been held, that the public officer may also institute proceedings against certain of the directors, in respect to past transactions to compel them to refund sums alleged to be due from them to the partnership. This was decided by Sir James Parker V. C., with reference to the Joint-Stock Banking Act, 7 Geo. IV. c. 46, § 9,² but the reasons on which his judgment rested would seem to render his decision applicable to all joint-stock companies duly registered.

The statute 7 & 8 Vic. c. 110, was, from the year 1844 until the passing of "The Joint-Stock Companies' Act, 1856,"³ the statute which regulated the constitution and management of almost all joint-stock companies;⁴ and questions may still occur with reference to companies constituted under it; but it was repealed, as to all future companies, by § 107 of the last-mentioned Act; and that section was repealed and re-enacted by the 20 & 21 Vic. c. 14, § 23. The Act of 1856, as modified by the Joint-Stock Companies' Acts of 1857 and 1858, regulated the constitution and management of joint-stock companies until the passing of "The Companies' Act, 1862;"⁵ which repealed these Acts, but consolidated and re-enacted them. For the present purpose, however, it is sufficient to observe, that all companies constituted under these Acts became and still become, upon certificate of incorporation, a body corporate, by the name prescribed in the memorandum of association.⁶

where the directors so act as to prevent a majority of the members from exercising a proper control over the affairs of the company. *McDougall v. Gardiner*, L. R. 20 Eq. 383. Where the object of the suit is to recover damages from an officer of a corporation for a fraudulent misappropriation or conversion of the corporate property, the action can only be brought by a stockholder after application to, and refusal by the corporation to sue. *Greaves v. Gouge*, 69 N. Y. 154; *Black v. Huggins*, 2 Tenn. Ch. 780. And so where the suit is against a third person for a wrong to the detriment of the corporation, one stockholder may sue for himself and others where he has first made an application to the directors of the company to institute the suit, and they have refused. *Duckett v. Gover*, 6 Ch. Div. 82; *Memphis City v. Dean*, 6 Wall. 73; *Bronson v. La Crosse R. Co.*, 2 Wall. 283; *Dodge v. Woolsey*, 18 How. 331; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314; *Cogswell v. Bull*, 29 Cal. 320; *Charleston Ins. & Tr. Co. v. Sebrigg*, 5 Rich. Eq. 342; *Bayless v. Orne*, 1 Freem. Ch. 173. See also, for cases in which bills by shareholders have been sustained under exceptional circumstances, many of the cases cited in the first part of this note, and *Gray v. Lewis*, L. R. 8 Ch. Ap. 103; *Hazard v. Durant*, 11 R. I. 195. In this last case, the English authorities are reviewed, and it is held that a general allegation of "often requested" is a sufficient averment of a request of the corporation to

sue, as a matter of pleading, and that a request made to an executive committee of a board of managers, to whom the authority of the corporation had been delegated, sustained the averment. And if the bill shows a state of facts from which it appears that a request would be unavailing, no request, it seems, is necessary. *Brewer v. Boston Theatre*, 104 Mass. 378, 389. And see *Speering's Appeal*, 71 Pa. St. 1. And when the same persons were directors in two corporations, one of which was indebted to the other, and, being more largely interested in the debtor corporation, were about to discontinue an action on the demand, then barred by the Statute of Limitations, a receiver was appointed, at the instance of a stockholder of the creditor company, to carry on the suit. *Hazzard v. Credit Mobilier*, 7 Rep. 360, U. S. C. C. Pa.]

² *Harrison v. Brown*, 5 De G. & S. 728; and see *Sedden v. Connell*, 10 Sim. 58, 76.

³ 19 & 20 Vic. c. 47.

⁴ See § 2.

⁵ 25 & 26 Vic. c. 89.

⁶ By 25 & 26 Vic. c. 89, § 69, where there is reason to believe that the assets of a limited company, suing in Equity, may be insufficient for payment of costs, the company may be required to give security for costs, see *Australian Steam Company v. Fleming*, 4 K. & J. 407; *Caillaud's Company v. Caillaud*, 26 Beav. 427; *Southampton, &c., Company v. Rawlins*, 2 N. R. 544, M. R.; 9 Jur. N. S. 887; *Southampton, &c., Company v. Pincock*,

The rule that all persons not lying under the disabilities after pointed out are entitled to maintain a suit as plaintiffs in the Court of Chancery, is not affected by the circumstance of their being resident out of the jurisdiction of the Court, unless they be alien enemies, or are resident in the territory of an enemy without a license or authority from the government here.¹

In order, however, to prevent the defendant or respondent in the case of a petition, from being defeated of his right to costs, it is a rule, that if the plaintiff² or his next friend,³ or the petitioner,⁴ if he is not a party to the cause,⁵ is resident abroad, the Court will, on the application of the defendant, or respondent, order him to give security for the costs of the suit or petition, and in the mean time direct all proceedings to be stayed.⁶

So, also, where a plaintiff appears to have no permanent residence, he will be made to give security for costs.⁷

*28 * It has been held in Ireland,¹ that notwithstanding the 41 Geo.

III. c. 90, § 5, by which an attachment is given in England to enforce an order or decree made in Ireland for the payment of money,

11 W. R. 978, M. R.; *Washoe Mining Co. v. Ferguson*, L. R. 2 Eq. 371, V. C. W. The security must be given where, the company being in a course of winding up, the suit is by the official liquidator; *Freehold Land & Brick-making Company v. Spargo*, W. N. (1868) 94 M. R.; but it will not be required where the company is plaintiff in a cross-suit. *Accidental & Marine Ins. Co. v. Mercati*, L. R. 3 Eq. 100, V. C. W. The security is not confined to 100*l.*, but must be for an amount equal to the probable amount of costs payable. *Imperial Bank of India v. Bank of Hindustan*, L. R. 1 Ch. Ap. 437; 12 Jur. N. S. 493, L. J.J., overruling *Australian Steam Company v. Fleming*, *ubi sup.*; and see *post*, 33. On an application for an injunction by a limited company, the Court will require an undertaking as to damages by some responsible person; *Anglo-Danubian Company v. Rogerson*, 10 Jur. N. S. 87, M. R. *Pacific Steamship Co. v. Gibbs*, 14 W. R. 218, V. C. W. As to suits by official managers under the Winding-up Acts, see 25 & 26 Vic. c. 89, §§ 95, 133 (7); and see §§ 87, 151, 195, 202; *Turquand v. Kirby*, L. R. 4 Eq. 123, M. R.; *Turquand v. Marshall*, L. R. 6 Eq. 112, M. R.; L. R. 4 Ch. Ap. 376, 382, L. C.

¹ Story Eq. Pl. §§ 51-54.

² Though suing as executor or administrator, *Knight v. De Blaquiére, Sau. & S.* 648. [*Murfree v. Leeper*, 1 Overt. 1.]

³ *Kerr v. Gillespie*, 7 Beav. 269.

⁴ *Drever v. Maudesley*, 5 Russ. 11; *Ex parte Seidler*, 12 Sim. 106; *Re Norman*, 11 Beav. 401; *Atkins v. Cook*, 3 Drew. 694; *Partington v. Reynolds*, 5 W. R. 307.

⁵ *Cochrane v. Fearon*, 18 Jur. 568.

⁶ *Fox v. Blew*, 5 Mad. 147; *Lillie v. Lillie*, 2 M. & K. 404; *Lautour v. Holcombe*, 1 Phil. 262, 264; *Newman v. Landrine*, 1 McCarter (N. J.), 291; *Barker v. Lidwell*, 1 Jones & Lat. 703. And it has been held that in default of the plaintiff giving security for costs when ordered, his bill should be dismissed. *Carnac v. Grant*, 1 Sim. 348; *Massey v. Gillelan*, 1 Paige, 644; *Breeding v. Finley*, 1 Dana, 477; *Bridges v. Canfield*, 2 Edw. Ch. 217. But if the non-resident plaintiff sues as executor or administrator, it has been held, that the defendant cannot compel security for costs. *Goodrich v. Pendleton*, 3 John. Ch. 520; *Catchcart v. Hewson*, 1 Hayes, 173. Especially after plea, 3 John. Ch. 520. As to giving security where all the plaintiffs are out but the next friend is within the jurisdiction, see *Lander v. Parr*, 16 L. J. Ch. 269, L. C. [The general rule applies when the plaintiff is a foreign government, Republic of Costa Rica v. Erlanger, 3 Ch. Div. 62.]

⁷ *Bailey v. Gundry*, 1 Keen, 53; *Playter v. Anderson*, 15 Sim. 104; 10 Jur. 169; and see *Calvert v. Day*, 2 Y. & C. Ex. 217; *Silbbering v. Earl of Balcarras*, 1 De G. & S. 683; 12 Jur. 108; *Hurst v. Padwick*, 12 Jur. 21; *Lumley v. Hughes*, 2 W. R. 112; *Matby v. Bewicke*, 8 De G., M. & G. 468; 2 Jur. N. S. 671; *Oldale v. Whitcher*, 5 Jur. N. S. 84, V. C. K.; *Knight v. Cory*, 9 Jur. N. S. 491, V. C. W.; *Dick v. Munder*, 11 Jur. N. S. 819; 13 W. R. 1013, M. R. The rule extends to the next friend of a plaintiff, see *Kerr v. Gillespie*, 7 Beav. 269; *Watts v. Kelly*, 6 W. R. 206.

¹ *Moloney v. Smith*, 1 M'Cl. & Y. 213.

a plaintiff residing in England must, on filing a bill in Ireland, give security for costs;² and although the same Act applies to persons who are resident in Ireland commencing suits in England, it has been decided in the English Courts, that where a plaintiff resident in Ireland files a bill here, he must also give security.³ It has likewise been held, that a person resident in Scotland must, in like manner, give security for costs.⁴

Where there are co-plaintiffs resident in England, the Court will not make an order that other plaintiffs who are abroad shall give security for costs;⁵ and where the plaintiff is abroad as a land or sea officer in the service of her Majesty, he will not be ordered to give security;⁶ and so, where he is resident abroad upon public service, as an ambassador or consul, he cannot be called upon to give security.⁷ The Court of Queen's Bench, however, has required a Judge in the East India Company's service to give security;⁸ and peers of the realm, although they are privileged from personal arrest, must, if they reside abroad, give security for costs; for, although such costs cannot be recovered by personal process, they may by other process, if the plaintiff becomes a resident in this country.⁹ And it may be stated generally that, wherever a plaintiff is out of the jurisdiction, the defendant is entitled to security for costs, unless it is distinctly shown that the plaintiff is exempted from his liability.¹⁰

As a general rule, the plaintiff in a cross-suit cannot be called upon to give security for costs to the plaintiff in the original suit, on the principle that a cross-bill is, in reality, a portion of the defence * to the original bill;¹ but his co-defendants to the cross-bill *29 may move for such security against their plaintiff;² and it has been held, that a bill to restrain an action at Common Law is so far a defensive proceeding as to exempt the plaintiff in Equity from the liability to give security for costs;³ but, on the other hand, a defendant in an interpleader suit being out of the jurisdiction, was looked upon as

² Mullett v. Christmas, 2 Ball & B. 422; see also Stackpoole v. Callaghan, 1 Ball & B. 566.

³ Hill v. Reardon, 6 Mad. 46; Moloney v. Smith, 1 M'Cl. & Y. 213; and see, as to plaintiff resident in Ireland suing here in other cases, Craig v. Bolton, 2 Bro. C. C. 609.

⁴ Kerr v. Duchess of Munster, Bunb. 35; *Ex parte* Latta, 3 De G. & S. 186.

⁵ Winthrop v. Royal Exch. Ass. Co., 1 Dick. 232; Walker v. Easterby, 6 Ves. 612; Green v. Charnock, 1 Sumner's Ves. 396, and note (a); Orr v. Bowles, 1 Hodges, 23; Doe v. Roe, 1 Hodges, 315; Gilbert v. Gilbert, 2 Paige, 603; Burgess v. Gregory, 1 Edw. Ch. 439. This rule does not apply where a husband, who has no substantial interest, is co-plaintiff with his wife. Smith v. Etches, 1 H. & M. 711; 10 Jur. N. S. 124. No indorser is required in Massachusetts, where any one of two or more joint plaintiffs is an inhabitant of the State. Genl. Sts. c. 123, § 20.

⁶ Evelyn v. Chippendale, 9 Sim. 497; Clark v. Fergusson, 1 Giff. 184; 5 Jur. N. S. 1155; Fisher v. Bunbury, Sau. & S. 625; Wright v. Everard, Sau. & S. 651.

⁷ Colebrook v. Jones, 1 Dick. 154; Beames on Costs, 123. As to ambassadors resident here, and their servants, see *post*, p. 32.

⁸ Plowden v. Campbell, 18 Jur. 910, Q. B.; see Powell v. Bernhard, 1 Hogan, 144.

⁹ Lord Aldborough v. Burton, 2 M. & K. 401, 403.

¹⁰ Lillie v. Lillie, 2 M. & K. 404. As to security by a limited company, see *ante*, p. 26 n. (6).

¹ Vincent v. Hunter, 5 Hare. 320; M'Gregor v. Shaw, 2 De G. & S. 360; Sloggett v. Viant, 13 Sim. 187; Wild v. Murray, 18 Jur. 892; Tynte v. Hodge, 2 J. & H. 692; 8 Jur. N. S. 1226; Washoe Mining Co. v. Ferguson, L. R. 2 Eq. 371, V. C. W.

² Sloggett v. Viant, 13 Sim. 187.

³ Watteu v. Billam, 3 De G. & S. 516; 14 Jur. 165; Wilkinson v. Lewis, 3 Giff. 394; 8 Jur. N. S. 908.

plaintiff, and ordered to give security for costs;⁴ and so also, a defendant who had obtained the conduct of the cause has been required to give security.⁵ And where the right to require security for costs from a plaintiff out of the jurisdiction had been waived, such waiver did not preclude the defendant from requiring security from the representative of the original plaintiff, by whom on his death the suit was revived, and who was also out of the jurisdiction,⁶ or from the plaintiff on his amending the bill and stating thereby that he was out of the jurisdiction.⁷

A plaintiff cannot be compelled to give security for costs, unless he himself states upon his bill that he is resident out of the jurisdiction, or unless the fact is established by affidavit; and the mere circumstance of his having gone abroad will not be a sufficient ground on which to compel him to give security, unless it is stated, either by the plaintiff himself, or upon affidavit, that he is gone abroad for the purpose of residing there.⁸

Whenever security is asked for, the question arises whether the party is resident abroad or not within the meaning of the rule; and the answer to that question depends, in each case, upon the interpretation to be put upon the phrase "resident," or "permanently resident" abroad. Thus, if a plaintiff goes to reside abroad, under circumstances rendering it likely that he will remain abroad for such a length of time that there is no reasonable probability of his being forthcoming, when the defendant may

be entitled to call upon him to pay costs in the suit, that is sufficient;⁹ and where *a plaintiff, domiciled in Scotland, took furnished lodgings in London, and then filed his bill, it was held that he must give security for costs;¹ and so, where the plaintiff went out of the jurisdiction on matters connected with the suit, he was ordered to give security; but on his return the order was discharged.²

In order to entitle a defendant to require security for costs from a plaintiff, he must make his application at the earliest possible time after the fact has come to his knowledge, and before he takes any further step in the cause; therefore, where the fact of the plaintiff being resident abroad appears upon the bill, he must apply before he puts in his answer, or applies for time to do so: either of which acts will be con-

⁴ *Smith v. Hammond*, 6 Sim. 10, 15.

⁵ *Mynn v. Hart*, 9 Jur. 860, V. C. K. B.

⁶ *Jackson v. Davenport*, 29 Beav. 212; 7 Jur. N. S. 1224.

⁷ *Wyllie v. Ellice*, 11 Beav. 99; 12 Jur. 711; and see *Stewart v. Stewart*, 30 Beav. 322.

⁸ *Green v. Charnock*, 3 Bro. C. C. 371; 2 Cox, 284; 1 Ves. J. 396; *Hoby v. Hitchcock*, 5 Ves. 699; *Edwards v. Burke*, 9 L. T. N. S. 406, V. C. K.

⁹ *Blakeney v. Dufaur*, 16 Beav. 292; 2 De G. M. & G. 771; 17 Jur. 98; and see *Kennaway v. Tripp*, 11 Beav. 588; *Drummond v. Tillinghurst*, 15 Jtr. 384, Q. B.; *Stewart v. Stewart*, 20 Beav. 322; *Wyllie v. Ellice*, 11

Beav. 99; 12 Jur. 711; *White v. Greathead*, 15 Ves. 2; 1 Hoff. Ch. Pr. 200; *Ford v. Boucher*, 1 Hodges, 58. It is well settled that, to constitute one a resident, his residence must be of a fixed and permanent, and not of a mere temporary, character. *Graham, Prac.* 505. An absence of eighteen months will not be regarded as merely temporary. *Foss v. Wagner*, 2 Dowl. P. C. 499. Even though it is sworn that the party is soon expected. *Wright v. Black*, 2 Wend. 258; *Gilbert v. Gilbert*, 2 Paige, 603.

¹ *Ainsley v. Sims*, 17 Beav. 57; 17 Jur. 657.

² *O'Connor v. Sierra-Nevada Co.*, 24 Beav. 435.

sidered as a waiver of his right to the security.³ Filing a demurrer has, however, been held not to be a waiver;⁴ and where the plaintiff amended his bill, and stated thereby that he was out of the jurisdiction, the defendant was held not to be precluded from requiring security for costs, although he had some notice of the plaintiff being resident abroad previously to the date of the amendment.⁵

If the plaintiff is not described in the bill as resident abroad, and the defendant does not become apprised of that fact before he puts in his answer, he may make the application after answer; if, however, he takes any material step in the cause after he has notice, he cannot then apply. Where the plaintiff was described in the original bill as late of the West Indies, but then of the city of London, and the defendant, having answered, filed a cross-bill against the plaintiff, but, exceptions having been taken to the answer, put in a further answer, and then applied to the Court that the plaintiff in the original bill might give security for costs: alleging in his affidavit, that upon applying to the plaintiff's solicitor in the original suit to appear for him to the cross-bill, he discovered, for the first time, that the plaintiff did not reside in *London, as alleged in the bill, but in Ireland; it was *31 held that as the defendant had, in his cross-bill, stated the plaintiff to be resident in Ireland, and after that had answered the exceptions to his answer to the original bill, he had thereby taken a step in the cause after it was evident that he had notice of the plaintiff's being out of the jurisdiction, and had thereby precluded himself from asking for security for costs, and the motion was therefore refused.¹ *Ex parte Seidler*² was a petition under an Act of Parliament, authorizing the Court to make an order in a summary manner upon petition. The petitioner being out of the jurisdiction of the Court, and the respondent having answered the affidavits in support of the petition, the question was whether he had thereby lost his right to require the petitioner to give security for costs: Sir Lancelot Shadwell V. C. ruled that he had not, but that he might make the application on the petition coming on to be heard.³

³ *Melioruechy v. Melioruechy*, 2 Ves. S. 24; 1 Dick. 147; *Craig v. Bolton*, 2 Bro. C. C. 609; *Anon.*, 10 Ves. 287; and see *Swanzy v. Swanzy*, 4 K. & J. 237; 4 Jur. N. S. 1013; *Murrow v. Wilson*, 12 Beav. 497; *Cooper v. Furtou*, 8 W. R. 702; and see *Long v. Tottenham*, 1 Ir. Ch. Rep. 127; *Atkins v. Cook*, 3 Drew. 694; 3 Jur. N. S. 283; *Newman v. Landrine*, 1 McCarter (N. J.), 291; *Long v. Tardy*, 1 John. Ch. 202; *Goodrich v. Pendleton*, 3 John. Ch. 520. In Massachusetts, though a writ, sued out by the plaintiff, who is not an inhabitant of the State, is not indorsed as is required by Genl. Sts. c. 123, § 20, yet the defendant must make the objection at the first term, or he will be held to have waived it. *Carpenter v. Aldrich*, 3 Met. 58; see *Whiting v. Hollister*, 2 Mass. 102; *Gilbert v. Nantucket Bank*, 5 Mass. 98; *Clapp v. Balch*, 3 Greenl. 216. The practice

in New York, under the Act of that State authorizing the defendant to require security for costs, allows the application to be made at any stage of the cause, if the plaintiff was a non-resident at the commencement of the suit, and continues so. *Burgess v. Gregory*, 1 Edw. Ch. 449.

⁴ *Watteu v. Bil'am*, 3 De G. & S. 516; 14 Jur. 165; *Goodrich v. Pendleton*, 3 John. Ch. 520; *Priors v. White*, 2 Moll. 361; *Eardy v. Headford*, 4 Moll. 464.

⁵ *Wyllie v. Ellice*, 11 Beav. 99; 12 Jur. 911; and see *Stewart v. Stewart*, 30 Beav. 320.

¹ *Mason v. Gardner*, 2 Bro. C. C. ed. Belt, 609, notes; and see *Wyllie v. Ellice*, 11 Beav. 99; *Smith v. Castles*, 1 Gray, 108.

² 12 Sim. 106.

³ See, however, *Atkins v. Cock*, 3 Drew. 694; 3 Jur. N. S. 283.

Where the defendant had sworn to his answer before he had notice of the fact of the plaintiff being resident abroad, but, in consequence of some delay in the Six Clerks' Office, the answer was not filed till after the defendant had been informed of the plaintiff's residence, a motion that the plaintiff might give security for costs was considered too late: although the defendant himself was not privy to, or aware of, the delay which had taken place in filing his answer.⁴

If a plaintiff, after filing a bill, leave the kingdom for the purpose of settling, and do actually take up his residence in foreign parts, it is, in any stage of the cause, ground for an order that he shall give security for costs.⁵ Such application ought to be made as early as possible after the defendant has become apprised of the fact; and it is not enough to support such an application to swear that the plaintiff has merely gone abroad, but the affidavit should go on to say that he is gone to settle abroad.⁶ In *Weeks v. Cole*,⁷ an application was made by the defendant,

after answer, that the proceedings might be stayed until the plaintiff gave security for costs, on an affidavit that the plaintiff, who, when the bill was filed was resident in London, had, since the answer was put in, entirely abandoned the country, and gone to reside in the Isle of Man; and Lord Eldon made the order, observing, however, that the plaintiff ought to have an opportunity of answering the affidavit; the propriety of which suggestion is evident from the case of *White v. Greathead*,¹ where an order for the plaintiff to give security for costs, after answer, was refused, in consequence of an affidavit which had been filed by the plaintiff's solicitor, stating that the plaintiff had gone to the West Indies merely for the purpose of arranging his affairs, and that he had informed the deponent that he intended soon to return to this country, where he had left his family.

To entitle a defendant to an order that the plaintiff may give security for costs, it is necessary that the plaintiff should absolutely be gone abroad: the mere intention to go will not be sufficient;² in a case, however, where the plaintiff, who was an alien enemy, was under confinement preparatory to his removal out of the country, upon a warrant by the Secretary of State under the Alien Act, the proceedings were stayed

⁴ *Dyott v. Dyott*, 1 Mad. 187; and, as to laches, see *Wyllie v. Ellice*, 11 Beav. 99; 12 Jur. 711; *Swanzy v. Swanzy*, 4 K. & J. 237; 4 Jur. N. S. 1013; *Murrow v. Wilson*, 12 Beav. 497.

⁵ *Anon.*, 2 Dick. 775; *Hoby v. Hitchcock*, 5 Ves. 699; *Weeks v. Cole*, 14 Ves. 518; *Kerr v. Gillespie*, 7 Beav. 269; *Kennaway v. Tripp*, 11 Beav. 588; *Stewart v. Stewart*, 20 Beav. 323; *Edwards v. Burke*, 9 L. T. N. S. 406, V. C. K. See also *Busk v. Beetham*, 2 Beav. 537; *Blakeney v. Dufaur*, 2 De G., M. & G. 771; 17 Jur. 98. In Massachusetts, if a plaintiff in a process at Law or in Equity, after its commencement, removes from the State, the Court where the suit is pending shall, on the motion of any other party, re-

quire the plaintiff to procure a sufficient indorser. Genl. Sts. c. 129, § 29; *Smith v. Castles*, 1 Gray, 108.

⁶ The affidavit should also show clearly, that the defendant did not know of the plaintiff's removal before taking the last step in the cause, or the application will be denied. *Newman v. Landrine*, 1 McCarter (N. J.), 291.

⁷ 14 Ves. 518.

¹ 15 Ves. 2; and see *Edwards v. Burke*, 9 L. T. N. S. 406, V. C. K.; *Kerr v. Gillespie*, 7 Beav. 269.

² *Adams v. Colthurst*, 2 Anst. 552; *Willis v. Garbutt*, 1 Y. & J. 511; 1 Barb. Ch. Pr. 103; *Hoby v. Hitchcock*, 5 Ves. 699.

until he gave security for costs, although he was not actually gone out of the country.³ In proceedings at Common Law, where after the commencement of an action, and after issue joined, the plaintiff has been convicted of felony and ordered to be transported, the Courts have ordered security to be given for costs, as well retrospective as prospective;⁴ and it is presumed that Courts of Equity will follow the rule at Law. Where, however, the plaintiff had not been convicted of felony, but only of a misdemeanor under the 52 Geo. III. c. 130, § 2, for poaching, for which he was sentenced to seven years' transportation, and it was admitted that he had not sailed for the place of transportation, but was in a penitentiary place of confinement, Sir John Leach V. C. refused a motion for stay of proceedings till the plaintiff had given security for costs.⁵

From analogy to the course adopted where the plaintiff is resident out of the jurisdiction, the Court will, upon application, restrain an ambassador's servant, whose person is privileged from arrest by the 7 Anne, c. 12, from proceeding with his suit until he has given security for costs.⁶

By the old practice, 40*l.* was the amount of security required to answer costs by any plaintiff who was out of the jurisdiction *of *33 the Court, but this sum has been increased to 100*l.*¹ Where a person out of the jurisdiction of the Court presents a petition to have his solicitor's bills taxed, it seems that he must give security for the costs of the petition, and also for the balance that may be found due from him on the taxation.²

Where it appears on the bill³ that the plaintiff is resident out of the jurisdiction, an order that he give security for costs is obtained on motion of course, or more usually on petition of course,⁴ presented to the Master of the Rolls, on production of the stamped copy of the bill served on the defendant, or other authenticated copy thereof.

In other cases, a special application by motion or summons⁵ must be made. The notice of motion, or the summons,⁶ must be served on the

³ *Seilaz v. Hanson*, 5 Ves. 261.

⁴ *Harvey v. Jacob*, 1 B. & Ald. 159; *Bartlett v. Power*, 9 Exch. 338; 18 Jur. 156; and see *Dunn v. McEvoy*, 1 Hogan, 355.

⁵ *Baddeley v. Harding*, 6 Mad. 214.

⁶ *Anon.*, Mos. 175; *Goodwin v. Archer*, 2 P. Wms. 452; *Adderly v. Smith*, 1 Dick. 355.

¹ Ord. XL. 6. The order applies to the case of a plaintiff, within the jurisdiction, ordered to give security. *Bailey v. Gundry*, 1 Keen, 53. The Court refused to increase, upon an interlocutory application, the amount of security; *Barry v. Jenkins*, 19 L. T. N. S. 276, V. C. M. It seems, however, that in the case of a petition, the amount is still only 40*l.*, *Atkins v. Cook*, 3 Jur. N. S. 283, V. C. K.; *Partington v. Reynolds*, 6 W. R. 307, V. C. K. In New York, the penalty of the bond

was required to be at least \$250; but the Court in a proper case might enlarge it, and might either fix the amount itself or refer it to a Master. 2 Rev. Sts. N. Y. 620, § 4; *Fulton v. Roosevelt*, 1 Paige, 179; *Massey v. Gillelan*, 1 Paige, 644; *Gilbert v. Gilbert*, 2 Paige, 603.

² *Anon.*, 12 Sim. 262; see also *Re Passmore*, 1 Beav. 94; *Re Dolman*, 11 Jur. 1095, M. R.

³ What is stated in the text as to a bill suit will apply, *mutatis mutandis*, to a summons suit, petition, or other proceeding in which security is directed to be given.

⁴ *Wyllie v. Ellice*, 11 Beav. 99; 12 Jur. 711.

⁵ *Tynte v. Hodge*, 2 J. & H. 692.

⁶ For forms of notice and summons, see Vol. III.

plaintiff's solicitor, and the application must be supported by evidence of the facts entitling the applicant to the order.

The order directs the plaintiff to procure some sufficient person on his behalf to give security, according to the course of the Court, by bond to the Record and Writ Clerk in whose division the cause or matter is,⁷ in the penalty of 100*l.*, conditioned to answer costs, in case any shall be awarded to be paid by the plaintiff; and it restrains proceedings in the mean time.⁸

When an order of course has been obtained, it must be served on the plaintiff or his solicitor; service of a special order, made on notice to him, is unnecessary.

The security is given in one of the following modes: (I.) The *34 plaintiff's solicitor prepares a bond in the terms of the order;⁹ *en-grosses it on paper bearing a 2*s.* 6*d.* inland revenue stamp;¹ procures it to be executed by the obligor or obligors; lodges it with the Record and Writ Clerk;² and on the same day serves notice thereof³ on the solicitor of the defendant who obtained the order; it is also advisable to serve the notice on the solicitor of any co-defendants who have not applied for security;⁴ and the security is deemed to have been given on the day the bond is lodged.⁵ (II.) The plaintiff, instead of giving the bond in the first instance, may serve the defendant's solicitor with a notice⁶ of the name, address, and description of the proposed obligor or obligors; and if no objection be made by him within two days thereafter, the bond may be prepared, executed, lodged, and notified as above explained.⁷ (III.) The plaintiff may apply by special motion⁸ or summons,⁹ that, in lieu of giving a bond, he may pay a sum of money into Court, to a separate account, to answer the costs; the amount should be sufficient to cover the sum mentioned in the order directing the security to be given, and the costs of bringing it into Court

⁷ See Ord. I. 38.

⁸ For forms of orders, see Seton, 1269, 1270.

⁹ The bond is in the following form:—

"Know all men by these presents, that we, A. B., of the city of London, merchant, and C. D., of the same place, merchant, are held and firmly bound to _____, Esq., in the penal sum of _____, for which payment to be well and faithfully made, we bind ourselves and each of us, our, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, &c.

"Whereas L. R., plaintiff, has lately exhibited his bill of complaint in her Majesty's High Court of Chancery against R. S., defendant, touching the matter therein contained: Now the condition of this obligation is such, that if the above bounden A. B. and C. D., or either of them, their heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, all such costs as the Law Court shall think fit to award to

the defendant on the hearing of the said cause or otherwise, then this obligation to be void, or else to remain in full force and virtue. Sealed and delivered, &c."

¹ If the bond is for a larger sum than 100*l.*, an increased stamp of 1*s.* 3*d.* for each additional 50*l.* is payable; see Tilsley, Dig. 218.

² The bond should be indorsed with the short title of the cause or matter, the words "Bond for Security for Costs," and the name, &c., of the solicitor leaving it.

³ For form of notice, see Vol. III.

⁴ Braithwaite's Pr. 534.

⁵ *Ibid.*

⁶ For form of notice, see Vol. III.

⁷ Braithwaite's Pr. 533.

⁸ *Cliffe v. Wilkinson*, 4 Sim. 122; and see *Fellows v. Deere*, 3 Beav. 353; *Re Norman*, 11 Beav. 401.

⁹ *Jarvis v. Shand*, V. C. W. at Chambers, 30 Jan., 1864; Reg. Lib. A. 164; *Merlin v. Blagrove*, Seton, 1270. For forms of notice of motion and summons, see Vol. III.

and getting it out.¹⁰ The usual amount is 120% ;¹¹ no evidence in support of the application is necessary, beyond the production of the former order ; the costs of the application are made costs in the cause. The order is drawn up and passed by the registrar, and entered, and the money is paid into Court in the manner hereafter explained.

One obligor is sufficient, but it is prudent to have two or more ; as on the death or bankruptcy¹² of the sole, or sole surviving, obligor, the defendant is entitled to apply by special motion,¹³ or summons,¹⁴ that a new security may be given, and for a stay of proceedings in the mean time.

Where one or more of several defendants have obtained an order for security, it is advisable to extend the bond to the costs of all the defendants, as otherwise the defendants who have not obtained the order may afterwards apply for a further bond as to their costs ; and it is presumed that, where a bond embracing the *costs of all the *35 defendants is lodged with the Record and Writ Clerk, and notified to them, he will hold the bond on behalf of all the defendants ;¹ and that a separate bond or bonds cannot afterwards be required.² Whatever number of bonds, however, may be given, they all form a security for one sum only.³

It has been decided that a solicitor ought not to be surety for his client.⁴ The bond of an incorporated society has been held sufficient.⁵

The defendant, on receiving notice that a bond has been lodged in the first instance, may, if dissatisfied with the bond, apply by special motion,⁶ or summons,⁷ that in lieu of, or in addition to, such bond, the plaintiff may be ordered, within a limited time to give security for costs, according to the course of the Court, or in default thereof, that the bill may be dismissed with costs, and that in the mean time all proceedings may be stayed.⁸ The application should be supported by affidavit showing that the obligor is not a solvent person ; and may be opposed by his own affidavit,⁹ justifying in double the amount named in the bond,¹⁰ and by other evidence that he is a person of substance. The costs of inquiring into the circumstances of the proposed surety have been allowed.¹¹

Where the plaintiff in the first instance submits, for approval, the

¹⁰ Cliffe v. Wilkinson, 4 Sim. 123.

¹¹ See Cliffe v. Wilkinson, *ubi sup.* ; Australian Co. v. Fleming, 4 K. & J. 407. In the case of a petition, it is presumed 60% would be sufficient.

¹² Transatlantic Co. v. Pietroni, cited Seton, 1269 ; Cliffe v. Wilkinson, 4 Sim. 122.

¹³ Latour v. Holcombe, 1 Phil. 262 ; and see Veitch v. Irving, 11 Sim. 122.

¹⁴ Tynte v. Hodge, 2 J. & H. 692. For forms of notice of motion and summons, see Vol. III.

¹ See Lowndes v. Robertson, 4 Mad. 465 ; and see Ord. I. 38.

² See, however, 1 Smith's Pr. 866 ; Braithwaite's Pr. 532.

³ Lowndes v. Robertson, 4 Mad. 465.

⁴ Pantou v. Labertouche, 1 Phil. 265 ; 7 Jur. 589.

⁵ Plestow v. Johnson, 1 Sm. & G., App. 20 ; 2 W. R. 3.

⁶ Pantou v. Labertouche, 1 Phil. 265 ; 7 Jur. 589.

⁷ For forms of notice of motion and summons, see Vol. III.

⁸ Giddings v. Giddings, 10 Beav. 29, and the cases collected, *ib.* 31 ; and see Denny v. Mars, Seton, 1279, where the order is given ; Payne v. Little, 14 Beav. 647 ; O'Connor v. Sierra-Nevada Co., 23 Beav. 608.

⁹ See form in Vol. III.

¹⁰ See 1 Turn. & Ven. 764 ; 1 Grant, 444.

¹¹ Bainbridge v. Moss, 3 Jur. N. S. 107 V. C. W.

name of the proposed obligor, the defendant, if he objects to the person proposed, must notify his objection to the plaintiff's solicitor within a reasonable time :¹² otherwise, the plaintiff may complete and lodge the bond. The plaintiff, on receiving notice of the defendant's objection, must either propose another person, or the person already offered must justify by affidavit¹³ in double the sum for which he is to be bound ;¹⁴ and in the latter case, it is presumed the plaintiff should file the affidavit, and lodge the bond, and give notice thereof to the defendant.

If the plaintiff fail to comply with the order to give security, the defendant may apply by special motion, or summons,¹⁵ that the plaintiff give security within a limited time, or, in default, that his *bill may be dismissed with costs ; and that proceedings may, in the mean time, be stayed.¹

The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until, and including the day on which such security is given, is not to be reckoned in the computation of time allowed a defendant to plead, answer, or demur, or otherwise make his defence to the suit.² If it becomes necessary for the defendant to put the bond in suit, he must obtain an order,³ on special motion or summons, that he may be at liberty to do so, and may have the bond delivered out to him for that purpose, and may use the name of the Record and Writ Clerk, the obligee, on giving him an indemnity : such indemnity to be settled by the Judge, if the parties differ. The notice of motion or summons⁴ must be served on the plaintiff's solicitor ; and the application must be supported by production of evidence of the costs having been directed to be paid, and of the amount and non-payment thereof. The order on such application is drawn up by the Registrar ; a plain copy of it is lodged with the Record and Writ Clerk, together with a receipt for the bond, and an undertaking to indemnify him against the costs of any proceedings to be taken thereon in his name ; and, if satisfied therewith, he will deliver out the bond. The receipt and undertaking are required to be signed by the defendant applying, and also by his solicitor, and are usually written at the foot of the copy of the order.⁵

¹² See, however, *Cliffe v. Wilkinson*, 4 Sim. 122, where the defendant moved on notice that the plaintiff might be ordered to give security in lieu of, or in addition to, the persons proposed. It is conceived, however, that the usual practice is, as stated in the text, to notify the objection to the plaintiff before applying to the Court. For form of notice of objection, see Vol. of Forms.

¹³ For form, see Vol. III.

¹⁴ See 1 Turn. & Ven. 764 ; 1 Grant, 444.

¹⁵ For forms of notice of motion and summons, see Vol. III.

¹ *Cooper v. Purton*, 1 N. R. 468, V. C. W. ; and see *Giddings v. Giddings*, 10 Beav. 20, and cases collected 10 Beav. 31 ; *Knight v. De Blaquiere*, Sau & S. 648 ; *Payne v. Little*,

14 Beav. 647 ; *O'Connor v. Sierra-Nevada Co.*, 23 Beav. 608 ; *Kennedy v. Edwards*, 11 Jur. N. S. 153, V. C. W. ; see also *Camac v. Grant*, 1 Sim. 348 ; 2 Sim. 570. For circumstances under which the time to give security was extended, see *Grant v. Ingram*, 20 L. T. N. S. 70, V. C. M. For form of order, see *Seton*, 1279, No. 7.

² Ord. XXXVII. 14 ; see *Henderson v. Atkins*, 7 W. R. 318, V. C. K.

³ *Robinson v. Brutton*, 6 Beav. 147 ; *Bainbrigge v. Moss*, 3 Jur. N. S. 107, V. C. W. ; *Reg. Lib.* 1857, A. 283.

⁴ For forms of notice and summons, see Vol. III.

⁵ *Braithwaite's Pr.* 535, 536. For forms of receipt and undertaking, see Vol. III.

The bond is put in suit in the Petty Bag Office, the procedure in which is regulated by the 12 & 13 Vic. c. 109.

Where money has been paid into Court as security for costs, in lieu of a bond, an application may be made at chambers, by summons,⁶ for payment thereout of any costs ordered to be paid by the plaintiff to the defendant. The summons must be served on the plaintiff, and on any co-defendants interested in the fund, and must be supported by evidence of such payment having been directed, and of the amount payable, and by production of the Accountant-General's certificate of the fund being in Court.

If, subsequently to the order directing security for costs to be given, the plaintiff becomes resident within the jurisdiction, he may apply, on special motion or summons,⁷ that the order may be discharged; but he must pay the costs of the application.⁸

* SECTION V. — *Paupers.*

*37

It has been before stated¹ to be a general rule, subject to very few exceptions, that there is no sort or condition of persons who may not sue in the Court of Chancery. Amongst the exceptions to this rule, those who are in indigent circumstances are not included, and any party, however poor he may be, being in other respects competent, has the same right as another to commence proceedings in the Court of Chancery for the assertion of his claims; and that, without being required to give any security for the payment of costs to the opposite party, in case he fails in his suit.² This liberality seems to be extended to the case of the next friends of infants.³ Indeed, any other rule would amount to a denial of justice to the children of poor persons, who might

⁶ For form of summons, see Vol. III.

⁷ For forms of notice of motion and summons, see Vol. III.

⁸ *O'Connor v. Sierra-Nevada Co.*, 24 Beav. 435; *Mathews v. Chichester*, 30 Beav. 135. For more on the subject of security for costs, see *post*, Chap. III. § 2, *Alien*; Chap. VI. § 5, *The Bill*; *Ogilvie v. Hearn*, 11 Ves. 600.

¹ *Ante*, p. 5.

² Such is the law of Massachusetts. *Fenley v. Mahoney*, 21 Pick. 212. [And Tennessee. *Dudley v. Balch*, 4 Hay. 192; Code of Tenn. § 3192.] This right must not be abused: see *Burke v. Lidwell*, 1 Jo. & Lat. 703, where a pauper plaintiff was required to give security: the person really interested having nominally assigned to the pauper, in order to avoid liability to costs; see, however, *Worrall v. White*, 3 Jo. & Lat. 513, 515. See as to requiring security for costs from insolvent plaintiff in a class suit, *Tredwell v. Burch*, 1 Y. & C. Exch. 476.

³ [The next friend of a minor plaintiff cannot be compelled to give security for costs. *St. John v. Earl of Besborough*, 1 Hogan, 41; *Fellows v. Barrett*, 1 Keen. 119; *Murrell v. Clapham*, 8 Sim. 74. Nor would the Court

enter into any inquiry as to the circumstances of a proposed next friend of an infant in place of another whom it became important to examine as a witness. *Davenport v. Davenport*, 1 S. & S. 101.

The early English cases are, however, uniform that the next friend of an infant should be a person of substance, otherwise he may be ruled to security. *Wale v. Salter*, Mos. 47, citing *Webster v. Guy*, decided by the Lord Chancellor on the previous day; *Anonymous*, Mos. 86; *Anonymous*, 1 Atk. 570; *Turner v. Turner*, 2 P.W. 297. In view of these authorities, Chancellor Walworth required the insolvent next friend of an infant to give security in *Fulton v. Rosevelt*, 1 Paige, 178. See *Dalrymple v. Lamb*, 3 Wend. 424. And where a party is enabled, by rule of Court, such as the 98th rule of Lord Bacon (Beames's Orders, 44), or by statute, to prosecute a suit as a pauper, upon taking a prescribed oath of poverty, the next friend of an infant cannot sue *in forma pauperis*, the privilege being considered as personal. *Wilkinson v. Belsher*, 2 Bro. C. C. 272; *Anonymous*, 1 Ves. Jr. 409; *Green v. Harrison*, 3 Sneed, 131; *Cohen v. Shyer*, 1. Tenn. Ch.

become entitled to property, and yet be precluded from asserting their right because their father, who is the proper person to be their next friend, by reason of his circumstances could not be so, without giving security for costs, which he might not be able to procure.⁴ With regard to the next friend of a *feme covert*, there is, in this respect, a great difference in the rule; for it has been held, that the next friend of a married woman must be a person of substance;⁵ because a married woman and an infant are differently circumstanced, as the infant cannot select his own next friend, but must rely upon the good offices of those who are nearest to him in connection, or otherwise his rights might go unasserted, but the married woman has the power of selecting; she is, therefore, required to select for her next friend a person who, if her claim should turn out to be unfounded, can pay to the defendant the costs of the proceedings.

In consequence of the provisions of stat. 11, Hen. VII. c. 12,⁶ *38 *the practice of the Courts of Law has been to admit all persons to sue *in formâ pauperis* who could swear that they were not worth 5*l.*, except their wearing-apparel, and the subject-matter of the suit: and the practice of the Courts of Law in this respect has been adopted by Courts of Equity, although persons suing in these Courts do not come within the provisions of the Act of Parliament above referred to,¹ and, proceeding further, they have extended the relief to the case of defendants.²

The privilege will not be extended to a plaintiff or a defendant suing or being sued in a representative character, as executor or administra-

192. Nor can the next friend of a married woman. *Lawrence v. Lawrence*, 3 Paige, 287. Nor the informer in a *qui tam* action. *Johnson v. Hunter*, 1 Leg. Rep. 168. An executor or administrator cannot sue *in formâ pauperis*. *Paradise v. Sheppard*, 1 Dick. 136; *McCoy v. Broderick*, 3 Sneed, 203; *infra* 38, n. 3.

But the Court may, upon being satisfied by the report of the Master that there is probable cause for proceeding, authorize an infant to sue by next friend *in formâ pauperis*. *Fulton v. Rosevelt*, 1 Paige, 178. Though the affidavit of the infant alone will not sustain the order. *Lindsay v. Tyrrell*, 2 De G. & J. 7. And may, in like manner, permit a wife to file a bill against the husband *in formâ pauperis*. *Robertson v. Robertson*, 3 Paige, 387. But see *contra* *Ward v. Ward*, 2 Dev. Eq. 553.

The next friend of a married woman may be charged with the costs in a proper case. *Re Wells*, 12 W. R. 97. So may the next friend of an infant. *Haggard v. Benson*, 3 Tenn. Ch. 268, 279; see *infra* 79, n. 1. But, ordinarily, if the suit be prosecuted in good faith, the costs will be paid out of the infant's estate. *Staines v. Maddox*, Mos. 319; *Taner v. Fire*, 2 Ves. 466; *Smith v. Floyd*, 1 Pick. 273; *Pemley v. Mahoney*, 21 Pick. 212; *Beuche v. Ryan*, 3 Blackf. 472; *Yourie v.*

Nelson, 1 Tenn. Ch. 614. In Massachusetts, upon a construction of their statutes, it has been held that the next friend of an infant is not chargeable with costs. *Crandall v. Slaid*, 11 Met. 288.]

⁴ See *Anon.*, 1 Ves. Jr. p. 410; *Squirrel v. Squirrel*, 2 Dick. 765; 2 P. Wms. 297, n. [but see preceding note].

⁵ *Anon.*, 1 Atk. 570; *Pennington v. Alvin*, 1 S. & S. 264; *Jones v. Fawcett*, 2 Phil. 278; *Stevens v. Williams*, 1 Sim. N. S. 545; *Wilton v. Hill*, 2 De G., M. & G. 807-809; *Hind v. Whitmore*, 2 K. & J. 458; *Re Wills*, 9 Jur. N. S. 1225; 12 W. R. 97, V. C. S.; *Elliott v. Ince*, 7 De G., M. & G. 475; 3 Jur. N. S. 597; *Smith v. Etches*, 1 H. & M. 711; 10 Jur. N. S. 124; and see *post*, *Femes Covert Plaintiffs*.

[Where the same person was the next friend of an infant plaintiff and of a married woman plaintiff, Lord St. Leonards stayed the proceedings in the cause until the next friend of the *feme* plaintiff was changed or gave security for costs. *Drinan v. Mannix*, 2 Dru. & War. 154.]

⁶ Beames on Costs, 72.

¹ See Story Eq. Pl. § 50; 1 Harr. Ch. Pr. by Newl. 389, 390; 1 Hoff. Ch. Pr. 67, *et seq.*; *Isnard v. Cazeaux*, 1 Paige, 39.

² See *post*, Chap. IV., § 7, *Pauper Defendants*.

tor;⁸ but the case of a person sustaining the mixed character of executor and beneficiary is an exception to the general rule; although in order to prevent any undue practice in suing *in formâ pauperis*, and under color of that privilege obtaining *dives* costs, a special order is necessary.⁴ And an exception to the strict application of the rule has been made, by allowing an executor to proceed *in formâ pauperis*, for the single purpose of clearing a contempt incurred in the cause.⁵

It is said, that a person filling the character of next friend cannot sue *in formâ pauperis*,⁶ although, as we have seen before, the poverty of a next friend of an infant is no ground for dismissing him; and, until recently, some uncertainty prevailed as to the practice, when a married woman could not obtain a substantial next friend to sue on her behalf;⁷ but it has now been determined, that she may, on an *ex parte* motion,⁸ supported by affidavit that she is unable to procure any substantial person to act as her next friend,⁹ obtain an order authorizing her to institute and prosecute a suit;¹⁰ *to carry on proceedings after *39 decree;¹ or to appeal² without a next friend, *in formâ pauperis*.

It seems also that, in a proper case, an infant will be permitted to sue by a next friend *in formâ pauperis*, on an *ex parte* motion, supported by affidavit that the infant cannot get any substantial person to act as next friend.³

A husband and wife may obtain an order of course to sue *in formâ pauperis*, in respect of the wife's reversionary interest;⁴ and where a woman was ordered to be examined *pro interesse suo*, respecting a claim set up by her to some lands taken under a sequestration, but was unable

⁸ *Paradise v. Sheppard*, 1 Dick. 136; *Beames on Costs*, 79, App. No. 21; *Oldfield v. Cobbett*, 1 Phil. 613; 10 Jur. 2; *Fowler v. Davies*, 16 Sim. 182; 12 Jur. 321; *St. Victor v. Devereux*, 6 Beav. 584; 8 Jur. 26.

⁴ *Thompson v. Thompson*, H. T. 1824, cited 1 Turn. & Ven. 513; and see *Rogers v. Hooper*, 1 W. R. 474, V. C. K.; *Everson v. Matthews*, 3 W. R. 159, V. C. W.; *Parkinson v. Chambers*, *ib.* 34, V. C. W. As to the affidavit in such a case, see *Martin v. Whitmore*, W. N. (1869) 42; 17 W. R. 809, L. C.

⁵ *Oldfield v. Cobbett*, 1 Coll. 169.

⁶ *Anon.*, 1 Ves. J. 410. [The reason is, that the privilege of suing *in formâ pauperis* is personal. *Williamson v. Belsher*, 2 Bro. C. C. 272; *Robertson v. Robertson*, 3 Paige, 387. So of the next friend of a married woman. *Lawrence v. Lawrence*, 3 Paige, 267. See *ante* 37, n. 3.]

⁷ See *Dowden v. Hook*, 8 Beav. 299.

⁸ For form of motion paper, see Vol. III.

⁹ For form of affidavit, see Vol. III.

¹⁰ *Re Foster*, 18 Beav. 525; *Wellesley v. Wellesley*, 16 Sim. 1; 1 De G., M. & G. 501; *Wellesley v. Mornington*, 18 Jur. 552, V. C. K.; *Re Lancaster*, 18 Jur. 229, L. C. & L. J.J.; *Crouch v. Waller*, 4 De G. & J. 43; 5 Jur. N. S. 326; *Re Barnes*, 10 W. R. 464, V. C. S.; *Smith v. Etches*, 1 H. & M. 711; 10 Jur. N. S. 124; 3 N. E. 457; and see, *Ex parte*. *Hakewill*, 3 De G., M. & G. 116.

The decision in *Page v. Page*, 16 Beav. 588, where such an order was discharged is overruled by these cases; but see *Caldicott v. Baker*, 13 W. R. 449, V. C. K. The order is not as of course, *Coulsting v. Coulsting*, 8 Beav. 463; 9 Jur. 587; [and has been held not to be allowable where the suit is against the husband. *Ward v. Ward*, 2 Dev. Eq. 553. It has also been held that a wife cannot sue her husband by her trustee, but only by a next friend. *Hunt v. Booth*, 1 Freem. Ch. 215. Under the construction of the divorce statutes in Tennessee, the wife has been permitted to sue without a next friend, and *in formâ pauperis*. *Hawkins v. Hawkins*, 4 Sneed, 105.] Upon a proper application, a wife may be permitted to file a bill against her husband, for a separation, *in formâ pauperis*. But this will not be done until the Court has ascertained by the report of a Master, that she has probable cause for filing such a bill. *Robertson v. Robertson*, 3 Paige, 387.

¹ *D'Oechsner v. Scott*, 24 Beav. 239.

² *Crouch v. Waller*, 4 De G. & J. 43; 5 Jur. N. S. 326; and see *Martin v. Whitmore*, W. N. (1869) 42; 17 W. R. 809, L. C.

³ *Lindsey v. Tyrell*, 2 De G. & J. 7; 24 Beav. 124; 3 Jur. N. S. 1014.

⁴ *Pitt v. Pitt*, 1 Sim. & G. App. 14; 17 Jur. 571.

from poverty to make out or support her right, liberty was given to her to do so *in formâ pauperis*.⁵

Proceedings under the Trustee Relief Act⁶ and the Infant Custody Act⁷ may be prosecuted *in formâ pauperis*; and so also may claims in a suit by persons who are not parties;⁸ but in these cases, the order is made on application by *ex parte* motion,⁹ supported by affidavit, and is not of course.

A plaintiff may be admitted to sue as a pauper, upon the usual affidavit, at any time after the bill has been filed, or summons issued;¹⁰ but he will be liable to all the costs incurred before his admission,¹¹ and may be attached for the non-payment of costs previously ordered to be paid, without being first dispaupered.¹²

It seems doubtful, whether, after a dismissal of a former suit, a plaintiff will be permitted to sue again for the same matter *in formâ pauperis*, without paying the costs of the first suit;¹³ but the circumstance that the suit is a second suit for the same matter as a former suit, in which the plaintiff had likewise sued as a pauper, is no ground of objection to the second suit, unless it can be justly characterized as very vexatious.¹⁴

*40 A pauper may appeal,¹ and where a party has, in any stage of the suit, obtained the common order for his admission as a pauper, no special order is required to enable him to appeal without payment of the deposit;² but where he has not been already admitted as a pauper, an order which can only be made by the Court of Appeal, authorizing the appeal *in formâ pauperis* and without payment of the deposit, is necessary;³ and it seems that a certificate of counsel that there are special and strong grounds for the appeal may be required.⁴

⁵ *James v. Dore*, 2 Dick. 788.

⁶ *Re Money*, 13 Beav. 109; the Act is 10 & 11 Vic. c. 96.

⁷ *Re Hakewill*, 3 De G., M. & G., 116; the Act is 2 & 3 Vic. c. 54; and see *post*, Vol. II., *Infant Custody Act*.

⁸ See *Re Shard*, *Partington v. Reynolds*, cited Seton, 1272, where the order is given; and see in other cases *Ex parte Hakewill*, 3 De G., M. & G., 116; *Ex parte Fry*, 1 Dr. & S. 318.

⁹ Not by Petition, see Seton, 1272; for form of motion paper, see Vol. III.

¹⁰ See *Parkinson v. Chambers*, 3 W. R. 34, V. C. W.; *Braithwaite's Pr.* 562; but a married woman may apply before bill, if the draft bill has been settled and signed by counsel. *Wellesley v. Mornington*, 18 Jur. 552; *Re Barnes*, 10 W. R. 464, V. C. S.

¹¹ *Mos. 68*; and see *Ballard v. Catling*, 2 Keen, 606; *Church v. Marsh*, 2 Hare, 652; 8 Jur. 54; *Smith v. Pawson*, 2 De G. & S. 490; *Prince Albert v. Strange*, 2 De G. & S. 652, 718; 13 Jur. 507.

¹² *Davenport v. Davenport*, 1 Phil. 124; *Brown v. Story*, 1 Paige, 588. See, however, *Bennett v. Chudleigh*, 2 Y. & C. C. C. 164; *Snowball v. Dixon*, 5 De G. & S. 9.

¹³ *Corbett v. Corbett*, 16 Ves. 407, 410, 412; *Brook v. Alcock*, 20 March, 1834, V. C. E., cited 1 Smith's Ch. Pr. 555; but see *Fitton v. Earl of Macclesfield*, 1 Vern. 264; and see *Chitty's Arch.* 1292; *Hawes v. Johnson*, 1 Y. & J. 10.

¹⁴ *Wild v. Hobson*, 2 V. & B. 105, 112; see *Brook v. Alcock*, and *Elsam v. Alcock*, cited 1 Smith's Ch. Pr. 555.

¹ *Bland v. Bland*, 2 J. & W. 402; *contra*, *Taylor v. Bouchier*, 2 Dick. 504; *Bolton v. Gardner*, 3 Paige, 273; and see *post*, 1482.

² *Drennan v. Andrew*, L. R. 1 Ch. Ap. 300, L. C.; and see cases cited, *ib.* 301, n. (7).

³ Seton, 1271; see also *Clarke v. Wyburn*, 12 Jur. 167, L. C.; *Heaps v. Commissioners of Churches*, *ib.* n.: L. R. 1 Ch. Ap. 301, n. (7); *Bradberry v. Brooke*, 25 L. J. Ch. 576; 4 W. R. 699, L. J. L.; *Crouch v. Waller*, 4 De G. & J. 43; 5 Jur. N. S. 326; *Grimwood v. Shave*, 5 W. R. 482, L. C. For form of order, see Seton, 1271, No. 7. The order is obtainable on *ex parte* motion.

⁴ *Grimwood v. Shave*, 5 W. R. 482, L. C.; and see L. R. 1 Ch. Ap. 301, n. (7).

In order to be permitted to sue *in formâ pauperis*, the plaintiff must present a petition to the Master of the Rolls, containing a short statement of his case, and of the proceedings, if any, which have been had in the cause, and praying to be admitted to sue *in formâ pauperis*, and that a counsel and a solicitor may be assigned him.⁶

This petition must be underwritten by a certificate signed by counsel,⁶ that he conceives the case to be proper for relief in this Court;⁷ and must be supported by an affidavit, sworn by the plaintiff, that he is not worth the sum of 5*l.*, his wearing-apparel and the subject-matter of the suit only excepted.⁸ The meaning of the affidavit is, that the plaintiff has not 5*l.* in the world available for the prosecution of the suit; and if he can make an affidavit with truth in that sense, the omission to set forth the details of his means, and the circumstances which render them unavailable, is not such an omission of material facts as will induce the Court, on that ground alone, to discharge the order.⁹

This affidavit must be sworn by the party himself; and in a case in which it afterwards appeared that the affidavit had been sworn by a third person, the party was dispaupered.¹⁰

The petition and certificate, and an office copy of the plaintiff's * affidavit, and usually also a copy of the bill, are lodged with *41 the Under-Secretary of the Rolls, who, if he sees no cause against it, draws up and enters an order, by which the petitioner is admitted to sue *in formâ pauperis*, and a counsel and solicitor are assigned to act on his behalf.¹

The order should be served upon the opposite party as soon as possible; for a plaintiff admitted to sue *in formâ pauperis* has been ordered to pay *divers* costs to the defendant, in respect of a step in the cause taken before service of the order;² it seems, however, that there is a discretion in the Court in such cases, and that the order to sue *in formâ pauperis* is not necessarily inoperative in all cases until service.³ The order should also be lodged with the Record and Writ Clerk, for entry in his books;⁴ and must be produced to the officers of the Court, whenever required by them.

If an order has been obtained as of course upon a suppression of

⁶ But a plaintiff *feme covert* cannot obtain the order as of course, and it must therefore be applied for on an *ex parte* motion in the Court to which the cause is attached. *Coulsting v. Coulsting*, 8 Beav. 463; *Re Lancaster*, 18 Jur. 229, L. C. & L. J.; *Re Foster*, 18 Beav. 525. For form of motion paper, see Vol. III.

⁷ As to the duty of counsel for a pauper, see *Iles v. Flower*, 6 L. T. N. S. 843, L. C.

⁸ Ord. VII. 8. For forms of petition, certificate, and affidavit, see Vol. III.

⁹ The affidavit must not except the just debts of the plaintiff, as appears at one time to have been allowed: per Sir J. L. Knight Bruce, V. C., in *Perry v. Walker*, 1 Coll. 233; *Beames on Costs*, 80; and see form of affidavit, Vol. III.

⁹ *Dresser v. Morton*, 2 Phil. 286; and see, as to the poverty which entitles a person to sue *in formâ pauperis*, *Allen v. McPherson*, 5 Beav. 469, 485; *Boddington v. Woodley*, 5 Beav. 555; *Goldsmith v. Goldsmith*, 5 Hare 125; *Perry v. Walker*, 1 Coll. 233, 236.

¹⁰ *Wilkinson v. Belsher*, 2 Bro. C. C. 272.

¹ For form of order, see Seton, 1271, where an order had been obtained on an *ex parte* application that the plaintiff be permitted to prosecute *in formâ pauperis*, the same was vacated with costs. *Isnard v. Cazeaux*, 1 Paige, 39.

² *Ballard v. Catling*, 2 Keen, 606; see also *Smith v. Pawson*, 2 De G. & S. 490.

³ *Church v. Marsh*, 2 Hare, 652; 8 Jur. 54.

⁴ *Braithwaite's Pr.* 563.

material facts, it will be discharged on an application by motion on notice.⁵

After admittance, no fee, profit, or reward is to be taken of the pauper by any counsel or solicitor, for the despatch of his business, whilst it depends in Court, and he continues *in formâ pauperis*; nor is any agreement to be made for any recompense or reward afterwards; and any person offending is to be deemed guilty of a contempt of Court; and the party admitted giving any such fee, or making any such agreement, is to be thenceforth dispaupered, and not be admitted again in that suit to sue *in formâ pauperis*.⁶

The counsel or solicitor assigned by the Court to assist a person admitted *in formâ pauperis*, either to sue or defend, may not refuse so to do, unless he satisfies the Judge who granted the admittance with some good reason for his unwillingness.⁷

When a pauper has had counsel assigned to him, he cannot be heard in person.⁸

No process of contempt will be issued, at the instance of any person suing or defending *in formâ pauperis*, until it be signed by his solicitor in the suit. And all notices of motion served, or petitions presented on behalf of any person admitted to sue or defend *in formâ pauperis* (except for the discharge of his solicitor) must be signed by his solicitor; and such solicitor should take care that no such process be taken out, and that no such notice or petition be served, needlessly, or for vexation, but upon just and good grounds.⁹

*42 * A pauper may move to dismiss his bill without costs,¹ but the motion must not be made *ex parte*;² and a pauper cannot amend his bill by striking out defendants, except on payment of their costs.³ If a cause goes against a pauper at the hearing, he is not ordered to pay costs to the defendant; it is said, however, that he may be punished personally, although the practice of inflicting such punishment appears to be now obsolete.⁴

It seems to have been formerly considered, that where a plaintiff sues *in formâ pauperis*, and has a decree in his favor with costs, he will only be entitled to such costs as he has been actually out of pocket;⁵ but it is now settled, that the costs of a successful pauper are in the discretion of the Court;⁶ and where costs are ordered to be paid to a party suing or defending *in formâ pauperis*, such costs are to be taxed as

⁵ See *Nowell v. Whitaker*, 6 Beav. 407.

⁶ Ord. VII. 9.

⁷ Ord. VII. 10.

⁸ *Parkinson v. Hanbury*, 4 De G., M. & G. 508.

⁹ Ord. VII. 11; *Perry v. Walker*, 2 Y. & C. C. 655; 4 Beav. 452; and see Ord. III. 10, and *Brown v. Dawson*, 2 Hogan, 76, as to the liabilities of a pauper's solicitor.

¹ Although in *Pearson v. Belsher*, 3 Bro. C. C. 87, it is stated that the dismissal is only to be made on payment of costs, the order was drawn up without costs; see Reg.

Lib. 1789, B. 524, entered *Pearson v. Wolfe*; 3 Bro. C. C. 87, ed. Belt, n. 1; *Beames on Costs*, 88.

² *Parkinson v. Hanbury*, 4 De G., M. & G. 508; and see *Wilkinson v. Belsher*, 2 Bro. C. C. 272.

³ *Wilkinson v. Belsher*, 2 Bro. C. C. 272.

⁴ Har. 391.

⁵ *Angell v. Smith*, Prec. Cha. 220; see *Williams v. Wilkins*, 3 John. Ch. 65.

⁶ *Scatchmer v. Foulkard*, 1 Eq. Ca. Ab. 125, pl. 3; *Hauton v. Hager*, cited in *Angell v. Smith*, Prec. Cha. 220; *Wallop v. War-*

dives costs, unless the Court otherwise directs.⁷ Where an appeal against a decree in favor of a person suing *in formâ pauperis* was dismissed without costs, the deposit was ordered to be paid out to the pauper.⁸

It was determined as long ago as the time of Tothill, that a pauper must pay the costs of scandal in his answer.⁹

As a party may be admitted to sue *in formâ pauperis* at any time during the suit, so if, at any time, it is made to appear to the Court that he is of such ability that he ought not to be allowed to sue or to continue to sue *in formâ pauperis*, the Court will dispauper him;¹⁰ therefore, where it was shown to the Court that a pauper was in possession of the property in question, the Court ordered him to be dispaupered, though the defendant had a verdict at Law, and might * take a writ of possession at any time;¹ and so also where a *43 plaintiff had offered by her bill to redeem a mortgage if any thing should be found due on it, she was ordered to be dispaupered;² it has been decided that an officer upon half pay (which is not alienable) could not proceed *in formâ pauperis*, notwithstanding he had taken the benefit of the Insolvent Act.³ The application to dispauper is made by special motion, on notice;⁴ and should be made without delay.⁵

At Common Law, if a pauper act vexatiously or improperly in the conduct of the action, the Court will order him to be dispaupered:⁶ and in like manner, in Courts of Equity, if a party who is admitted to sue *in formâ pauperis* be guilty of vexatious conduct in the suit,⁷ or of vexatious delays, or make improper motions, he will be dispaupered, though the Court always proceeds very tenderly in such points;⁸ and it has

burton, 2 Cox; 409; Rattray v. George, 16 Ves. 233; Church v. Marsh, 2 Har. 655; 8 Jur. 54; Roberts v. Lloyd, 2 Beav. 376; Stafford v. Higginbotham, 2 Keen, 147; Williams v. Wilkins, 3 John. Ch. 65. A plaintiff suing *in formâ pauperis*, and recovering a legacy against executors, when there was no unreasonable delay on their part, ought not to recover *dives* costs, but only the actual expenses of the suit, to be paid by the executors out of the assets. Williams v. Wilkins, 3 John. Ch. 65.

⁷ Ord. XL. 5; see Beames on Costs, 77; and for cases since the order, Wellesley v. Wellesley, 1 De G., M. & G. 501; Mornington v. Keen, 3 W. R. 429, 24 L. J. Ch. 400, V. C. W.; Phillips v. Phillips, 4 De G., F. & J. 208, 220; 8 Jur. N. S. 145, L. C. If a party, suing *in formâ pauperis*, amends his bill after answer under the common order, it must be upon the payment of costs, as in ordinary suits; and if he has a meritorious claim to amend without costs, he must apply to the Court by special motion upon affidavit and notice to the adverse party. Richardson v. Richardson, 5 Paige, 58.

⁸ Phillips v. Phillips, 4 De G., F. & J. 208, 220; 8 Jur. N. S. 145, L. C.

⁹ Per Lord Eldon, in Rattray v. George, 16 Ves. 234; Tothill, 237.

¹⁰ Romilly v. Grint, 2 Beav. 186; Mather v. Shelmerdine, 7 Beav. 267; Butler v. Gardener, 12 Beav. 525; Perry v. Walker, 1 Coll. 229, 236; 8 Jur. 680; Goldsmith v. Goldsmith, 5 Hare, 125; Daintree v. Haynes, 12 Jur. 594, V. C. E.

¹ Wyatt's P. R. 321. See Spencer v. Bryant, 11 Ves. 49; see also Taprell v. Taylor, 9 Beav. 493; Butler v. Gardener, 12 Beav. 525.

² Fowler v. Davis, 16 Sim. 182; 12 Jur. 321.

³ Boddington v. Woadley, 5 Beav. 555.

⁴ For form of notice, see Vol. III.

⁵ See St. Victor v. Devereux, 9 Jur. 519, L. C.; Parkinson v. Hanbury, 4 De G., M. & G. 508.

⁶ 2 Chitty's Arch. 1280.

⁷ Wagner v. Mears, 3 Sim. 127; and see Perry v. Walker, 1 Coll. 229; 8 Jur. 680.

⁸ Whitelocke v. Baker, 13 Ves. 511; Wagner v. Mears, 3 Sim. 127; Daintree v. Haynes, 12 Jur. 594, V. C. E.; and see Perry v. Walker, 1 Coll. 229; 8 Jur. 680; Burry Port Co. v. Bowser, 5 W. R. 325, V. C. K.; Steele v. Mott, 20 Wend. 679. A party suing as a poor person is chargeable with the costs of setting aside his proceedings for irregularity, or of a contempt (Murphy v. Oldis, 2 Moll. 475), or of expunging impertinent or

been said that a pauper is liable to be committed if he files an improper bill, or otherwise he might be guilty of great oppression.⁹ The fact that the pauper has been supplied with money by a charitable subscription for the purpose of assisting him in the conduct of the suit, although it may afford ground for impeachment as maintenance, is no ground upon which he can be deprived of his right to sue as a pauper in Equity.¹⁰

Where an issue is directed in a pauper's suit, he must be admitted as a pauper in the Court in which the issue is to be tried, or otherwise he cannot proceed in it, *in formâ pauperis*.¹¹ In a case, however, where the plaintiff, a pauper, claimed as heir-at-law, and the defendant claimed under a will and deed, which were disputed, the bill was retained, with liberty to the plaintiff to bring an action; and the tenants were ordered to pay the plaintiff 150*l.* to enable him to go to trial.¹²

An order admitting a party to sue or defend *in formâ pauperis*, while in force, exempts the pauper from the payment of any fees *44 *in the offices of the Court, except for office copies made therein: for such copies, a charge of one penny-halfpenny per folio will be made.¹ Copies of documents which the pauper may himself make will be marked as office copies, without charge.² The charges for copies of pleadings, and other proceedings and documents delivered, under the 3d, 4th, and 5th rules of the 36th General Order of the Court,³ to a person admitted to sue or defend *in formâ pauperis*, or to his solicitor, by or on behalf of any other party, are to be at the rate of one penny-halfpenny per folio; but if such person shall become entitled to receive *dires* costs, the charges for such copies are to be at the rate of fourpence per folio; and nothing is to be allowed, on taxation, in respect of such charges, until such person, or his solicitor, shall have paid or tendered to the solicitor or party by whom such copies were delivered, the additional twopence-halfpenny per folio. But this proviso is not to apply to any copy which shall have been furnished by the party himself, who is directed to pay the costs, and not by his solicitor.⁴

The charges for copies delivered by a person admitted to sue or defend *in formâ pauperis*, other than those delivered by his solicitor, are to be at the rate of one penny-halfpenny per folio.⁵

scandalous matter, in the same manner as other suitors. *Richardson v. Richardson*, 5 P. & G. 38. A pauper's solicitor may be made to pay the costs of any irregular proceeding. *Hewson v. Dawson*, 2 Hogan, 76.

⁹ *Pearson v. Belchier*, 4 Ves. 627, 630.

¹⁰ *Corbett v. Corbett*, 16 Ves. 407, 412.

¹¹ *Gibson v. McCarty*, Ca. t. Hardwicke, 311.

¹² *Perishal v. Squire*, 1 Dick. 31; *Beames on Costs*, 76; App. 22; but see *Nye v. Maule*, 4 M. & C. 342, 345.

¹ Braithwaite's Pr. 563; and see *Wyatt's P. R.* 320; *Beames's Orders*, 216, n. (143).

² Braithwaite's Pr. 563.

³ These rules relate to copies of documents not made or delivered by the officers of the Court, but by the solicitors of other parties in the cause.

⁴ Regul. to Ord. Part IV. 2.

⁵ Regul. to Ord. Part IV. 2, 3. For more on the subject of Paupers, see *post*, Chap. IV. § 7.

SUITS BY PERSONS WHO ARE UNDER DISABILITY.

SECTION I. — *Generally.*

THE general rule that all persons, of whatever rank or condition, and whether they have a natural or only political character, are capable of instituting suits in Equity, is liable, as has been stated,¹ to a few exceptions. What these exceptions are will be the subject of the present Chapter.

The disabilities by which a person may be prevented from suing may be divided into two sorts: namely, such as are absolute, and, during the time they last, effectually deprive the party of the right to assert his claim; and such as are qualified, and merely deprive him of the power of suing without the assistance of some other party to maintain the suit on his behalf. Of the first sort are the disabilities which arise from *Alienage*, *Outlawry*,² *Attainder*, *Conviction of Felony*, and *Bankruptcy*; of the second sort, are those which arise from *Infancy*, *Coverture*, *Idiocy*, and *Lunacy*.

SECTION II. — *Aliens.*

With respect to aliens in general, it is to be observed that, although by the old law no alien, whether friend or enemy, could sue in the Queen's Courts, yet the necessity of trade has gradually done away with the too rigorous restraints and discouragements which formerly existed; and it is now clear that, for a mere personal demand, an alien born, provided he be not an alien enemy, may sue in the Courts of this country.³ This rule is clearly recognized in *Ramkissenseat v. Barker*,⁴

¹ *Ante*, p. 5.

² The disabilities of outlawry and excommunication are either wholly unknown in America, or, if known at all, are of very limited local existence. Story Eq. Pl. § 51. See *Roosevelt v. Crommelin*, 18 John. 253; *Dilman v. Schultz*, 5 S. & R. 36. It has lately been held in England, that a nun is neither civilly dead, nor under any disability arising from duress or undue influence. *Re Metcalfe*, 2 De G., J. & S. 122; 10 Jur. N. S. 287, L. J.J.; *ib.* 224, M. R.; and see as to civil death, and the status of a nun, the cases there cited, and *Evans v. Cassidy*, 11 Irish Eq. 243; *Blake v. Blake*, 4 Irish Eq. 349.

³ Story Eq. Pl. §§ 51, 52. An alien friend is entitled to the benefit, and subject to the action, of the insolvent laws of the State where he resides. *Judd v. Lawrence*, 1 Cush. 3. In the Courts of the United States he is entitled to claim the same protection of his rights as a citizen is. *Taylor v. Carpenter*, 3 Story, 458; S. C. 2 Wood. & M. 1.; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Byam v. Stevens*, 4 Edw. Ch. 119. An alien does not lose his right to sue in the Courts of the United States, by residing in one of the States of the Union. *Breedlove v. Nicolet*, 7 Peters, 413.

⁴ 1 Atk. 51; see also *Pisani v. Lawson*, 6 Bing. N. C. 90.

*46 where a bill was filed against *executors for an account, by a plaintiff who had been employed by the testator in India as his banyan or broker, and the plea was put in on the ground that the plaintiff was an alien born and an infidel, not of the Christian faith, and upon a cross-bill incapable of being examined upon oath, and therefore disqualified from suing here; but the Court overruled the plea without argument; observing, that the plaintiff's was a mere personal demand, and that it was extremely clear that he might bring a bill in this Court. It was a matter of doubt to what extent the Court would protect the copyright of a foreigner;¹ it has, however, now been decided, that where a foreign author owes a temporary allegiance to the Crown of England, by residence in this country,² or any part of the British dominions,³ at the time of his first publication of the work, not having previously published it elsewhere, he is an author within the protection of the Copyright Acts. By several recent Acts, a system of international copyright has now been established.⁴

The right of an alien to sue in the Courts of this country was, at Common Law, confined to cases arising upon personal demands; for an alien might trade and traffic, and buy and sell, and therefore he was considered to be of ability to have personal actions; but he could not maintain either real or mixed actions:⁵ because an alien, though in amity, was incapable of holding real property.⁶

¹ Delondre v. Shaw, 2 Sim. 237; Bentley v. Foster, 10 Sim. 329; Buxton v. James, 5 De G. & S. 80; 2 Kent, 373.

² Jefferys v. Boosey, 4 H. L. Cas. 815; 1 Jur. N. S. 615, overruling S. C. 4 Exch. 145; in Exch. Ch., 6 Exch. 580.

³ Low v. Routledge, L. R. 1 Ch. Ap. 42; affirmed, S. C. L. R. 3 H. L. 100; Low v. Ward, L. R. 6 Eq. 415, V. C. G.

⁴ 7 & 8 Vic. c. 12, and 15 & 16 Vic. c. 12; Cassell v. Stiff, 2 K. & J. 279; Buxton v. James, 5 De G. & S. 80; 16 Jur. 15; Ollendorff v. Black, 4 De G. & S. 209; 14 Jur. 1080; Wood v. Boosey, L. R. 2 Q. B. 340; affirmed L. R. 3 Q. B. 223, Exch. Ch.; Wood v. Chart, Wood v. Wood, W. N. (1870) 118; L. R. 10 Eq. 193; and see as to an alien's copyright in designs, 24 & 25 Vic. c. 73.

⁵ Co. Litt. 129 b.

⁶ Co. Litt. 2 b. The title of an alien friend to land purchased by, or devised to him, is good against everybody but the State, and can only be divested by office found, or by some act done by the State to acquire possession. McCreery v. Allender, 4 Har. & M'H. 409; Groves v. Gordon, 1 Conn. 111; Marshall v. Conrad, 5 Call. 364; University v. Miller, 3 Dev. 191; Doe v. Hornblea, 2 Hayw. 37; Buchanan v. Deshon, 1 Har. & G. 280; Scanlan v. Wright, 13 Pick. 523; Jenkins v. Noel, 3 Stew. 60; Doe v. Robertson, 11 Wheat. 322; Dudley v. Grayson, 6 Monroe, 269; Jackson v. Adams, 7 Wend. 367; Bradstreet v. Supervisors, &c., 13 Wend. 546; Wilbur v. Tobey, 16 Pick. 179; Foss v. Crisp, 20 Pick. 124; Waugh v. Riley, 8 Met. 295;

People v. Conklin, 2 Hill. 67; [Halstead v. Commissioners of Lake, 56 Ind. 363. An alien will be protected in the possession of public lands against trespassers. Courtney v. Turner, 12 Nev. 345. But not against one who connects himself with the government title. Golden Fleece Co. v. Cable, &c. Co., 12 Nev. 312.] The disability of aliens to hold real estate has been partially removed in some States, and wholly in others. See 2 Kent, 53, 54 note; Genl. Sts. of Massachusetts, ch. 90, § 38; Rouche v. Williamson, 3 Ired. (N. C.) 146; Duke of Richmond v. Miln, 17 Louis. 312. In States where an alien cannot hold real estate, of course he cannot maintain ejectment; but if he is in possession of real property, he may maintain trespass, *quare clausum fregit*. Bayes v. Hogg, 1 Hayw. 485. But an alien's right to sustain an action for the recovery of land in case of an intrusion by an individual was maintained in McCreery v. Allender, 4 Har. & M'H. 409; Bradstreet v. Supervisors, &c., 13 Wend. 546; Waugh v. Riley, 8 Met. 295; see also Scanlan v. Wright, 13 Pick. 523; Jackson v. Britton, 4 Wend. 507; Jackson *Ex dem.* Culverhouse v. Beach, 1 John. Cas. 399; Gansevoort v. Lunn, 3 id. 109; Orser v. Hoag, 3 Hill, 79. [See Lareau v. Davignon, 1 Buff. N. Y. Sup. Ct. 128.] An alien, who holds land under a special law of a State, may maintain a suit in the Circuit Court of the United States relating to such land. Bonaparte v. Camden, &c. Railroad Co., 1 Bald. 316; see Commonwealth v. Andre, 3 Pick. 224.

* By the statute, intituled "An Act to amend the Laws relating to Aliens," section 3, it was enacted, "that every person now born or hereafter to be born out of her Majesty's dominions of a mother being a natural-born subject of the United Kingdom, shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, by devise or purchase, or inheritance of succession." By section 4 it was enacted, "that from and after the passing of this Act, every alien, being the subject of a friendly State, shall and may take and hold by purchase, gift, bequest, representation or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom." And section 5 enacted "that every alien now residing in, or who shall hereafter come to reside in any part of the United Kingdom, and being the subject of a friendly State, may by grant, lease, demise, assignment, bequest, representation or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of Parliament, as if he were a natural-born subject of the United Kingdom."

But now, by the recent "Naturalization Act, 1870,"¹ section 2, "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession, to a natural-born British subject; Provided, (1.) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise; (2.) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; (3.) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either immediately * or immediately, in possession or expectancy, in *48 pursuance of any disposition made before the passing of this

¹ 33 & 34 Vic. c. 14; by § 16 power is given to the Legislatures of British possessions to give the privileges of naturalization within their own limits; by § 12, regulations are made as to evidence under the Act; and by § 18, the former Alien Acts (7 & 8 Vic. c. 66, and 10 & 11 Vic. c. 83) are repealed.

See as to the rights of descendants of British subjects who had settled abroad before the Act; *Fitch v. Weber*, 5 Hare, 51. See also *Count De Wall's case*, 6 Moore P. C. 216; 12 Jur. 145; *Barrow v. Wadkin*, 24 Beav. 327; *Rittson v. Stordy*, 3 Sm. & G. 230.

Act,¹ or in pursuance of any devolution by law on the death of any person dying before the passing of this Act."

Although an alien may maintain a suit in this country, yet, if one alien sues another upon a contract entered into in a foreign country, it would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place: therefore, where a French emigrant, resident in this country, obtained by duress securities from another French emigrant, for the payment of a demand, alleged to be due from him under an obligation entered into in France as security for another, and for which, according to the laws of France, his person could not be affected: Lord Rosslyn refused to dissolve an injunction which had been obtained to restrain an action at Law upon those securities, and intimated a very strong opinion, that when the case came on for hearing he should in all probability set the securities aside.² Upon the same principle, it was held that the Court will not grant a writ *Ne exeat Regno*, where it appears that the transactions between the parties were entered into upon the faith of having justice in the place where they respectively resided;³

though, in the case before him, he considered that the parties
*49 did not deal upon any such understanding, *and therefore refused to discharge the writ without security; if, however, one of the parties is an Englishman, and they were both resident in different countries at the time the contract was entered into, the Court will not

¹ This was the 12th of May, 1870.

² Talleyrand v. Boulanger, 3 Ves. 447, 450. Suits are maintainable, and are constantly maintained, between foreigners where either of them is within the territory of the State in which the suit is brought, both in England and America. Story Conf. Laws, § 542.

In Brinley v. Avery, Kirby, 25, it was held that a plea in abatement, that both parties are aliens, and that the contract declared on was made in a foreign country, and was to have been performed there, is good; and in Dumoussay v. Delevit, 3 Har. & J. 151, an action of replevin was held abatable, on a plea that both parties were aliens, and the Court therefore had not jurisdiction. But in Barrell v. Benjamin, 15 Mass. 354, the Court were inclined to the opinion that one foreigner may sue another, who is transiently within the jurisdiction of the Courts of a State, upon a contract made between them in a foreign country. And see Roberts v. Knight, 7 Allen, 449. In construing such contracts, the law of the place where they are made will be administered. *Id.* p. 357; Story Conf. Laws, § 270 *et seq.*; De La Vega v. Vianna, 1 B. & Ad. 284. But the remedy will be applied according to the law of the place where it is pursued. A controversy between two foreigners, who are private citizens, is not cognizable in the Courts of the United States under the Constitution. See Barrell v. Benjamin, 15 Mass. 357.

In De La Vega v. Vianna, 1 B. & Ad. 284, it was held that one foreigner may arrest another in England for a debt which accrued in Portugal while both resided there, though the Portuguese law does not allow of arrest for debt. In the above case, Lord Tenterden C. J. remarked, that a person suing in England must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors in England, and he ought not, therefore, to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all British subjects are entitled to. The remedy upon contracts is governed by the law of the place where the parties pursue it. See also Whitemore v. Adams, 2 Cowen, 626; Willing v. Consequa, 1 Peters C. C. 317; Contois v. Carpentier, 1 Wash. C. C. 376; Wyman v. Southward, 10 Wheat. 1; Don v. Lippman, 5 Cl. & Fin. 1; Hinkley v. Moreau, 3 Mason, 88; Titus v. Hobart, 5 Mason, 378; Atwater v. Townsend, 4 Conn. 47; Story Conf. Laws, §§ 568-571. The same doctrine was maintained in Smith v. Spinolla, 2 John. 198. See also Peck v. Hozier, 14 John. 346; Sicard v. Whale, 11 John. 194; Talleyrand v. Boulanger, 3 Sumner's Ves. 447, note (a).

³ Robertson v. Wilkie, Amb. 177; and see De Carrière v. De Calonne, 4 Ves. 590.

discharge a *Ne exeat* obtained by the party resident in this country, against the other who had casually come hither on the ground that, by the law of the country of which the other was a native, he would be exempt from arrest for a debt of the same nature.¹ It is, however, to be observed, that with respect to writs of *Ne exeat Regno*, Lord Northington is distinctly stated to have thought that this process ought not to be granted between foreigners;² and in *De Carrière v. De Calonne*,³ Lord Rosslyn said, it is very delicate to interfere as against foreigners, whose occasions or misfortunes have brought them here, by an application of this writ to them, and that it would be a necessary term, that it should be simply a case of Equity, affording no ground to sue at Law.

With respect to alien enemies, the law is clearly settled by numerous cases, that an alien enemy not resident here, or resident here without the permission of the government, cannot institute any suit whatever in this country, whether at Law or in Equity, either for real or personal property, until both nations be at peace;⁴ and it is said, that the question whether he is in amity or not, should be tried by the record, *viz.*, by the production of the proclamation of war.⁵ It is to be observed, that in declaring war, the Queen, in her proclamation, usually qualifies it, by permitting the subjects of the enemy resident here to continue so, as long as they peaceably demean themselves; so that such persons are to be deemed in effect alien friends;⁶ therefore, where an alien enemy has lived here peaceably a long time, or has come here for refuge and protection, the Court will discountenance pleas of alienage against him.⁷ It seems, also, that a prisoner of war may sue upon a contract entered into by him during the time of his captivity.⁸

* The mere circumstance of residing in a foreign country, the government of which is at war with this country, and of carrying on trade there, is sufficient to constitute any person an alien enemy, even though he would not otherwise be considered in that character.¹ *50

¹ Flack v. Holm, 1 J. & W. 405, 413, 418.

² 4 Ves. 585.

³ 4 Ves. 590.

⁴ Co. Litt. 129 b.; 6 T. R. 23; 1 Bos. & P. 163; 3 Bos. & P. 113; *Alcinous v. Nigren*, 4 El. & Bl. 217; S. C. *nom.* *Alcinius v. Nygren*, 1 Jur. N. S. 16; Story Eq. Pl. §§ 51-54; *Mumford v. Mumford*, 1 Gall. 366; *Bradmonston v. Weeks*, 1 John. Ch. 208; *Crawford v. Wm. Penn*, 1 Peters C. C. 106; *Wilcox v. Henry*, 1 Dall. 69; *Bell v. Chapman*, 10 John. 183; *Hepburn's case*, 3 Bland. 95; *Griswold v. Waddington*, 16 John. 438; *Clemonston v. Blessig*, 11 Exch. 135, 141, note; *Dean v. Nelson*, Sup. Ct. U. S. 10 Am. Law Reg. N. S. 221, and the learned note and authorities cited at the end of that case.

⁵ Co. Litt. by Harg. & But. 129 b. n. 2.

⁶ Co. Litt. by Harg. & But. 129 b. n. 3.

⁷ *Wyatt's P. R.* 327; Story Eq. Pl. § 52; *Bradwell v. Weeks*, 1 John. Ch. 208; *Russell v. Skipwith*, 6 Binn. 241.

⁸ *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163; *Maria v. Hall*, 2 Bos. & P. 236; 1 Taunt. 33; *Crawford v. The William Penn*, 3 Wash. C. C. 484.

In many cases, an alien enemy is entitled even to sue for his own rights; as, when he is permitted to remain in the country, or is brought here as a prisoner of war. He is recognized in our Courts in his character as executor; and in all cases his property is protected and held in trust for him until the return of peace. *Bradwell v. Weeks*, 1 John. Ch. 208; *Bell v. Chapman*, 10 John. 183; *Clark v. Morey*, 10 John. 69; *Hutchinson v. Russell*, 11 Mass. 119; *Parkinson v. Wentworth*, 11 Mass. 26; *Russell v. Skipwith*, 6 Binn. 241.

¹ 1 Kent, 76 *et seq.*; *Case of the Sloop Chester*, 2 Dallas, 41; *Murray v. Schooner Betsey*, 2 Cranch, 64; *Maley v. Shattuck*, 3 Cranch, 488; *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506; *The Venus*, 3 Cranch, 253; *The Francis*, 8 Cranch, 363; *Society v. Wheeler*, 2 Gall. 105.

Thus, a subject of a neutral State, resident in a hostile State in the character of consul of the neutral State will, if he carry on trade in the hostile country, be considered as an alien enemy, and disqualified from suing in the Courts of this country: although, had he merely resided there in his diplomatic character, he would not have been disqualified.² And even if a British subject, residing in a foreign State which is at war with this country, carry on trade there without a license from the government of this country, his trading will be considered such an adherence to the Queen's enemies as will incapacitate him from maintaining a suit here;³ and although he be an ambassador, or other representative of the Crown residing in a hostile State, yet if he carry on trade in such State without a license, he will deprive himself of the right to sue in the municipal Courts of this country, because he is lending himself to the purposes of the enemy by furnishing him with resources.⁴

If, however, a subject of this country, residing in a hostile country, have a license from this government to trade, he will not incur any disability as long as he confines himself to the trade authorized by such license;⁵ but if a person having a license to reside in a hostile country, and to export corn or other specified articles to this country, were to use such license beyond its expression, for the purpose of dealing in articles to which it has no relation, he cannot maintain that such dealing is not an enemy's dealing.⁶

The disability to maintain a suit on account of alienage extends to all cases in which an alien enemy is interested, although his name does not appear in the transaction.⁷ thus, it has been held, that an action at Law cannot be maintained upon a policy of insurance upon the property of an alien enemy, even though the action is brought in the name of an

English agent,⁸ and though it is alleged that the alien is indebted *51 to the agent in more money * than the value covered by the policy.⁹ Where, however, a certain trading of an alien enemy (viz., for specie and goods to be brought from the enemy's country in his ships into our colonial ports) was licensed by the King's authority, it was held, that an insurance on the enemy's ship, as well as on the cargo, was in furtherance of the same policy, which allowed the granting of the licenses to authorize the trade: and that effect ought, therefore, to be given to the ordinary means of indemnity, by which that trade (from the continuance of which the public must be supposed

² *Albion v. Sweeney*, 1 T. & B. 323, 327.

³ *McCannell v. Hume*, 2 Bos. & P. 114; *O'Malley v. Wilson*, 1 Term. 492, but he may lawfully proceed for the necessities of Englishmen detained abroad, and reap, on the account of peace, without commercial trade for war purposes. *Amos v. McCannell*, 2 Term. 207; *Dunsmuir v. Locking*, 1 Stark. 92.

⁴ *Ex parte Bagshaw*, 18 Ves. 326, 328.

⁵ *Ex parte Bagshaw*, 18 Ves. 329; see *Conway v. The William Penn*, 3 Wash. C. C. 484.

⁶ *Ex parte Bagshaw*, 18 Ves. 329.

⁷ *Conford v. The William Penn*, 1 Peters C. C. 105. It is no objection, after the war, that the suit was originally brought by the plaintiff as trustee for an alien enemy. *Hansen v. Lambert*, 2 John. Ch. 308.

⁸ *Perkins v. Towers*, 4 T. B. 65.

⁹ *Brandon v. Nestlin*, 4 T. B. 23.

to derive benefit) may be best promoted and secured: the Court of King's Bench, therefore, determined, that an action brought by an English agent to recover the amount of the insurance on the ship, might be maintained, notwithstanding the ship belonged to an enemy.² It was held, however, that although in such a case the agent might sue, because the King's license had purged the trust in respect to him of all its injurious consequences to the public interest, yet that it had not the same effect of removing the personal disability of the principal, so as to enable him to sue in his own name.³

The disability to sue under which an alien enemy lies is personal, and takes away from the Queen's enemies the benefit of her Courts, whether for the purpose of immediate relief or of giving assistance in obtaining that relief elsewhere; therefore, an alien enemy cannot institute a suit for the purpose of obtaining a discovery, even though he seek no further relief.⁴

The right of an alien to maintain a suit relating to a contract is only suspended by war if the contract was entered into previously to the commencement of the war, and it may be enforced upon the restoration of peace.⁵ Upon this principle, in bankruptcy, the proof of a debt due to an alien enemy, upon a contract made before the war broke out, was admitted, reserving the dividend.⁶ But no suit can be sustained to enforce an obligation arising upon a contract entered into with an alien enemy during war, such contract being absolutely void.⁷ And

² *Kensington v. Inghis*, 8 East, 273, 288.

³ *Kensington v. Inghis*, 8 East, 279.

⁴ *Dunberry v. Davidson*, 2 Aust. 492; but see *Albrecht v. Sassman*, 2 V. & B. 324, 329, 327. An alien friend may maintain a bill for discovery in aid of a suit in a foreign country. 2 Story Eq. Jur. § 1405; *Meredith v. Smith*, 1 Paige, 287; *Story Eq. Pl.* § 53 in note. [But see *Reimer v. Marquis of Salisbury*, 2 Ch. Div. 378. *Infra*, 1556, n. 7.]

⁵ *Akinous v. Nigren*, 4 Ell. & Bl. 247; *S. C. nom. Alcinous v. Nigren*, 1 Jur. N. S. 10; *Flindt v. Waters*, 15 East, 260; *Hamilton v. Eaton*, 2 Marsh. C. C. 1; *Buchanan v. Curry*, 19 John. 137; *Clemontson v. Blessig*, 11 Exch. 135, 141, note; *Hammersley v. Lambert*, 2 John. Ch. 508; *Bradwell v. Weeks*, 1 John. Ch. 206. And in Massachusetts the statutes of limitation of personal actions are expressly suspended in favor of an alien during the war. *Genl. Sts.* ch. 155, § 8. See *Hepkirk v. Bell*, 3 Cranch, 454. A plea, that the plaintiff was an alien enemy, is sufficiently answered by a treaty of peace, made after the plea was filed. *Johnson v. Harrison*, 6 Litt. 226. The Court will take notice of the fact, though the plaintiff do not reply it. *Ibid.* Treaties with foreign nations are part of the law of the land, of which the Courts are bound to take notice. *Baby v. Dubois*, 1 Blackf. 255.

[The effect of the late civil war upon contracts of life insurance came frequently before the Courts, and resulted in conflicting decisions. Some of the Courts held that the

contracts between citizens of the rebellious States and insurance companies of the loyal States were annulled by the war. *Doland v. Manhattan Life Ins. Co.*, 44 Ill. 371; *Tait v. N. Y. Life Ins. Co.*, 4 Ill. Cas. 470; *Watson v. Charter Oak Life Ins. Co.*, 41 Conn. 372. A majority of the Courts hold that the contract was merely suspended by the war. *Reimer v. International Life Ins. Co.*, 22 N. Y. 54; *Cohen v. Mutual Life Ins. Co.*, 50 N. Y. 610; *Manhattan Life Ins. Co. v. Warwick*, 20 Grant. 614; *N. Y. Life Ins. Co. v. Watson*, 7 Bush, 174; *Hilliard v. Mutual Benefit Life Ins. Co.*, 37 N. J. Law, 441. In *Smith v. Charter Oak Life Ins. Co.*, 1 Cent. L. J. 76 (Mo.), and *Hancock v. N. Y. Life Ins. Co.*, 4 Ill. Cas. 488 (Ill.), the assured were allowed the value of the policy at the outbreak of the war, subsequent premiums having been tendered to an agent in the Confederate States. In *New York Life Ins. Co. v. Sullivan*, 11 U. S. 24, the Supreme Court of the United States held that the contract was terminated by the war, but gave the assured the equitable value of the policy at that date. While in *Crawford v. Aetna Life Ins. Co.*, 5 Cent. L. J. 100, the Supreme Court of Tennessee allowed the assured the value of a paid-up policy on the day of the involuntary cessation of payments. The cases are collected and commented on in a note to this last case by Hon. J. O. Pierce, of Memphis.]

⁶ *Ex parte Boussmaker*, 13 Ves. 71.

⁷ *Ex parte Boussmaker*, 13 Ves. 71; and see *Ex parte Boussmaker*, in *Ex. Ch.* 7 Ell. &

*52 where a policy of insurance, *on behalf of French subjects was entered into just before the commencement of the war, upon which a loss was sustained in consequence of capture by a British ship, after hostilities had commenced, the proof of a debt arising from such policy, which had been admitted by the commissioner in bankruptcy, was ordered to be expunged.¹ The principle upon which the last mentioned case was decided is fully stated by Lord Ellenborough in *Brandon v. Carling*,² where it is laid down by his Lordship as a rule, that every insurance on alien property by a British subject must be understood with this implied exception, "that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer."

A defence on the ground that the plaintiff is an alien enemy, should be made by plea before answer. Thus, where a bill was filed by a plaintiff residing in a foreign country at war with this, for a commission to examine witnesses there, and the defendant put in an answer, an application for an order for the commission was granted: though it was objected that the Court ought not to grant a commission to an enemy's country, the Court being, as it seems, of opinion that the objection had come too late.³

It does not appear, from any case in the books, what would be the effect of a war breaking out between the country of the plaintiff and this country, after the commencement of the suit; but, from analogy to what is stated by Lord Chief Baron Gilbert to be the practice of the Court with regard to outlawry, namely, that if it is not pleaded it may be shown to the Court on the hearing, as a peremptory matter against the plaintiff's demands, because it shows the right to the thing to be in the Queen,⁴ it is probable that the Court would, under such circumstances, stay the proceedings.⁵

It appears to be the essence of a plea that the plaintiff is an alien enemy, to state that the plaintiff was born out of the allegiance of the Queen, and within the allegiance of a State at war with us; but where the plea contains words which amount in substance to an allegation of these facts, it will be sufficient, although they are not averred with the same strictness that is required by the rules of Law. Thus, where

*53 a plea averred that the plaintiffs were Frenchmen, *aliens, and enemies of the King, the Court held, that the plea was sufficient:

Bl. 779; 5 W. R. 732, as to the dissolution of contracts by a declaration of war.

¹ *Ex parte Lee*, 13 Ves. 64.

² 4 East, 410.

³ *Cahill v. Shepherd*, 12 Ves. 335.

⁴ *Gibb For. Rem.* 53.

⁵ *Story Eq. Pl.* § 54. If the plaintiff becomes an alien enemy after the commencement of the suit, the defendant may plead it. *Bell v. Chapman*, 10 John. 183. But as the disability is merely temporary, if the suit is not abated during the war, it is no objection after the war, that the plaintiff was

an alien enemy when the suit was brought. *Hamersley v. Lambert*, 2 John. Ch. 508. The effect of the plea of alien enemy is not to defeat the process entirely, but to suspend it. *Hutchinson v. Brock*, 11 Mass. 119; *Parkinson v. Wentworth*, 11 Mass. 26; *Levine v. Taylor*, 12 Mass. 8; *Hamersley v. Lambert*, 2 John. Ch. 508.

Where the plaintiff becomes an alien enemy after judgment, the Court will not, on motion, stay or set aside the execution. *Buckley v. Lytle*, 10 John. 117. See *Owens v. Hanney*, 9 Cranch, 180.

the word alien being a legal term, importing born out of the allegiance of the King, and within the allegiance of some other State; and the words, Frenchmen and enemies of the King, showing that they were the subjects of a State at war with this country.¹

It is to be observed, that the Courts here take notice, without proof, of a war in which this country is engaged; but a war between foreign countries must be proved.²

In all cases of a person permitted to sue in Equity, if he state himself in his bill to be resident abroad, or if it comes to the knowledge of the defendant that he is actually so, the defendant may obtain an order of the Court that the plaintiff shall, before he proceeds further, give security to answer to the defendant the costs of the suit.³ The practice with respect to this rule has been before stated;⁴ and is applicable to aliens and foreigners, as well as to natural born subjects.⁵ It seems that an alien resident in this country will not be required to give security for costs, although his residence here is merely temporary, and for the purpose of carrying on the suit.⁶

SECTION III.—*Persons attainted or convicted.*

Formerly, after judgment of outlawry, or of death, in a prosecution for treason or felony, the criminal was said to be attainted, *attinctus*, or blackened,⁷ and became incapable of maintaining a suit in any Court of justice, either civil or criminal, unless for the purpose of procuring a reversal of his attainder;⁸ he also incurred a forfeiture of all his property, real and personal,⁹ and was disqualified from holding any which he might in future acquire, either by descent, purchase, or contract;¹⁰ but now, by the 33 and 34 Vic. c. 23, from and after the 4th of July, 1870,¹¹ no confession, verdict, inquest, conviction or judg-

¹ Daubigny v. Davallon, 2 Anst. 462, 468.

² Dolder v. Lord Huntingfield, 11 Ves. 272; and see Alcinous v. Nigren, 4 El. & Bl. 217; S. C. *nom.* Alenius v. Nygren, 1 Jur. N. S. 17.

³ Melioruchy v. Melioruchy, 2 Ves. S. 24; Green v. Charnock, 1 Ves. J. 396; Hoby v. Hitchcock, 5 Ves. 699; Seilaz v. Hanson, *ib.* 261; Dreyer v. Maudesley, 5 Russ. 11.

⁴ See *ante*, pp. 27–37.

⁵ For more as to trading with alien enemies, see The Hoop, Tudor's L. C. Merc. Law, 787–813.

⁶ Cambottie v. Inngate, 1 W. R. 533, V. C. W.; and see Ainsley v. Sims, 17 Beav. 57; 17 Jur. 657; Swanzy v. Swanzy, 4 K. & J. 237; 4 Jur. N. S. 1013.

⁷ 4 Bla. Com. 381.

⁸ *Ex parte* Bullock, 14 Ves. 452, 464. A person attainted under the Act of New York, 1799, is considered as *civiliter mortuus*. Jack-

son v. Catlin, 2 John. 248. One attainted under the Act cannot sustain an action for rent due to him previous to the passing of the Act, or make it a set-off in an action by his lessee. Sleight v. Kade, 2 John. 236.

A plea of attainder is of rare occurrence and a plea of this sort in Equity would probably be construed with the same strictness as the like plea is at Law. Story Eq. Pl. § 723.

⁹ But not such land, stock, or choses in action as he holds as a trustee or mortgagee; see 13 & 14 Vic. c. 60, § 46; and see, before the Act, *Ex parte* Tyson, 1 Jur. 472; nor lands of which he is only equitable owner. Attorney-General v. Sands, Tudor, R. Prop. 664–679.

¹⁰ Bullock v. Dodds, 2 B. & Ald. 277.

¹¹ The day on which the 33 & 34 Vic. c. 23, received the royal assent.

*54 ments, *of or for, any treason or felony, or *felo de se*, causes any attainder or corruption of blood, or any forfeiture or escheat; the law of forfeiture, consequent upon outlawry is, however, not affected;¹ and no action at Law or suit in Equity for the recovery of any property, debt, or damage whatsoever can be brought by any convict² against any person during the time while he shall be subject to the operation of the Act;³ and every convict is incapable, during such time as aforesaid, of alienating or charging any property, or of making any contract; but these disabilities are suspended during the time which he may be lawfully at large under any license.⁴

With respect to the forfeiture of real estates by attainder, there was a distinction between attainders for treason and for felony. By attainder for treason, a man forfeited all estates of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the Crown, and also the profits of all lands and tenements which he had in his own right, for life or years, so long as such interest should subsist;⁵ but with respect to the attainder for felony, the 54 Geo. III. c. 145, enacted, that except in cases of high treason, petit treason, and murder or abetting the same, no attainder should extend to the disinheriting any heir, nor to the prejudice of the right or title of any person, except the offender during his life only; and upon the death of the offender, every person to whom the right or interest of any lands or tenements should or might, after the death of such offender, have appertained, if no such attainder had been, might enter thereupon.⁶

The forfeiture of real estate, consequent upon attainder of treason or felony, related backwards to the time of the treason or felony committed, so as to avoid all intermediate sales or incumbrances, but not those before the fact.⁷ The case was, however, different with *55 regard to the forfeiture of goods and chattels; for *that had no relation backwards; so that those only which a man had at the time of conviction were forfeited.¹ But by attainder, not only all the per-

¹ 33 & 34 Vic. c. 23, § 1.

² The word "convict" means any person against whom, after the passing of the Act (i. e. 4th July, 1870), judgment of death, or of penal servitude, has been pronounced or recorded by any Court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony. 33 & 34 Vic. c. 23, § 6.

³ The convict ceases to be subject to the operation of the Act when he dies or becomes bankrupt, or has suffered any punishment to which sentence of death pronounced or recorded against him has been lawfully commuted, or has undergone the full term of penal servitude for which judgment has been pronounced or recorded against him, or such other punishment as may have been duly substituted for such full term, or has received a pardon for the treason or felony of which he

has been convicted. 33 & 34 Vic. c. 23, § 7.

⁴ 33 & 34 Vic. c. 23, §§ 8, 30.

⁵ 4 Bla. Com. 381. Descent may be traced through a person attainted since 1333; see 3 & 4 Will. IV. c. 106, § 10.

⁶ 54 Geo. III. c. 145. All copyhold estates were forfeited to the lord, and not to the Queen, unless there was an Act of Parliament or an express custom to the contrary; 1 Watk. on Copy. 326; 1 Cruise's Dig. 307; and the forfeiture in such case did not accrue upon mere conviction, but only on complete attainder: 3 B. & Ald. 510; 2 Vent. 38; unless by special custom to the contrary.

⁷ 4 Bla. Com. 381-6; Tudor, R. P. 690.

¹ 4 Bla. Com. 387; Perkins v. Bradley, 1 Hare, 219, 228; but a colorable alienation to avoid a forfeiture would be void as against the Crown, 1 Hare, 227; and see Bullock v.

sonal property and rights of action which a man actually had were forfeited, but all personal property and rights of action which accrued to the offender after attainder were forfeited and vested in the Crown, without office found;² so that it has been held, that attainder might be well pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder.³ There was another distinction between the forfeiture of real and of personal estate: lands were forfeited upon attainder, and not before; goods and chattels were forfeited upon conviction, because in many of the cases where goods were forfeited there never was any attainder, which happened only where judgment of death or outlawry was given; and being necessarily upon conviction in those, it was so ordered in all other cases.⁴ In outlawries for treason or felony, lands were forfeited only by judgment, but goods and chattels were forfeited by a man's being put in the exigent, without staying till he was *quinto exactus* or finally outlawed; for the secreting himself so long from justice was construed a flight in law.⁵

These points, although they do not immediately relate to the personal disqualification from suing under which a party lie who had been attainted either of treason or felony, are nevertheless necessary to be adverted to; because, if a party claiming a title to property under an attainted person were to institute proceedings in a Court of justice relating to that property, his claim might be met by pleading the attainder of the person from whom his claim was derived:⁶ and in such case, the time when the forfeiture accrued might be a very important point for consideration.

With respect to such felonies as were not punishable with death, the felon on conviction, forfeited his civil rights; but the punishment endured had the like effect and consequences as a pardon under the great seal;⁷ and restored the offender to his civil rights, on the determination of the period of punishment.⁸

Forfeiture of land only arose on attainder;⁹ and therefore, in the case of a felony not capital, the offender, though convicted, might convey or create a valid trust of his real estate,¹⁰ and might dispose thereof by will.¹¹ But all personal property possessed by *him at the *56 time of his conviction,¹ or which afterwards accrued to him, before the term of punishment expired, was forfeited to the Crown,² including personal property held in trust for him,³ and a vested interest, in re-

Dodds, 2 B. & Ald. 258; Chowne v. Baylis, 31 Beav. 351; Saunders v. Warton, 9 Jur. N. S. 570, V. C. S.

² Office found was abolished by 22 & 23 Vic. c. 21, § 25.

³ Bullock v. Dodds, 2 B. & Ald. 258.

⁴ 4 Bla. Com. 387; Perkins v. Bradley, 1 Hare, 219.

⁵ 4 Bla. Com. 387; see also 33 & 34 Vic. c. 23, § 1.

⁶ Ld. Red. 232.

⁷ 9 Geo. IV. c. 32, § 3.

⁸ See Williams, Pers. Prop. 44; and *post*, p. 58.

⁹ See *Re Harrop*, 3 Drew. 726.

¹⁰ Lewin on Trusts, 26.

¹¹ 1 Jarm. Wills, 33; 2 Prideaux, Conv. 268.

¹ No forfeiture, however, followed conviction under the 10 & 11 Vic. c. 82, § 12; 13 & 14 Vic. c. 37; or 18 & 19 Vic. c. 126.

² 4 Bla. Com. 387; Roberts v. Walker, 1 R. & M. 752.

³ Lewin on Trusts, 581.

mainder, in the proceeds of land actually converted ;⁴ but not a contingent legacy, where the event on which the contingency depended did not happen till after the punishment had been endured ;⁵ nor a vested interest, in remainder, in land directed to be, but not actually converted ;⁶ and where land to which an infant was entitled was taken, under a local Act, and the purchase-money paid into Court by reason of his infancy, and he was afterwards convicted for felony, and sentenced to seven years' transportation, it was held, on the expiration thereof, that he was entitled to the money as realty.⁷

An administrator of the property of any convict may be appointed by the Crown ; and, upon his death, or revocation of his appointment, a new administrator may be appointed, who will be the successor in law of the former administrator ; and all property vested in, and powers given to, the former administrator devolve upon and vest in the new administrator, who is bound by all the acts of the former administrator.⁸

Upon the appointment of the administrator, all the real and personal property, including *choses in action*, to which the convict is, at the time of his conviction, or becomes, while subject to the Act, entitled, (except property acquired by him while at large under any license⁹), vests in the administrator ;¹⁰ who has absolute power to deal therewith.¹¹ The convict, or any person claiming an interest in the property, cannot call in question any acts *bonâ fide* done by the administrator ;¹² and, subject to the powers and provisions of the Act, the property is to be preserved and held in trust by the administrator ; and, on the convict ceasing to be subject to the Act, is to revert to him, his heirs, executors, or administrators.¹³ If no administrator is appointed, an *ad interim* curator, who has, in general, the same power as the administrator, may be
 *57 appointed, *and from time to time removed ;¹ and all judgments or orders for payment of money may be executed against the property in the hands of the interim curator, or of any person who may have, without legal authority, taken possession of the property of the convict ;² and all judgments or orders may be executed by writ of *scire facias* against property vested in the administrator.³

Proceedings may be taken by summons to make any administrator

⁴ *Re Thompson*, 22 Beav. 506.

⁵ *Stokes v. Holden*, 1 Keen, 145, 153.

⁶ *Re Thompson*, 22 Beav. 506.

⁷ *Re Harrop*, 3 Drew. 726. By 6 & 7 Vic. c. 7, § 3, convicts holding tickets of leave are enabled to hold personal property, and to maintain actions in respect thereof, while their tickets remain unrevoked.

⁸ 33 & 34 Vic. c. 23, § 9.

⁹ 33 & 34 Vic. c. 23, § 30.

¹⁰ 33 & 34 Vic. c. 23, § 10.

¹¹ 33 & 34 Vic. c. 23, § 12. The administrator may pay out of the property the costs of the prosecution, and of executing the Act (§ 13) ; and the debts and liabilities of the convict, and may deliver any property com-

ing to his hands to any person entitled to it (§ 13) ; and may out of the property, make compensation to any person defrauded by the criminal or fraudulent acts of the convict (§ 15).

¹² 33 & 34 Vic. c. 23, § 17.

¹³ 33 & 34 Vic. c. 23, § 18. Unless otherwise ordered, the costs as between solicitor and client, and the charges and expenses of the administrator incurred in reference to the property, are a first charge thereon ; 33 & 34 Vic. c. 23, § 20.

¹ 33 & 34 Vic. c. 23, §§ 21-26.

² As to enforcing decrees and orders, see *post*, Chapter XXVI.

³ 33 & 34 Vic. c. 23, § 27.

or interim curator account, before the property reverts to the convict; ⁴ and, subject to the provisions of the Act, the administrator or interim curator is liable, when the convict ceases to be subject to the Act, to account for all property received by him.⁵

Conviction is taken advantage of by plea, and it seems that such a plea would be judged with the same strictness as if it were a plea at Law.⁶

In order to bar a plaintiff's suit on the ground of an offence committed, it is not always necessary to show an attainder or conviction; for if a plea goes to show that, in consequence of an offence committed, no title ever vested in the plaintiff, conviction of the offence is not essential to the plea.⁷

Where a judgment pronounced upon a conviction for treason or felony, is falsified or reversed, all former proceedings are absolutely set aside; and the party stands as if he had never been accused;⁸ and he may, therefore, sue in a Court of Equity, in the same manner that he might have done if no conviction had taken place.

The disqualification arising from a conviction may also be obviated by the Queen's pardon; or by enduring the punishment imposed.⁹ A pardon formerly could only have been granted under the Great Seal; but now, a warrant under the Royal sign manual, countersigned by one of the Principal Secretaries of State, granting a free pardon and the prisoner's discharge under it, or a conditional pardon, and the performance of such condition, is as effectual as a pardon under the Great Seal.¹⁰

There is a great difference between the effect of a pardon and of a reversal. In the case of a reversal, the party is, as we have seen, in all respects, replaced in the same condition that he was in before the commencement of the proceedings; but a pardon has not that effect.¹¹ Thus, a person who has been convicted and pardoned cannot sue upon any right accrued to him before his pardon, although he may for a right accrued afterwards.¹²

*Where a pardon is conditional, the effect of the conviction is *58 not removed until the condition has been performed; and a felon who has been sentenced to transportation¹ is not restored to his civil rights until the term of his transportation has expired,² and therefore it was held, that personal property which did not belong to a felon at the

⁴ 33 & 34 Vic. c. 23, § 28.

⁵ 33 & 34 Vic. c. 23, § 29.

⁶ Ld. Red. 229; and see *Burk v. Brown*, 2 Atk. 397.

⁷ *Fall v. —*, May, 1782, Ld. Red. 233.

⁸ 4 Bla. Com. 393.

⁹ 33 & 34 Vic. c. 23, § 7. Formerly in the case of a capital felony, enduring the punishment did not have the effect of a pardon; see 9 Geo. IV. c. 32, § 3. [See, as to effect of pardon, *Armstrong's Foundry*, 6 Wall. 766; *Lapeyra v. United States*, 17 Wall. 191; *Carlisle v. United States*, 16 Wall. 147. Pardon

may be conditional. *Wells Ex parte*, 18 How. 307.]

¹⁰ 6 Geo. IV. c. 25, § 1; 7 & 8 Geo. IV. c. 28, § 13.

¹¹ 4 Bla. Com. 402.

¹² 1 Com. Dig. Abatement, E. 3.

¹ Under 8 Geo. III. c. 15.

² *Bullock v. Dodds*, 2 B. & Ald. 258; and see 4 Bla. Com. 400; *Gully's case*, *Leach's Crown Law*, 99. As to the remission of transportation, see 5 Geo. IV. c. 84, § 26; *Gough v. Davies*, 2 K. & J. 623.

time of his conviction, but which accrued to him afterwards during the time of his transportation, was forfeited to the Crown.³

SECTION IV. — *Bankrupts.*

The disability to maintain a suit on account of alienage, outlawry, and attainder, or conviction, arises partly from the plaintiff being personally disqualified, and partly from his not being capable of holding the property which is the object of the suit. The disability accruing from bankruptcy arises from the latter cause only, or rather from the fact that, by the bankruptcy, all the bankrupt's property, whether in possession or action, is vested in the trustee of his property,⁴ and a bankrupt, even though uncertificated or undischarged, is not personally disqualified from suing; and may, in many cases, sustain suits either at Law or in Equity.⁵

Thus, under the former Bankrupt Law, a bankrupt who had not obtained his certificate was allowed to file a bill to restrain a nuisance, or the infliction of any injury of a private or particular nature, without making his assignees parties;⁶ and where sued at law upon a bond or note, he has been allowed to file a bill of discovery, in order to obtain proof that such bond or note was fraudulently procured. The specific relief prayed is, however, material in determining whether the assignee is a necessary party to the bill; for where it prayed that the instrument upon which an insolvent debtor was sued at law might

³ *Roberts v. Walker*, 1 R. & M. 752, 766. Transportation is abolished by 20 & 21 Vic. c. 3, and penal servitude substituted by 16 & 17 Vic. c. 99; and see 27 & 28 Vic. c. 47.

⁴ By the Bankrupt Act, 1869 (32 & 33 Vic. c. 71), § 17, the property of the bankrupt is, immediately upon the adjudication, to vest in the Registrar, and is, on the appointment of a trustee, forthwith to pass to and vest in the trustee. As to the appointment of trustee, see § 14. As to release of trustee, see §§ 51-53; as to death and removal of trustee and suits by and against him, see § 83. As to liquidation by arrangement, see § 125. As to composition with creditors, see §§ 126, 127. See also the Liquidation Act, 1868 (31 & 32 Vic. c. 68). As to entering, under former Bankrupt Law, a suggestion on the death or removal of an assignee plaintiff, see *Lloyd v. Waring*, 1 Coll. 536; *Man v. Ricketts*, 7 Beav. 484; 9 Jur. 1103; 1 Phil. 617; and see 16 Beav. 440.

⁵ See *Herbert v. Sayers*, 5 Q. B. 978; *Calvert on Parties*, 199 *et seq.*; *Story Eq. Pl.* §§ 495, 726; *Elderkin v. Elderkin*, 1 Root, 139; *Hilliard B. & I.* 384. For instances in which bankrupts have been allowed to sue at Law, see *Perkin v. Proctor*, 2 Wils. 382; *Summersett v. Jarvis*, 6 Moore, 56; 3 P. & B. 2; *Coles v. Barrow*, 4 Taunt. 754; *Chippendale v. Tomlinson*, 4 Doug. 318; 1 Cooke's B. L.

428; *Silk v. Osborne*, 2 Esp. 140; see *Selwyn's N. P. Sup.* 323; *Evans v. Brown*, 1 Esp. 170; *Fowler v. Down*, 1 Bos. & P. 44; *Laroche v. Wakeman*, Peake, 190; *Webb v. Ward*, 7 T. R. 296; *Webb v. Fox*, 7 T. R. 391; *Clarke v. Calvert*, 3 Moore, 96; *Cumming v. Roebuck*, 1 Holt N. P. 172; *Lincoln v. Bassett*, 9 Gray, 355; *Merrick's Estate*, 5 Watts & S. 1. A bankrupt can in his own name maintain a suit brought before he was declared a bankrupt, for a wrong done, unless his assignee should interpose an objection. *Sawtelle v. Rollins*, 23 Maine, 196; *Tunno v. Edwards*, 3 Brev. 510; *Kirwan v. Latour*, 5 H. & John. 289; *Hayllar v. Sherwood*, 2 Nev. & M. 401. [The bankrupt has the exclusive right to sue for a trespass upon exempt property committed prior to the proceedings in bankruptcy. *Selling v. Gunderman*, 35 Tex. 545. And see, where the plaintiff has been declared a bankrupt after the commencement of suit, *Woodall v. Holliday*, 44 Ga. 18.] A claim for an injury done to a party by the negligence of another did not pass by an assignment of his estate under the insolvency laws of Massachusetts before the recovery of judgment. *Stone v. Boston and Maine Railroad*, 7 Gray, 539.

⁶ *Simple v. London & Birmingham Railway Company*, 9 Sim. 209.

be delivered up, the assignee was considered a necessary party ;¹ where, also, persons claiming to be creditors of bankrupts, instead of seeking relief in the bankruptcy, brought an action against the bankrupts, and the bankrupts filed a bill seeking a discovery in aid of their defence to the action, and praying that the accounts between them and the plaintiffs at Law might be taken, and that the plaintiffs at Law might pay the balance, a plea of bankruptcy was overruled ; the Court being of opinion that the bankrupts were entitled to the discovery and account, although they were not entitled to that part of the prayer which sought the payment to them of the balance.²

In general, however, a bankrupt, although he is by law entitled to the surplus of his estate which remains after payment of his debts, cannot bring a bill in Equity for any property which is vested in the trustees under the adjudication, even though there may be collusion between them and the persons possessed of the property ;³ thus, where a bill was filed by a bankrupt to recover property due to his estate, stating that the commission against him was invalid, and that there was a combination between his assignees and the debtor, to which a demurrer was put in, Sir John Leach V. C. allowed the demurrer : saying, that if it had been true that the commission was invalid, the plaintiff ought to have tried its validity by an action, and could not by bill impeach the commission ; and that if there were a combination between the debtor and his assignees, his proper course was to apply by petition, to have the assignees removed, and new assignees appointed.⁴

In the case of *Heath v. Chadwick*,⁵ the question arose whether creditors of an insolvent, under the Insolvent Debtor's Act,⁶ could maintain a suit respecting property, or rights alleged to have belonged to the insolvent, and to be vested in his assignee, upon an allegation of collusion between the assignee and the party * against whom *60 relief is prayed. Lord Cottenham reviewed the various cases upon the subject, and from his judgment it appears, that the creditors of an insolvent cannot under such circumstances sue, and that the same principle is applicable also to cases in bankruptcy ; and further, that there is no distinction in this respect between bankrupts or insolvents themselves and their creditors, or persons claiming under them.¹

¹ *Balls v. Strutt*, 1 Hare, 146 ; *Meddowcroft v. Campbell*, 13 Beav. 184.

² *Lowndes v. Taylor*, 1 Mad. 423. This decision was afterwards affirmed on appeal. 1 Mad. 425 ; 2 Rose, 432 ; and see *Govet v. Armitage*, 2 Aust. 412 ; *Kaye v. Fosbrooke*, 8 Sim. 28.

³ Property belonging to the bankrupt as factor, executor, or trustee, does not pass to the assignees. *Archbold's B'kpcy*, 328-333 ; *Ex parte Ellis*, 1 Atk. 101 ; *Bennet v. Davis*, 2 P. Wms. 316 ; *Ex parte Butler*, Amb. 74 ; *Ex parte Chion*, 3 P. Wms. 187, n. (a) ; *Godfrey v. Furzo*, *ib.* 185 ; *Pennell v. Deffell*, 4 De G., M. & G. 372, 379 ; and see *Lewin on Trusts*, 180-185 ; 12 & 13 Vic. c. 106, § 130.

⁴ *Hammond v. Attwood*, 3 Mad. 158 ; see also *Yewens v. Robinson*, 11 Sim. 105, 120.

⁵ 2 Phil. 649 ; and see *Major v. Auckland*, 3 Hare, 77 ; *Goldsmith v. Russell*, 5 De G., M. & G. 547 ; *Tudway v. Jones*, 1 K. & J. 691, and cases at Common Law there cited ; and the observations of Lord Cottenham in *Rochfort v. Battersby*, 2 H. L. Ca. 403, 409 ; *Davis v. Snell*, 28 Beav. 321 ; 6 Jur. N. S. 1134 ; 2 De G., F. & J. 463.

⁶ 1 & 2 Vic. c. 110 ; 5 & 6 Vic. c. 116 ; 7 & 8 Vic. c. 96.

¹ See *Stoevers v. Stoevers*, 9 Serg. & R. 434 ; *Griswold v. McMillan*, 11 Ill. 590 ; [*Allen v. Montgomery*, 48 Miss. 101.]

In *Spragg v. Binkes*,² it was held by Lord Alvanley M. R. that a bankrupt cannot file a bill for the redemption of a mortgage, in respect of his right to the surplus of his estate; and in *Benfield v. Solomons*,³ a demurrer was allowed to a bill by a bankrupt against a mortgagee of estates in England and Berbee, for an account and payment of the balance to the assignees, who were made defendants and charged with collusion.

It may be here stated, that, in general, the Court of Chancery will not interfere to give relief in cases where the party applying might obtain his rights by proceeding in bankruptcy.⁴ In *Preston v. Wilson*,⁵ Sir James Wigram V. C. said, "I have had occasion to consider the effect of the Bankrupt Laws in excluding the jurisdiction of this Court, in cases to which its jurisdiction would otherwise extend; and I was strongly impressed with the necessity of maintaining, to the fullest extent which may be consistent with justice, the exclusive jurisdiction of the Bankrupt Courts, in cases committed to their administration. The jurisdiction of the Commissioners of Bankrupts is a limited jurisdiction. They have not, as this Court has, an original and general jurisdiction, within which cases of a given class will fall of themselves, unless by some special act of the Legislature they are withdrawn from it. The powers of the Commissioners being new, and derived from special statutes, are limited by these statutes;" and his Honor added, that he did not find any express powers given the Commissioners to compel the assignee to assign a surplus to the bankrupt, or to dismiss a petition, or take it off the file, in a case like that before him. Accordingly, the plaintiff was, under the special circumstances of the case, having satisfied all his creditors, allowed to maintain a suit against the defendant as mortgagee, for the redemption of an estate which had been mortgaged before he presented his petition to the Court of Bankruptcy, under the 5 & 6 Vic. c. 116,⁶ notwithstanding the objection of the defendant that the estate of the plaintiff (if any) was vested in the official assignee.⁷

*61 * As a bankrupt cannot file a bill against strangers respecting property vested in his assignees under the bankruptcy, so it has been held, that he cannot maintain a suit against his assignees for an account of their receipts and payments under the bankruptcy, and for

² 5 Ves. 583, 589.

³ 9 Ves. 77, 82; and *Smith v. Moffatt*, L. R. 1 Eq. 397; 12 Jur. N. S. 22, V. C. W.

⁴ See *Riches v. Owen*, W. N. (1868) 158 V. C. G.; L. R. 3 Ch. Ap. 820, L. J.J.; *Bell v. Bird*, L. R. 6 Eq. 635, V. C. G.; *Martin v. Powning*, L. R. 4 Ch. Ap. 355, L. J.J.; *Stone v. Thomas*, L. R. 5 Ch. Ap. 219, L. C.; *Phillips v. Furber*, 18 W. R. 479, M. R.; see also *Forshaw v. Mottram*, W. N. (1867) 191, V. C. S.

⁵ 5 Hare, 185, 192.

⁶ Repealed by the Bankruptcy Act, 1861 (24 & 25 Vic. c. 134), § 230, and Schedule G.

⁷ *Preston v. Wilson*, 5 Hare, 185; and see *Wearing v. Ellis*, 6 De G., M. & G. 596; 2 Jur. N. S. 204, 1149. It has been held that an insolvent debtor who has made a general assignment, may on proof of his paying all debts due at the time of his discharge, bring ejectment in his own name, for lands assigned by him, without any formal re-assignment. *Power v. Holman*, 2 Watts, 218. As to disclaimer by the assignees in a foreclosure suit, see *Ford v. White*, 16 Beav. 120.

payment of the surplus. This doctrine was clearly laid down by Lord Eldon, and has since been acted upon.¹

It is to be observed, that whatever property a bankrupt has, or, to use a technical expression, may depart with, becomes, upon bankruptcy, the property of the assignees, who are to have it for the benefit of the creditors; and the circumstance of such property being in a foreign country, where the Bankrupt Laws of this country do not prevail, makes no difference; so that a bankrupt cannot maintain a suit in this country, even though the property in respect of which the suit is instituted is in another country.²

The rules with regard to bankrupts applied, by analogy, to persons who had taken the benefit of the Insolvent Debtors' Acts, who were equally considered as being divested of all right to maintain a suit in respect of any surplus to which they might eventually be entitled;³ but these provisions are no longer in force;⁴ and all persons, whether traders or non-traders, are now subject to the Bankrupt Laws.⁵

But, although neither bankrupts nor insolvent debtors can sue in respect of their interest in the surplus of the property, yet, as they have such an interest in the surplus as is capable of assignment, it seems that the persons claiming under such assignments, if made for valuable consideration, may maintain bills respecting them. This appears to have been the opinion of Lord Alvanley M. R. in *Spragg v. Binkes*,⁶ though his Lordship seems to have doubted whether the Court had not gone too far in permitting such assignments, and to have held that a party could not parcel out a right in accounts to be *62 taken to different persons, so that every one of these persons might file a bill *pro interesse suo*.

The disability of a bankrupt to maintain a suit, does not apply to a bankrupt who has obtained his order of discharge, where he is suing in respect of property acquired after his order of discharge has taken effect.

In most respects the situation of an insolvent debtor, as far as regards the right to sue for property acquired previous to his discharge, was similar to that of a bankrupt whose order of discharge has taken effect; but there was a material difference in their situation with regard

¹ *Saxton v. Davis*, 18 Ves. 72, 79; *Tarleton v. Hornby*, 1 Y. & C. Ex. 172, 188; *Smith v. Moffatt*, L. R. 1 Eq. 397; 12 Jur. N. S. 22, V. C. W.; see *Lincoln v. Bassett*, 9 Gray, 355.

² *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 402; *Benfield v. Solomons*, 9 Ves. 77, and see *Re Blithman*, L. R. 2 Eq. 23, M. R.; 35 Beav. 219.

³ *Gill v. Fleming*, 1 Ridg. P. C. 431; *Spragg v. Binkes*, 5 Ves. 583; *Dyson v. Hornby*, 7 De G., M. & G. 1; *Cook v. Sturgis*, 3 De G. & J. 506; 5 Jur. N. S. 475; *Troup v. Ricardo*, 10 Jur. N. S. 859; 12 W. R. 1135, M. R.; 13 W. R. 147, L. C.; 10 Jur. N. S. 1161, L. C.; *Smith v. Moffatt*, L. R. 1 Eq. 397; 12 Jur. N. S. 22, V. C. W.;

Roberts v. Moreton, W. N. (1869) 28; 17 W. R. 397, V. C. J. As to insolvents under 5 & 6 Vic. c. 116, see *Wearing v. Ellis*, 6 De G., M. & G. 596; 2 Jur. N. S. 204, 1149. A suit for administration of a deceased insolvent's estate may be instituted by a scheduled creditor. *Galsworthy v. Durrant*, 2 De G., F. & J. 466; 7 Jur. N. S. 113; 29 Beav. 277; 6 Jur. N. S. 743; see *Smith v. Moffatt*, L. R. 1 Eq. 397; 12 Jur. N. S. 22, V. C. W.

⁴ The Bankruptcy Repeal and Insolvent Courts Act, 1869 (32 & 33 Vic. c. 83), § 20, and schedule.

⁵ The Bankruptcy Act, 1869, 32 & 33 Vic. c. 71, § 6.

⁶ 5 Ves. 583, 589; *Cook v. Sturgis*, 3 De G. & J. 506; 5 Jur. N. S. 475.

to after-acquired property. A bankrupt may, as we have seen, after his order of discharge has taken effect, become entitled to property in the same manner that he might before his bankruptcy;¹ but in the case of an insolvent debtor, his future property was made liable to the payment of his debts contracted before his discharge.

The proper course by which to take advantage of the bankruptcy or insolvency of the plaintiff in a suit, where such bankruptcy or insolvency has occurred previously to the filing of the bill, is by demurrer, if the fact appears upon the bill;² and if the fact does not so appear, it should be pleaded. In *Bowser v. Hughes*,³ which was the case of a plea to a bill by an insolvent debtor against his assignees, and a debtor to the estate, the facts stated in the plea appeared upon the face of the bill, and yet the plea was held good; and it has been held, that as at Law any matter which arises between the declaration and the plea may be pleaded, so bankruptcy or other matters arising between the bill and plea may be pleaded in Equity.⁴

In pleading bankruptcy it was the rule that all the facts should be stated successively and distinctly; and it was not sufficient to say that a commission or fiat of bankruptcy was duly issued against the plaintiff, under which he was duly found and declared a bankrupt, and that all his estates and effects had been duly transferred to or become vested in the assignees;⁵ a plea of bankruptcy must have stated distinctly the trading, the contracting debts, the petitioning creditor's debt, the act of bankruptcy, the commission or fiat, and that the plaintiff had been found bankrupt; but it may be doubted how far this rule would now be strictly enforced.⁶

*63 *With respect to the bankruptcy of the plaintiff after the commencement of a suit, or after plea and answer put in, it seems that the bankruptcy of a sole plaintiff does not strictly cause an abatement, but renders the suit defective;¹ or, according to the language of Lord Eldon, in *Randall v. Mumford*,² "this Court, without saying whether bankruptcy is or is not strictly an abatement, has said that,

¹ Under the Bankruptcy Act, 1861, since repealed by the 32 & 33 Vic. c. 83, § 20, and schedule, the Court might, however, grant the order of discharge, subject to any condition touching after-acquired property of the bankrupt; see 24 & 25 Vic. c. 134, § 159, rule 3; and see *Ex parte Griffiths*, 10 Jur. N. S. 786, 787, L. C. Property coming to the bankrupt, between the time of pronouncing the order of discharge and the time allowed for appealing therefrom, belongs to the bankrupt, when the order is not recalled or suspended on appeal, *Re Laforest*, 9 Jur. N. S. 851; 11 W. R. 738, L. C.

² *Bentfield v. Solomons*, 9 Ves. 77, 82; Story Eq. Pl. § 495. [The plea need not be put in under oath. *Dearden v. Villiers*, 16 W. R. 479, overruling *Joseph v. Tuckey*, 2 Cox, 44.]

³ 1 Anst. 101.

⁴ *Turner v. Robinson*, 1 S. & S. 3; *Serger v. Mayhew*, 2 M. N. & G. 97; *Lane v. Smith*, 14 Beav. 49; [*Payne v. Beech*, 2 Tenn. Ch. 708. And see *infra*, p. 606, 607.]

⁵ *Carleton v. Leighton*, 3 Mer. 667, 671; *Lane v. Smith*, 14 Beav. 49.

⁶ See *Pepper v. Henzell*, 2 H. & M. 486; and the Bankruptcy Act, 1869 (32 & 33 Vic. c. 71), § 10; *post*, p. 69; but see *Lane v. Smith*, 14 Beav. 49; see *Lacy v. Rockett*, 11 Ala. 100; *Seaman v. Stoughton*, 3 Barb. Ch. 344; *Stone v. Parks*, 1 Chand. 60.

¹ *Lee v. Lee*, 1 Hare, 621; see *Hobbs v. Dane Manuf. Co.*, 5 Allen, 581; [*Northman v. Insurance Companies*, 1 Tenn. Ch. 312, 319; *Swepson v. Rouse*, 65 N. C. 34.]

² 18 Ves. 427.

according to the course of the Court, the suit is become as defective as if it was abated."⁸

The result in practice of the above principle is, that if the assignees of a bankrupt, sole plaintiff, desire to prosecute the suit, they must obtain, on motion or petition of course, an order enabling them so to do.⁴ And upon the non-prosecution of a suit in which the plaintiff has become bankrupt, the defendant, if he wishes to get rid of the suit entirely, must adopt a course of proceeding analogous to that pursued where the plaintiff obtains an injunction and dies; in which case, the defendant may move that the injunction be dissolved, unless the representatives of the deceased plaintiff revive within a certain time;⁵ he must move that the trustee may, within a specified time (usually three weeks) after notice of the order, take proper supplemental proceedings for the purpose of prosecuting the suit against him; or in default thereof, that the plaintiff's bill may stand dismissed;⁶ where the bankruptcy has taken place after decree the motion should be that the trustee may, within a limited time, elect whether he will prosecute the suit, or that in default all further proceedings should be stayed.⁷

This is, however, not a motion of course, and the trustee must be served with the notice of it.⁸ It should also be supported by *an affidavit of the facts;¹ and it is to be observed, that the dis- *64 missal will be without costs, as a bankrupt cannot be made to pay costs.² Where, however, the bankruptcy takes place between the hearing and judgment, the Court will not, before giving judgment, compel the assignees to revive.³

After the bankruptcy of the plaintiff, the defendant cannot make the

³ But see *Sawtelle v. Rollins*, 23 Maine, 6; *Hilliard B. & I.* 397 *et seq.*

⁴ *Jackson v. Riga Railway*, 28 Beav. 75; for forms of motion paper and petition, see Vol. III.

⁵ *Wheeler v. Malins*, 4 Mad. 171; *Lord Huntingtower v. Sherborn*, 5 Beav. 380; *Robinson v. Norton*, 10 Beav. 484; *Fisher v. Fisher*, 6 Hare, 628; 2 Phil. 236; *Meiklam v. Elmore*, 4 De G. & J. 208; 5 Jur. N. S. 904; *Jackson v. Riga Railway*, 28 Beav. 75; *Boucicault v. Delafield*, 10 Jur. N. S. 937; 12 W. R. 1025, V. C. W.; 10 Jur. N. S. 1063; 13 W. R. 64, L. J.J.; *Simpson v. Bathurst*, L. R. 5 Ch. Ap. 193, L. C.

⁶ See *Story Eq. Pl.* § 349 and note; *Sedgwick v. Cleveland*, 7 Paige, 287, 290; *Garr v. Gower*, 9 Wend. 649; 2 Barb. Ch. Pr. 65, 66. This is the course before decree; after decree, the motion should ask to stay all further proceedings: *Clarke v. Tipping*, 16 Beav. 12; and see *Whitmore v. Oxborrow*, 1 Coll. 91; and an application by the defendant for an order to revive under 15 & 16 Vic. c. 86, § 52, after decree, was refused, *Maw v. Pearson*, 12 W. R. 701, M. R.; where the bankruptcy has occurred in a foreign country, see *Bourbaud v. Bourbaud*, 12 W. R. 1024, V. C. W.; *Clement v. Langthorn*, W. N. (1868) 181, 186,

V. C. G. For forms of notice of motion, see Vol. III.; and for an order in like case, see *Seton*, 1278. The same practice should be followed where the plaintiff has executed a trust deed under the Bankruptcy Act, 1861 (24 & 25 Vic. c. 134); *Price v. Rickards*, L. R. 9 Eq. 35, V. C. J.

⁷ *Whitmore v. Oxborrow*, 1 Coll. 91; *Clarke v. Tipping*, 16 Beav. 12.

⁸ The plaintiff need not be served; *Brown v. Rogers*, 22 July, 1869, Reg. Lib. 2168, V. C. J., where the order was directed to be drawn up without notice to the plaintiff; and see form of order, *Seton*, 1278, No. 6. See *contra*, *Vestris v. Hooper*, 8 Sim. 570; see also *Randall v. Mumford*, 18 Ves. 424, 428; *Wheeler v. Malins*, 4 Mad. 171. As to the proper time for making the application, see *Sharp v. Hullett*, 2 S. & S. 496.

¹ *Porter v. Cox*, 5 Mad. 80.

² *Wheeler v. Malins*, 4 Mad. 171; *Lee v. Lee*, 1 Hare, 621; *Meiklam v. Elmore*, 4 De G. & J. 208; 5 Jur. N. S. 904; *Boucicault v. Delafield*, 10 Jur. N. S. 937; 12 W. R. 1025, V. C. W.; 10 Jur. N. S. 1063; 13 W. R. 64, L. J.J.

³ *Boucicault v. Delafield*, 12 W. R. 8, V. C. W.

ordinary motion to dismiss; and in *Sellas v. Dawson*,⁴ Lord Thurlow held that such an order, pending the bankruptcy of the plaintiff, was a nullity, and therefore refused to discharge one obtained under such circumstances.

The rule of practice, by which a defendant is required to give notice to the trustee in the case of the bankruptcy of a plaintiff, is confined to the case of a sole plaintiff, who, becoming bankrupt, is supposed to be negligent of what is sought by the bill, and the Court, to prevent surprise and save expense, requires notice to be given to the trustee; but there is no instance where the Court has taken upon itself to interpose the rule where there are two plaintiffs, one of whom is solvent and the other insolvent; for it is as competent to the solvent plaintiff as it is to the trustee, to rectify the suit.⁵

In the case of an injunction granted at the suit of a plaintiff who afterwards becomes bankrupt, the practice which has been adopted is to require the bankrupt to bring the trustee before the Court; and the Court will make an order to dissolve the injunction and dismiss the bill, unless the trustee shall be brought before it within a reasonable time; which order, it seems may be served upon the bankrupt alone, as it is supposed that the bankrupt will find the means of giving the trustee notice.⁶ Such an order will also be without costs.

Where the trustee elects to continue the suit and obtains a supplemental order authorizing him to prosecute it, he becomes liable to the costs of the suit from the commencement;⁷ and, where the plaintiff had, previously to his bankruptcy and the supplemental order, been ordered to pay the costs of a proceeding, the proceedings in the suit were stayed until the payment of such costs.⁸

*65 *A suit does not abate by the death or change of the trustee plaintiff, but the Court may, upon the suggestion of such death or change, allow the suit to be prosecuted in the name of the surviving or new trustee.¹ An order is necessary for this purpose, which may be obtained on motion or petition of course.²

It was formerly necessary, in all actions where the assignees, either as plaintiffs or defendants, claimed property under the bankrupt, to prove strictly the three requisites to support the commission, *viz.* the trading, the act of bankruptcy, and the petitioning creditor's debt, as well as

⁴ 2 Anst. 458, n.; S. C. *nom.* *Sellers v. Dawson*, 2 Dick. 738; *Robinson v. Norton*, 10 Beav. 484. The motion cannot be made after the execution by the plaintiff of a trust deed under the Bankruptcy Act, 1861 (24 & 25 Vic. c. 134); *Price v. Rickards*, L. R. 9 Eq. 35, V. C. J.

⁵ *Caddick v. Masson*, 1 Sim. 501; *Latham v. Kenrick*, 1 Sim. 502; *Kelminster v. Pratt*, 1 Hare, 632; but see *Ward v. Ward*, 8 Beav. 379; 11 Beav. 159; 12 Jur. 592.

⁶ *Randall v. Mumford*, 16 Ves. 424, 428; *Wheeler v. Malins*, 4 Mad. 171. It would seem that under the present practice the trustee should be served with notice of the motion.

⁷ *Poole v. Franks*, 1 Moll. 78.

⁸ *Cook v. Hathaway*, L. R. 8 Eq. 612, V. C. M.; and see Chap. XIX. § 1. *Dismissing Bills and Staying Proceedings.*

¹ 12 & 13 Vic. c. 106, § 157. This section applies only to the case of trustees suing as plaintiffs, see *Gordon v. Jesson*, 16 Beav. 440; the practice with respect to trustees as defendants will be stated in the next chapter; and see *Man v. Rickets*, 1 Phil. 617; *Mendham v. Robinson*, 1 M. & K. 217; *Lloyd v. Waring*, 1 Coll. 536.

² For forms of motion paper and petition, see Vol. III.

that the commission was regularly issued, and the assignment duly executed to the assignees. Upon failure of proving any one of these matters (the proof of which added considerably to the costs of an action, and was often difficult to be established by strict rules of evidence), the assignees were nonsuited, and thus frequently prevented from recovering a just debt due to the bankrupt's estate. To provide in some measure for this evil, certain provisions were contained in the former Bankruptcy Acts, with respect to what should be considered sufficient evidence of these facts; but many difficulties, and much discussion, ensued under these provisions; and it is now enacted,³ to the effect, that if the bankrupt do not dispute the fiat or petition within certain limited periods, the Gazette shall be conclusive evidence of the bankruptcy, as against the bankrupt, and against all persons whom the bankrupt might have sued if not adjudged bankrupt; and even the circumstance that the bankrupt is an infant will not prevent the Gazette being conclusive;⁴ and it is also enacted to the effect, that in any action or suit, other than an action or suit brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, no proof shall be required of the petitioning creditor's debt, or of the trading, or act of bankruptcy, respectively, unless notice be given that these matters will be disputed.⁵

It was held under the old law, that where the defendants to a suit, brought by the assignees of a bankrupt, were infants, they would be entitled to dispute the validity of the bankruptcy, without giving the notice required by the Act. This was decided by *Sir John *66 Leach V. C. in the case of *Bell v. Tinney*,¹ in which a bill was filed by the assignees of a bankrupt to set aside a settlement which had been made by the bankrupt upon his wife and children. The words of the present statute seem to be sufficient to meet such a case, and render it clear that, even as against infant defendants, the Gazette shall be conclusive evidence of the bankruptcy.²

Where a plaintiff, suing under the former practice as assignee in bankruptcy, had not been actually appointed assignee at the time of filing the bill, but before the hearing, he was so appointed as from a date antecedent to the filing of the bill, it was held that he was entitled to maintain the suit.³

³ 12 & 13 Vic. c. 106, § 233; Taylor on Evid. §§ 1477, 1556.

⁴ *In re West*, 3 De G., M. & G. 198.

⁵ 12 & 13 Vic. c. 106, §§ 234, 235; Taylor on Evid. §§ 1556 A., 1559; Pennell v. Home, 3 Drew. 337; and see Lee v. Dennistoun, 29 Beav. 465, where Sir John Romilly M. R. held the provisions to be inapplicable to the present practice in Chancery; but, in exercise of the general jurisdiction which the Court possesses over pleadings, gave the defendants ten days from the date of the application, within which to give notice of the intention to dispute.

¹ 4 Mad. 372.

² And it is now provided that the production of a copy of the London Gazette containing a copy of the order of the Court of Bankruptcy adjudging the debtor to be a bankrupt, is conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt and of the date of the adjudication. The Bankruptcy Act, 1869 (32 & 33 Vic. c. 71), § 10.

³ *Barnard v. Ford, Carrick v. Ford*, L. R. 4 Ch. Ap. 247, L. JJ.

SECTION V. — *Infants.*

We come now to the consideration of those disqualifications which incapacitate a person from maintaining a suit alone, but do not prevent his suing, provided his suit be supported by another person. Such disqualifications arise from Infancy, Idiocy, Lunacy or imbecility of mind, and Marriage. With respect to infants, idiots, lunatics, and persons of weak minds, the law considers that, by reason of the immaturity or imbecility of their intellects, they are incapable of asserting or protecting their own rights, or of forming a judgment as to the necessity of applying for protection or redress to the tribunals of the country; it therefore requires, that whenever it is necessary that application should be made on their behalf to a Court of justice, such application should be supported by some person, who may be responsible to the Court that the suit has not been wantonly or improperly instituted. With respect to married women, their incapacity does not arise from want of reason, but from the circumstance that, by the law of this country, the property of all women in a state of coverture vests in the husband; the consequence of which is, that, as a general rule, no suit can be maintained by the wife without her husband being made a party.

In consequence of their incapacity, persons under disability are unable to compromise their rights or claims, but where these rights and claims are merely equitable the Court of Chancery may, in general, order the trust property to be dealt with in whatever mode it may consider
 *67 to be for the benefit of *cestuis que trust* who *are under disability; and therefore has power to compromise such rights or claims.¹

In the present section, the attention of the reader will be directed to the peculiarities in the practice of the Court, arising from the circumstance of the party, or one of the parties suing, being an infant.

The laws and customs of every country have fixed upon particular periods, at which persons are presumed to be capable of acting with reason and discretion. According to the law of this country, a person is styled an infant until he attains the age of twenty-one years, which is termed his full age.²

An infant attains his full age on the completion of the day which precedes the twenty-first anniversary of his birth; but, as the law will make no fraction of a day, he may do any act which he is entitled to do at full age, during any part of such day. Thus, it has been adjudged, that if one is born on the 1st of February, at eleven at night, and on the last day of January, in the twenty-first year of his age, at one in

¹ *Brooke v. Lord Mostyn*, 2 De G., J. & S. 373, 415; 10 Jar. N. S. 1114, 1116; and see *Wilton v. Hill*, 25 L. J. Ch. 156, V. C. K.; *Wall v. Rogers*, L. R. 9 Eq. 58, M. R.

² *Jacob's Law Dict.* tit. *Infant*. The age

of majority of females is fixed by the Constitution of Vermont at eighteen years. *Young v. Davis*, *Brayt*. 124; *Sparhawk v. Buel*, 9 Vt. 41.

the morning, he makes his will of lands and dies, it is a good will, for he was then of full age.³

Although, for many purposes, an infant is under certain legal incapacities and disabilities, there is no doubt that a suit may be sustained in any Court, either of Law or of Equity, for the assertion of his rights, or for the security of his property; and for this purpose, a child has been considered to have commenced his existence as soon as it is conceived in the womb.⁴ Under such circumstances, it is termed in law an infant *en ventre sa mère*, and a suit may be sustained on its behalf; and the Court will, upon application in such suit, grant an injunction to restrain waste from being committed on his property.⁵ In *Robinson v. Litton*,⁶ Lord Hardwicke seems to have considered, that the point that a Court of Equity would grant an injunction to stay waste at the suit of an infant *en ventre sa mère*, though it had often been said *arguendo*, had never been decided; but it seems that, though Lord Hardwicke was not aware of the circumstance, such an injunction was actually granted by Lord Keeper Bridgman.⁷

But although an infant may maintain a suit for the assertion of his rights, he can do nothing which can bind himself to the performance *of any act; and therefore, where from the nature of the *68 demand made by the infant it would follow that, if the relief sought were granted, the rules of mutuality would require something to be done on his part, such a suit cannot be maintained. Thus, it has been held that an infant cannot sustain a suit for the specific performance of a contract; because, in such cases, it is a general principle of Courts of Equity to interpose only where the remedy is mutual, and if a decree were to be made for a specific performance, as prayed on the part of the infant, there would be no power in the Court to compel him to perform it on his part, either by paying the money or executing a conveyance.¹

Although an infant, as we have seen, is in general capable of maintaining a suit, yet, on account of his supposed want of discretion, and his inability to bind himself and make himself liable to the costs, he is incapable of doing so without the assistance of some other person, who may be responsible to the Court for the propriety of the suit in its institution and progress.² Such person is called the *next* friend of the infant; and if a bill is filed on behalf of an infant without a next friend,

³ Salk. 44, 625; 1 Ld. Ray. 480; 2 *id.* 1096; 1 Bla. Com. 463; 1 Jarman on Wills, 29; Herbert v. Torball, 1 Sid 142; S. C. Raym. 84; State v. Clark, 3 Harring. 557; Hamlin v. Stephenson, 4 Dana, 597. As to fractions of a day, and when they will and will not be regarded in the law, see D'Obree, *Ex parte*, 8 Sumner's Ves. 83, note (a); Lester v. Garland, 15 *id.* 248, note (3); [Murfree v. Carmack, 4 Yer. 270; Berry v. Clements, 9 Hum. 312; S. C., on appeal, 11 How. 398; Plowman v. Williams, 3 Tenn. Ch. 181.]

⁴ See Wallis v. Hodson, 2 Atk. 117.

⁵ See Musgrave v. Parry, 2 Vern. 710; Story Eq. Pl. § 59, note.

⁶ 3 Atk. 209, 211; see also Wallis v. Hodson, 2 Atk. 117.

⁷ Lutterel's case, cited Prec. Ch. 50.

¹ Flight v. Bolland, 4 Russ. 298; Hargrave v. Hargrave, 12 Beav. 408; but see Allen v. Davidson, 16 Ind. 416.

² Hoyt v. Hilton, 2 Edw. Ch. 202. There must be a next friend for every application on behalf of an infant, Cox v. Wright, 9 Jur. N. S. 981; 11 W. R. 870, V. C. K.; see also Stuart v. Moore, 9 H. L. Cas. 440; 4 Macq.

the defendant may move to have it dismissed with costs, to be paid by the solicitor. In a case, however, where a bill was filed by the plaintiff as an adult, and it was afterwards discovered that he was an infant at the time of filing the bill, and still continued so, whereupon the defendant moved that the bill might be dismissed, with costs to be paid by the plaintiff's solicitor, the Vice-Chancellor made an order that the plaintiff should be at liberty to amend his bill, by inserting a next friend.³

When an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the Court of Chancery, his nearest relation is supposed to be the person who will take him *under his protection, and institute a suit to assert his rights; ^{*69} and it is for this reason that the person who institutes a suit on behalf of an infant is termed his next friend. But, as it frequently happens that the nearest relation of the infant is the person who invades his rights, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the Court, in favor of infants, will permit any person to institute suits on their behalf;² and whoever thus acts the part which the nearest relation ought to take, is also styled the next friend of the infant, and is named as such in the bill.³ And although an infant has a guardian assigned him by the Court, or appointed by will, yet, where the infant is plaintiff, the course is not to call the guardian by that name, but to call him the next friend. But where the infant is defendant, the guardian is so called: and if the guardian be so called where the infant is plaintiff, it is no cause of demurrer.⁴

Before the name of any person is used as the next friend of an infant,

H. L. 1, 36 n.; 7 Jur. N. S. 1129. [In *Ex parte Brocklebank*, 6 Ch. Div. 358, it was held that an infant creditor may issue a debtor's summons in bankruptcy in his own name without a next friend.] An infant, by being made party to a suit, becomes thereby a ward of Court, Gynn v. Gilbard, 1 Dr. & S. 356; 7 Jur. N. S. 91; and see *Re Hodge's Trust*, 3 K. & J. 213; 3 Jur. N. S. 860. Where a plaintiff files a bill as an infant, infancy is a material allegation, and must be proved or admitted by the answer. *Boyd v. Boyd*, 6 Gill & J. 25; see *Shirley v. Hagar*, 3 Blackf. 228 and note; *Hanty v. Levin*, 5 Ham. 227.

As to the time for appointing a *prochein ami*, see *Wilder v. Ember*, 12 Wend. 191; *Matter of Frits*, 2 Paige, 374; *Fitch v. Fitch*, 18 Wend. 513; *Haines v. Oatman*, 2 Douglass, 430. In Massachusetts, the next friend will be admitted by the Court without any other record than the recital in the count. *Miles v. Boyden*, 3 Pick. 213. See also *Trevet v. Creath*, Breese, 12; *Judson v. Blanchard*, 3 Conn. 579.

The law knows no distinction between infants of tender and of mature years; and as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of

attaining his majority." *Parke B., Morgan v. Thorne*, 7 M. & W. 400, 408. In England, a *prochein ami* is treated as an officer of the Court and responsible accordingly. *Morgan v. Thorne*, 7 M. & W. 400. In this case, the rights and duties of a *prochein ami* are largely discussed. [See also *Simpson v. Alexander*, 6 Coldw. 630.]

³ *Flight v. Bolland*, 4 Russ. 298.

¹ See *Bank of the United States v. Ritchie*, 8 Peters, 128.

² *Andrews v. Cradock*, Prec. Ch. 376; see *Cross v. Cross*, 8 Beav. 455. [The father of an infant, if a proper person, is entitled, even after a decree for an account, to be substituted as next friend in place of a next friend who instituted suit without notice to him. *Woelf v. Pemberton*, 6 Ch. Div. 19.] A defendant, however, may not be next friend. *Payne v. Little*, 13 Beav. 114; *Anon.*, 11 Jur. 258, V. C. E. [But when the husband was a defendant in right of his wife, and next friend of the infant plaintiff, his name was stricken out as defendant, and the wife given liberty to defend separately. *Lewis v. Nobbs*, 8 Ch. Div. 591.]

³ *Ld. Red.* 25.

⁴ *Toth.* 173; *Wyatt's P. R.* 224; see *Holmes v. Field*, 12 Ill. 424. An infant may

he must sign a written authority to the solicitor for that purpose, which authority is filed with the bill.⁵

As any person may institute a suit on behalf of an infant, it frequently occurs that two or more suits for the same purpose are instituted in his name, by different persons, each acting as his next friend; in such cases, the Court will, where no decree has been made in any of the suits, direct an inquiry to be made at chambers as to which suit is most for his benefit; and, when that point is ascertained, will stay the proceedings in the other suits.⁶ Where no decree has been made in any of the suits,⁷ and they are all attached to the same branch of the Court, and none of them are in the paper for hearing, such inquiry will be directed on an *ex parte* motion:⁸ the Court being satisfied, in the first instance, with the allegation that the suits are for the same purpose.⁹ Where the suits are attached to different branches of the Court, an order *must be obtained, in the first instance, for *70 the transfer of one of the suits, so that they may both be before the same Judge;¹ and the order for the inquiry is obtained on special motion, of which notice must be given to the other parties to the suits.² The order for the inquiry should be made in both suits, and does not of itself stay the proceedings in the suits;³ and the amendment of one of the bills, pending the inquiry, does not stay the inquiry.⁴ When the result of the inquiry has been certified, any application that may be necessary is made by motion, on notice. Under special circumstances, the Court may, upon motion, on notice, make an order staying the suits, without directing an inquiry.⁵

If upon the inquiry, it appears that, although it would be beneficial to the infant to prosecute the first, yet it will be more beneficial to him

sue by his next friend, notwithstanding he have a guardian, if the guardian do not dissent. *Thomas v. Dike*, 11 Vt. 273; see *Trask v. Stone*, 7 Mass. 241. The general guardian of infants cannot file a bill in his own name to obtain possession of the property of his wards. But he must file it in the name of the infants, as their next friend. *Bradley v. Amidon*, 10 Paige, 235. [And if he sues in their name as their general guardian, he will be treated as a next friend. *Simpson v. Alexander*, 6 Coldw. 619.] The Court never appoints a guardian to prosecute for, but only to defend, an infant party. *Priest v. Hamilton*, 2 Tyler, 44.

⁵ 15 & 16 Vic. c. 86, § 11. In an injunction case the authority was permitted to be filed the day after an information. *Attorney-General v. Murray*, 13 W. R. 65, V. C. K. For form of authority, see Vol. III.

⁶ Ld. Red. 27; *Mortimer v. West*, 1 Swanst. 358; *Story Eq. Pl.* § 60.

⁷ *Rundle v. Rundle*, 11 Beav. 33.

⁸ For forms of motion paper, and notice of special motion, see Vol. III.

⁹ *Sullivan v. Sullivan*, 2 Mer. 40.

¹ This was the course pursued in *Knight v. Knight*, L. JJ., and M. R., 29 June, 1859,

and V. C. Stuart, 29 June, 1859, and 9 Nov. 1859. Compare *Duffort v. Arrowsmith*, 5 De G. M. & G. 434. The order for transfer is made by the L. C. or L. JJ., and the M. R. if transferred from or to the M. R. (5 Vic. c. 5, § 30), and by the L. C., or L. JJ., alone, in other cases; but the order will not be made, unless the consent of the Judges from and to whom the cause is transferred is first obtained. Such consent is usually signified, as of course, on the matter being mentioned by the counsel of the party moving. Formerly, it would seem that the order for inquiry might be made by either Court, without either of the causes being transferred, *Starten v. Bartholomew*, 5 Beav. 372.

² See *Bond v. Barnes*, 2 De G., F. & J. 387. For form of notice of motion, see Vol. III.

³ *Westby v. Westby*, 1 De G. & S. 410; 11 Jur. 764.

⁴ *Goodale v. Gawthorne*, 1 M'N. & G. 319, 323; but it is irregular, in such a case, to obtain an *order of course* to amend, *Fletcher v. Moore*, 11 Beav. 617.

⁵ *Staniland v. Staniland*, M. R., 21 Jan., 1864; and see *Frost v. Ward*, 12 W. R. 235, L. JJ.; 2 De G., J. & S. 70.

to prosecute a subsequent suit, the Court will stay the first suit, and give the next friend his costs.⁶ Where a decree has been made in any of the suits it is not usual to direct an inquiry,⁷ but the other suits will be stayed: liberty being given to each of the next friends in the stayed suits to apply for the conduct of the suit in which the decree was made.⁸ When another next friend takes upon himself to file a second bill, it is incumbent upon him to show some defect in the first suit, or a decided preference in the second; if their merits are only equal, the priority must prevail.⁹

As a check to the general license to institute suits on behalf of infants, the Court will, upon the application of the defendant, or of any person acting as next friend of the plaintiff for the purpose of the application,¹⁰ where a strong case is shown that a suit preferred in the name of an infant is not for the infant's benefit, or is instituted from improper motives, direct an inquiry concerning the propriety of the suit;¹¹ but an objection at the hearing to the propriety of the suit was held too late.¹² If, upon such inquiry, it appears that the suit is not for the benefit of the infant, either the proceedings will be stayed,¹ or else, if there is no excuse for the fact of the suit having been instituted, the bill will be dismissed with costs, to be paid by the next friend;² and in the case of *Sale v. Sale*,³ where it appeared clearly upon affidavits that the suit was commenced by the next friend, to promote his own views, and not for the benefit of the infant, Lord Langdale M. R. summarily, and without a reference to the Master, made such an order. And where an application was made, on behalf of the defendants, that the next friend of the infant plaintiff be restrained from further proceeding with the suit, and for a reference to the Master to appoint a new next friend to conduct it in his stead: which application was supported by strong affidavits, to show that the suit had in fact been instituted from improper motives, for the purpose of benefiting the solicitor, at whose request the person named as next friend (who was a stranger to the family, and had lately held the situation of farm servant or bailiff at monthly wages), had consented to act as such, the Master was directed to inquire, not only whether the suit was for the benefit of the infant, but whether the next friend was a fit and proper person to be continued in that character. The Master was also directed

⁶ *Starten v. Bartholomew*, 6 Beav. 143.

⁷ *Taylor v. Oldham*, Jac. 527; but see *Harris v. Harris*, 10 W. R. 31, V. C. K.

⁸ *Kenyon v. Kenyon*, 35 Beav. 300; and see *Frost v. Ward*, 2 De G., J. & S. 70; *Harris v. Harris*, 10 W. R. 31, V. C. K.

⁹ Per Lord Cottenham, *Campbell v. Campbell*, 2 M. & C. 30; and see *Harris v. Harris*, 10 W. R. 31, V. C. K.

¹⁰ *Guy v. Guy*, 2 Beav. 460.

¹¹ *Stevens v. Stevens*, 6 Mad. 97; *Lyons v. Blenkin*, Jac. 259; *Smallwood v. Rutter*, 9 Hare, 24. For form of notice of motion, see Vol. III.

¹² *Lacy v. Burchnall*, 3 N. R. 293.

¹ *Ld. Red. 27*; see also *Da Costa v. Da Costa*, 3 P. W. 140; *Richardson v. Miller*, 1 Sim. 133; *Fulton v. Rosevelt*, 1 Paige, 178; *Bowen v. Idley*, 1 Edw. Ch. 148; *Story Eq. Pl. § 60*. In *Da Costa v. Da Costa*, the inquiry was directed upon a petition; but the modern practice is to apply to the Court upon motion, of which notice is given to the next friend; see, however, *Anderton v. Yates*, 5 De G. & S. 202.

² *Fox v. Suwerkrop*, 1 Beav. 583.

³ 1 Beav. 586; see also *Guy v. Guy*, 2 Beav. 460; *Staniland v. Staniland*, ante, p. 70.

to inquire who would be the proper person to conduct the suit, in case the next friend was removed, and to report special circumstances.⁴ Where a decree is made in the suit, it is irregular to direct an inquiry whether any benefit has accrued to the infant from the suit, so as to make the answer to that inquiry depend on the result of the accounts directed by the decree.⁵

The result of the cases seems to be, according to the language of Lord Langdale M. R. in *Starten v. Bartholomew*,⁶ that the Court exercises a very careful discretion on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to file a bill on behalf of infants; and on the other, to prevent any abuse of that right, and any wanton expense to the prejudice of infants.⁷

No inquiry, however, as to the propriety of the suit, will be *ordered at the instigation of the next friend himself; because *72 the Court considers, that in commencing a suit, the next friend undertakes, on his own part, that the suit he has so commenced is for the benefit of the infant.¹ This rule, nevertheless, applies only to cases where an application is made for such an inquiry in the cause itself; if there is another cause pending by which the infant's property is subject to the control and disposition of the Court, such an inquiry is not only permitted, but is highly proper, when fairly and *bonâ fide* made, and may have the effect of entitling the next friend to repayment of his costs out of the infant's estate, even though the suit should turn out unfortunate, and the bill be dismissed with costs.²

If an infant is made a co-plaintiff with others in a bill, and it appears that it will be more for his benefit that he should be made a defendant, an order to strike his name out as plaintiff, and to make him a defendant, may be obtained upon motion or summons, on notice in either case;³ and an infant heir-at-law, against whose estate a charge is sought to be raised, ought to be made a defendant, and not a plaintiff, although he is interested in the charge when raised; and, where an infant heir had, under such circumstances, been made a co-plaintiff, Lord Redesdale ordered the cause to stand over, with liberty for the plaintiffs to amend, by making the heir-at-law a defendant instead of plaintiff, and thereupon to prove the settlement anew against him as a defendant.⁴ The reason given for this practice is, because an infant

⁴ *Nalder v. Hawkins*, 2 M. & K. 243; *Towsey v. Groves*, 9 Jur. N. S. 194; 11 W. R. 252, V. C. K.; see also *Clayton v. Clarke*, 2 Giff. 575; 7 Jur. N. S. 562; 9 W. R. 718, L. J.J.; and *Raven v. Kerl*, 2 Phil. 692; *Gravatt v. Tann*, 1 W. N. 327; 15 W. R. 83, M. R.; W. N. (1866) 405, L. J.J.

⁵ *Clayton v. Clarke*, 3 De G., F. & J. 682; 7 Jur. N. S. 562; 2 Giff. 575; 7 Jur. N. S. 252.

⁶ 6 Beav. 144; and see *Clayton v. Clarke*, 3 De G., F. & J. 682; 7 Jur. N. S. 562; 2 Giff. 575; 7 Jur. N. S. 252.

⁷ See *Matter of Frits*, 2 Paige, 374; *Waring v. Crane*, 2 Paige, 79.

¹ *Jones v. Powell*, 2 Mer. 141. But a reference will be directed, as to the propriety of the suit, upon the petition and affidavit of the infant that the suit was commenced without his knowledge, and that he believed it to be groundless. *Garr v. Drake*, 2 John. Ch. 542.

² *Taner v. Ivie*, 2 Ves. S. 466.

³ *Tappen v. Norman*, 11 Ves. 563; see *Le Fort v. Delafield*, 3 Edw. Ch. 32. For forms of notice of motion and summons see Vol. III.

⁴ *Plunket v. Joice*, 2 Sch. & Lef. 159.

defendant, where his inheritance is concerned, has in general a day given him, after attaining twenty-one, to show cause, if he can, against the decree, and is in some other respects privileged beyond an adult; but an infant plaintiff has no such privilege, and is as much bound as one of full age.⁵ In amicable suits, however, it is often an advantage to make an infant the plaintiff; because he may have such relief as he is entitled to, though not prayed for.⁶

Although, however, an infant is, in general, bound by a decree in a cause in which he himself is plaintiff, yet there is no instance of the

Court binding the inheritance of an infant by any discretionary
 *73 act: from this principle it follows, that where an infant *heir is plaintiff, it is not the practice to establish the will, or to declare it well proved; although, if there be no question raised concerning its validity, the Court will in many respects act upon it.¹ According to this doctrine, in *Lord Brook v. Lord Hertford*, above referred to, which was the case of a bill filed by an infant plaintiff for a partition against a co-tenant in common, although the Court decreed a partition, it would not direct any conveyance to be made until the infant plaintiff attained twenty-one;² and so in *Taylor v. Philips*,³ where it had been referred to the Master to see whether certain proposals, which had been made as to the surrender of a copyhold estate by the infant plaintiff, were reasonable, and for the infant's benefit, and the Master reported that they were so, the Court, nevertheless, would not make the order for the surrender, without inserting the words "without prejudice to the plaintiff, the infant, after he shall attain the age of twenty-one years."⁴

In general, however, where decrees are made in suits by infant plaintiffs, it is not usual to give the infant a day to show cause.⁵

When a day is given to an infant plaintiff to show cause against a decree after he comes of age, the proper course appears to be to have the cause reheard; for which purpose he must, within the period appointed by the decree, present a petition of rehearing.⁶

Though an infant is, in ordinary cases, bound by the effect of any suit or proceedings instituted on his behalf, and for his benefit, yet if there has been any mistake in the form of such suit, or of the proceed-

⁵ *Lord Brook v. Lord Hertford*, 2 P. Wms. 518; *Gregory v. Molesworth*, 3 Atk. 626; see also *Morison v. Morison*, 4 M. & C. 216; [*Davidson v. Bowden*, 5 Speed, 129; *Simpson v. Alexander*, 6 Coldw. 619.] The practice of giving infants a day to show cause is now nearly obsolete; but the present state of the law on this subject will be more suitably stated in the future chapter concerning infant defendants; see *post*, Chap. IV. § 10; and see *Seton*, 419, 686-689, and cases there cited.

⁶ See *post*, p. 73. A decree against an adult as if an infant, will not bind him, *Snow v. Hole*, 15 Sim. 161; *Green v. Badley*, 7 Beav. 271, 273.

¹ *Hills v. Hills*, 2 Y. & C. C. C. 327.

² The Court has now power, under the Trustee Act, to declare the infant a trustee, and to vest the lands, *Bowra v. Wright*, 4 De G. & S. 265; see *Seton*, 571 *et seq.*, and *post*, Chap. XXVIII. § 1.

³ 2 Ves. S. 23.

⁴ *Belt Supt. to Ves. S.* 259.

⁵ *Gregory v. Molesworth*, 3 Atk. 626; but see *Lady Effingham v. Sir John Napier*, 4 Bro. P. C. ed. Toml. 340; *Sir J. Napier v. Lady Effingham*, 2 P. Wms. 401; *Mos. 67*, for an exception to this rule, under very peculiar circumstances.

⁶ *Wyatt's P. R.* 225; see *ante*, p. 72, n. (5).

ings under it, or in the conduct of them, the Court will, upon application, permit such mistake to be rectified.⁷ Thus, an infant plaintiff may have a decree upon any matter arising from the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by his bill; and accordingly, where a bill was filed on behalf of an infant, claiming, as eldest son of his grandfather's heir-at-law, the benefit and possession of an estate, and to have an account of the rents and profits, and for general relief; and, upon the hearing, an issue was directed to try whether his father was legitimate, which the jury found he was not, so that the plaintiff's claim, as heir-at-law, was defeated: he was yet allowed to set up a claim to part of the estate, to which it appeared that he was entitled under certain deeds executed by his grandfather, but which claim was in no way raised or insisted *upon by his bill, *74 although the Court said it might have been otherwise if he had been adult.¹ And where the persons acting on behalf of an infant plaintiff, by mistake make submissions or offers on behalf of the infant, which the infant ought not to have been called upon to make, the Court will not suffer the infant to be prejudiced. Thus, where an infant plaintiff had, by mistake, submitted by her bill to pay off a mortgage, which she was not liable to pay, Sir J. Jekyll M. R. said he must take care of the infant, and not suffer her to be caught by any mistake of her agent; and, therefore, the infant was allowed to amend her bill, on paying the costs of the day.² It has been said, however, that in matters of practice, infants are in general as much bound by the conduct of the solicitor acting *bonâ fide* in their behalf as adults; ³ but it may be doubted whether they would now be bound, unless the sanction of the Court had been previously obtained; for it seems that a next friend or guardian cannot consent to the mode of taking evidence, or of any other procedure, without first obtaining the sanction of the Court, or of the Judge in chambers.⁴ The application at chambers is made by summons.⁵

It seems to have been the opinion of Lord Eldon, that facts could not be stated in a case for the opinion of a Court of Law so as to bind infants; ⁶ but this is not now of any practical importance, as the Court is now prohibited from directing a case to be stated for the opinion of any Court of Law.⁷

By Sir George Turner's Act,⁸ infants are enabled to concur in a special case.

It has been before stated⁹ that any person, who may be willing to undertake the office, may be the next friend of an infant; and it seems that even a person who has been outlawed in a civil action may fill that

⁷ Story Eq. Pl. § 59.

¹ *Stapilton v. Stapilton*, 1 Atk. 2, 6; see also *De Manneville v. De Manneville*, 10 Ves. 52, 59; *Walker v. Taylor*, 8 Jur. N. S. 681, H. of L.

² *Serle v. St. Eloy*, 2 P. Wms. 386.

³ *Tillotson v. Hargrave*, 3 Mad. 494; *Wall v. Bushby*, 1 Bro. C. C. 484, 487.

⁴ Ord. 5 Feb., 1861, r. 24.

⁵ For form of summons, see Vol. III.

⁶ *Hawkins v. Lascombe*, 2 Swanst. 392.

⁷ 15 & 16 Vic. c. 86, § 61.

⁸ 13 & 14 Vic. c. 35, §§ 4, 6.

⁹ *Ante*, pp. 37, 69.

character.¹⁰ Though it has been doubted,¹¹ it is now clear, as we have already seen,¹² that a next friend of an infant need not be a person of substance;¹³ and though there does not *appear to be any case where an infant has been allowed to sue by his next friend *in formâ pauperis*, it would seem that such a course would be permitted, on a special case being made.¹

If the next friend of an infant does not do his duty, or if any other sufficient ground be made out, the Court will, on motion or summons, on notice,² order him to be removed.³ Thus, when the next friend will not proceed with the cause, the Court will change him.⁴ And although a next friend may not have been actually guilty of any impropriety or misconduct, yet, if he is connected with the defendants in the cause in such a manner as to render it improbable that the interest of the plaintiff will be properly supported, the Court will remove such next friend, and appoint another in his place.⁵

In *Peyton v. Bond*,⁶ it appeared that the solicitor for the infants acted for the father also, and had been for ten years his confidential solicitor, and Sir Anthony Hart V. C. said, that although he was warranted by high authority in saying that in family suits it was proper that the same solicitor should be employed for all parties, yet the Court will watch with great jealousy a solicitor who takes upon himself a double responsibility; and if it sees a chance of his miscarrying, will take care, where the plaintiffs are infants, that he shall not stand in that relation to a defendant under circumstances of very adverse interest; and, upon this ground, his Honor decided that the solicitor of the father ought not to continue in the character of solicitor of the next friend.

It may be here remarked, that the next friend of an infant cannot be permitted to act as receiver in the cause; and that where an application was made on behalf of infant plaintiffs, that the next friend might be at

¹⁰ Gilb. For. Rom. 54.

¹¹ Ld. Red. 26; *Turner v. Turner*, 1 Stra. 708; 2 P. Wms. 297; 2 Eq. Ca. Ab. 238, pl. 18.

¹² *Ante*, p. 37, note 3.

¹³ *Anon.*, 1 Ves. J. 410; *Squirrel v. Squirrel*, 2 Dick. 765; *Fellows v. Barrett*, 1 Keen, 119; *Davenport v. Davenport*, 1 S. & S. 101; and see observations of V. C. Wood in *Hind v. Whitmore*, 2 K. & J. 458. In *Smith v. Floyd*, 1 Pick. 275, it was held that an infant plaintiff, who sues by *prochein ami*, is, under the statutes of Massachusetts, liable for costs; and in *Crandall v. Slaid*, 11 Met. 288, it was held that a *prochein ami*, as such, is not liable for costs; although it was suggested in the latter case by Wilde J. that this seems to be contrary to the English practice. See also *Bouche v. Ryan*, 3 Blackf. 472. But where a person, who prosecutes a suit in the name of an infant, as his next friend, is insolvent, he will be compelled, on the application of the defendant, to give security for costs. *Fulton v. Roosevelt*, 1 Paige, 178; *Dalrymple v. Lamb*, 3 Wend. 424. In *Crandall v. Slaid*, 11 Met.

288, 290, it was said by Wilde J. that in all cases, if the defendant doubts the ability of the infant to pay costs, the *prochein ami* may be compelled to indorse the writ, or to procure a sufficient indorser, or to become nonsuit. But see *Feneley v. Mahony*, 21 Pick. 212, 214.

¹ *Lindsey v. Tyrrell*, 24 Beav. 124; 3 Jur. N. S. 1014; 2 De G. & J. 7; *ante*, p. 39.

² For forms of notice of motion and summons, see Vol. III.

³ *Russell v. Sharp*, 1 Jac. & W. 482; *Lander v. Ingersoll*, 4 Hare, 596.

⁴ *Ward v. Ward*, 3 Mer. 706.

⁵ *Peyton v. Bond*, 1 Sim. 390; *Bedwin v. Asprey*, 11 Sim. 530; *Towsey v. Groves*, 9 Jur. N. S. 194; 11 W. R. 252, V. C. K.; and see *Gee v. Gee*, 12 W. R. 187, L. J.J.; *Sandford v. Sandford*, 9 Jur. N. S. 398; 11 W. R. 336, V. C. K.; *Lloyd v. Davies*, 10 Jur. N. S. 1041, M. R.; *Walker v. Crowder*, 2 Fred. Ch. 478; *Piffard v. Beebye*, 1 W. N. 268; 14 W. R. 948, V. C. K.

⁶ 1 Sim. 391.

liberty to go before the Master, and propose himself to be the receiver, Sir Thomas Plumer V. C. refused to accede to the motion, although it was consented to: observing, that it was the duty of the next friend to watch the accounts and conduct of the receiver, to be a control over him; and that the two characters were incompatible, and could not be united.⁷

If the next friend of an infant takes any proceeding in the *cause *76 which is incompatible with the advancement of the suit, such as moving to discharge an attachment issued by the solicitor in the regular progress of the cause, the Court will direct an inquiry whether it is fit that such next friend should continue in that capacity any longer.¹ But so long as the next friend continues such on the record, he is considered by the Court to be responsible for the conduct of the cause; and for this reason, Sir Thomas Plumer M. R., on a petition being presented to him on the part of the infant plaintiff, complaining of great delay in prosecuting the decree, refused to refer it to the Master to inquire into the cause of the delay, and to appoint proper persons on behalf of the infant to assist in taking the accounts: saying, that if there had been misconduct, he would assist the petitioner, but that it must be in a regular way.²

The next friend of an infant plaintiff was considered so far interested in the event of the suit, that neither he nor his wife could be examined as a witness;³ but this disability has been removed, by the recent statutes for improving the law of evidence.⁴

In general, a next friend will not be allowed to retire without giving security for the costs already incurred.⁵ And where the new next friend proposed in the notice of motion to be substituted, in the room of the one to be withdrawn, was alleged to be in indigent circumstances, and an inquiry was asked for as to whether he was a proper person to act in that capacity, with a view to his circumstances, Sir John Leach V. C. stated, as his reason for refusing such inquiry, that he would be at liberty to file a new bill.⁶

In *Melling v. Melling*,⁷ his Honor refused to allow another next friend to be substituted for the one who had up to that time conducted the suit in that capacity, and who desired to withdraw himself, without a previous reference to the Master, to inquire whether it was for the benefit of

⁷ *Stone v. Wishart*, 2 Mad. 64.

¹ *Ward v. Ward*, 3 Mer. 706.

² *Russell v. Sharp*, 1 Jac. & W. 482.

³ *Head v. Head*, 3 Atk. 511. But it has been held that a person who is made a *prochein ami* to an infant without his knowledge or consent is not disqualified from being a witness. *Barwell v. Corbin*, 1 Rand. 131; see *Lupton v. Lupton*, 2 John. Ch. 614. In a case where it appeared that the next friend of an infant plaintiff was a material witness, the Court allowed another person to be substituted in his place, upon his giving security for the costs previously incurred. *Colden v. Haskins*, 2 Edw. Ch. 311; *Helms v. Francis-*

cus, 2 Bland, 544; [*Davenport v. Davenport*, 1 S. & S. 101.]

⁴ 6 & 7 Vic. c. 85; 14 & 15 Vic. c. 99, § 2; 16 & 17 Vic. c. 83.

⁵ *Ld. Red. 27*, note 2; *Colden v. Haskins*, 3 Edw. Ch. 311. It is sometimes made a term of the order to substitute, that the substituted next friend shall give security, to be approved of by the Judge if the parties differ, to answer the defendant's costs to that time, in case any shall be awarded. See *Seton*, 1252, No. 6. The security usually given is a recognizance.

⁶ *Davenport v. Davenport*, 1 S. & S. 101.

⁷ 4 Mad. 261.

the infant that such substitution should take place, as it might be that the suit was improper, or had been improperly conducted; and the next friend was not thus *to escape from costs to which he might be liable. And in *Harrison v. Harrison*,¹ Lord Langdale M. R. observed, that "any person may commence a suit as next friend of an infant, but when once here in that character, he will not be removed, unless the Court is informed of the circumstances and respectability of the party proposed to be substituted in his place, and that such person is not interested in the subject of the suit;" and, accordingly, he required the production of an affidavit to that effect, before an order was made to substitute a new next friend: though the application was not opposed by the defendants. The application to substitute a next friend in lieu of one desirous to retire, is made by summons, on notice to the defendants.²

When, in consequence of the death, incapacity,³ or removal of the next friend of an infant, pending the suit, it becomes necessary to appoint a new next friend, the proper course of proceeding is, for the solicitor of the plaintiff to apply to the Court, or Judge at chambers, for an order appointing a new next friend in his stead,⁴ whose fitness, as we have seen, must be proved;⁵ and after such appointment, the name of the new next friend should be made use of in all subsequent proceedings where the former one, if alive, would have been named. Before the defendant has appeared, the name of the new next friend may be introduced into the record, under an order as of course to amend; and after appearance the same may be done, where the new next friend is appointed in the place of a deceased next friend,⁶ if the application for the order is made by the solicitor who acted in the suit for the deceased next friend. In other cases the order may be obtained on the plaintiff's petition, as of course, if the defendant's solicitors subscribe their consent thereto; if not, by motion upon notice, or by summons at chambers.⁷ If the plaintiff's solicitor omits to take this step within a reasonable time, the defendant may apply to the Court by motion, upon notice,⁸ for an order directing the approval of a new next friend, and for the insertion of his name as such in the proceedings.⁹ In *Large v. De Ferre*,¹⁰ the new next friend was appointed by the Chief Clerk's certificate, without further order.

¹ 5 Beav. 130; and see *Lander v. Ingersoll*, 4 Hare, 596.

² For form of summons, see Vol. III.

³ A female next friend will, on marriage, become incapacitated to act further as such.

⁴ *Westby v. Westby*, 2 C. P. Coop. t. Cot. 211.

⁵ *Harrison v. Harrison*, 5 Beav. 130.

⁶ For forms of motion paper and petition, see Vol. III.; and for the order on motion, see Seton, 1252, No. 5.

⁷ For forms of notice of motion and sum-

mons, see Vol. III.; and for the order, see Seton, 1252, No. 6.

⁸ For form of notice of motion, see Vol. III.

⁹ As to the former practice where the order was obtained on *ex parte* motion: see *Lancaster v. Thornton*, Amb. 308; *Ludolph v. Saxby*, *ibid.*; 12 Sim. 351; *Countess of Shelburne v. Ld. Inchiquin*, Amb. 398, n.; 12 Sim. 352; *Bracey v. Sandiford*, 3 Mad. 468; *Glover v. Webber*, 12 Sim. 351. For form of motion paper, see Vol. III.

¹⁰ *Braithwaite's Pr.* 558.

The order appointing the next friend must, in every case, be *served on the solicitors of the defendants in the cause, and be *78 left for entry in the cause books kept by the Clerks of Records and Writs.¹

Before appointing a new next friend, the Court or Judge requires to be satisfied of his willingness to act; and an authority signed by such next friend should be produced and filed.²

On any application on behalf of an infant plaintiff, a next friend must be named for the purposes of the application.³

Where a bill has been filed in the name of an infant, his coming of age is no abatement of the suit; ⁴ but he may elect whether he will proceed with it or not. If he goes on with the cause, all future proceedings may be carried on in his own name, and the bill need not be amended or altered; ⁵ he will also be liable to all the costs of the suit, in the same manner as he would have been had he been of age when the bill was originally filed.⁶ If he chooses to abandon the suit, he may move to dismiss it on payment of costs by himself,⁷ or he may refrain from taking any step in it; but he cannot compel the next friend to pay the costs, unless it be established that the bill was improperly filed.⁸ Therefore, where an infant, on attaining twenty-one, moved to dismiss a bill filed on his behalf, with costs to be paid by the next friend, the Court refused to make the order; but directed the bill to be dismissed, on the late infant plaintiff giving an undertaking to pay the costs, and the costs of the next friend.⁹

If the infant refrains from taking any step in the suit, he cannot be made liable to costs; thus, where the next friend of an infant died during the minority of the plaintiff, who, after he came of age, took no step in the cause, and the defendant brought the cause on again, and procured the bill to be dismissed, such dismissal was without costs; because the plaintiff, not having been liable to costs during his infancy, and never having made himself liable by taking any step in the cause after attaining twenty-one, and there being no next friend to be responsible for them, there was no person against whom the Court could make an order for payment of costs.¹⁰ In that case, the next friend, if living, would, of course, have been liable to the payment of the costs to the *defendant: the general rule being, *79

¹ Braithwaite's Pr. 558.

² For form, see Vol. III.

³ *Cox v. Wright*, 9 Jur. N. S. 981; 11 W. R. 870, V. C. K.; and see *Guy v. Guy*, 2 Beav. 460; *Furtado v. Furtado*, 6 Jur. 227, as explained by *Cox v. Wright*, 9 Jur. N. S. 981; 11 W. R. 870, V. C. K. A notice of motion should be given by the infant by the next friend, and not merely by the next friend. *Pidduck v. Boulton*, 2 Sim. N. S. 223.

⁴ *Wyatt's P. R.* 225.

⁵ *Wyatt's P. R.*; 1 Fowl. Ex. Prac. 421. The title of the suit in such case, however, is corrected, to read thenceforth thus: "A. B.,

late an infant, by C. D., his next friend, but now of full age, plaintiff."

⁶ *Coop. Eq. Pl.* 29; *Waring v. Crane*, 2 Paige, 79; *Story Eq. Pl.* § 59.

⁷ Where a decree has been made, the application should be a special motion to stay proceedings. For form of motion paper, see Vol. III.

⁸ If the bill was improperly filed, the infant may abandon the suit, and the costs will be charged upon the next friend. *Waring v. Crane*, 2 Paige, 79.

⁹ *Anon.*, 4 Mad. 461.

¹⁰ *Turner v. Turner*, 1 Stra. 708; 2 P.

that the next friend shall pay the defendant's costs of dismissing the plaintiff's bill; and so, if a motion is made on behalf of an infant plaintiff which is refused with costs, such costs must be paid by the next friend.¹

Where an infant, on coming of age, repudiates the suit, that repudiation relates back to the commencement of the suit, overriding all that has been done in it.²

An infant co-plaintiff, on coming of age, and desiring to repudiate the suit, if he takes any step, must move, on notice, not to dismiss the bill, but to have his name struck out as co-plaintiff;³ and if the next friend requires it, the late infant's name must be introduced in the future proceedings as a co-defendant.⁴

After an infant sole plaintiff comes of age, his next friend ought not to take any proceedings in the cause in the name of the plaintiff, even though they are consequential on former proceedings if the suit is to be prosecuted;⁵ but an infant co-plaintiff, on coming of age, will not be allowed to appear by another solicitor or counsel, unless he has obtained an order to change solicitors.⁶

The rule above referred to, under which a next friend is held liable to the costs of dismissing a bill, or of an unsuccessful motion, is applicable only as between the next friend and the defendant in the cause; for the Court is extremely anxious to encourage, to every possible extent, those who will stand forward in the character of next friend on behalf of infants,⁷ and will, wherever it can be done, allow the next friend the costs of any proceeding instituted by him for the infant's benefit, out of the infant's estate, provided he appears to have acted *bonâ fide* for the benefit of the infant. Therefore, where a suit was instituted on behalf of an infant, in which there was a decree made, under which the money recovered was brought into Court, and put out for the benefit of the infant plaintiff, and the defendant was ordered to pay the costs, but ran away: upon a motion by the solicitor of the plaintiff (in which the father, who was the next friend, and very poor, joined), that his costs might be paid out of the fund in Court, Lord King granted the motion, but with some reluctance,⁸ And in another case, where a supplemental bill had been filed on behalf of an infant,

for which there were apparent grounds, but which was eventually
*80 *dismissed as against one of the defendants with costs, which

Wms. 297; *Ld. Red.* 26. n. t.; and see *Dunn v. Dunn*, 7 De G., M. & G. 25; 1 Jur. N. S. 122; 3 Drew. 17; 18 Jur. 1068.

¹ *Buckley v. Puckeridge*, 1 Dick. 395. Costs must be paid by the next friend in every instance where there is no foundation for the suit. *Stephenson v. Stephenson*, 8 Hayw. 123; *Story Eq. Pl.* § 50. But see *Crandall v. Slaid*, 11 Met. 283. [*Ante* 37, n. 3.]

² *Dunn v. Dunn*, 7 De G., M. & G. 29; 1 Jur. N. S. 123, per L. J. Turner.

³ *Acres v. Little*, 7 Sim. 138; *Guy v. Guy*, 2 Beav. 460; *Cooke v. Fryer*, 4 Beav. 13. For form of notice of motion, see Vol. III; and for form of order, see *Seton*, 1253, No. 8.

⁴ *Bicknell v. Bicknell*, 32 Beav. 381; 9 Jur. N. S. 633.

⁵ *Brown v. Weatherhead*, 4 Hare, 122; *Brown v. Brown*, 11 Beav. 562.

⁶ *Swift v. Grazebrook*, 13 Sim. 185.

⁷ *Whittaker v. Marlur*, 1 Cox, 286.

⁸ *Staines v. Maddox*, Mos. 319.

were paid by the receiver in the original cause, upon a petition by the next friend to be allowed such costs out of the infant's estate in the original cause, Lord Hardwicke made the order: observing, that the next friend and the receiver had done nothing but what any man would do in his own case: and that though it had turned out unfortunately, the Court would not say that they ought to bear the costs; as if they were, nobody would undertake the management of an estate for an infant.¹

An inquiry may be directed whether it is for the benefit of the infant to proceed with a suit.² It seems, however, that such an inquiry will not be directed, on the application of the next friend, in the suit respecting which the reference is sought,³ but that the next friend must carry it on at his own risk; which appears to be a proper restraint to prevent suits of this description from being rashly undertaken; for as, on the one hand, the next friend, in case a fund should be recovered by means of the suit, has, through his solicitor's lien for his costs upon that fund,⁴ an adequate protection from losing the charge he may have been put to by means of the suit, so the risks which he runs of losing those costs, in case the suit should be unsuccessful, tends to make persons cautious in undertaking proceedings of this nature on behalf of infants, without having very good reason for anticipating a successful result.

Although the Court will so far encourage persons acting fairly or *bonâ fide* to institute proceedings on behalf of infants, or to protect them, when it is possible so to do, from all costs and expenses which they may incur by such step, a protection which it will not suffer any degree of mistake or misapprehension to deprive them of:⁵ yet, if it should turn out that the next friend has acted from improper motives, or merely to answer the purposes of spleen, the principle which guides the Court in encouraging an honest next friend, *i. e.*, the anxiety to have the affairs of infants properly taken care of, will involve a dishonest one in the expenses of his own proceeding.⁶ And so, if it should appear that, in the case of an infant, due diligence has not been exerted to acquire a proper knowledge of the facts of the case, and the bill should be dismissed, or an order discharged, upon facts which, though not known when the bill was filed, or the motion made, might have been known if proper inquiry had been made, the next friend will not be allowed the costs out of the infant's estate.¹ Thus, *81 where it appeared that a writ of *Ne exeat Regno* had been improperly obtained by the next friend, on motion supported by the

¹ *Taner v. Ivie*, 2 Ves. S. 466; *Cross v. Cross*, 8 Beav. 455.

² *Taner v. Ivie*, 2 Ves. S. 469.

³ *Jones v. Powell*, 2 Mer. 141; *ante*, p. 72.

⁴ *Staines v. Maddox*, Mos. 319.

⁵ *Whittaker v. Marlur*, 1 Cox. 286; *Anderton v. Yates*, 5 De G. & S. 202.

⁶ *Whittaker v. Marlur*, 1 Cox. 286; and see *Cross v. Cross*, 8 Beav. 455; *Clayton v. Cook*, 3 De G., F. & J. 682; 7 Jur. N. S. 562.

¹ *Pearce v. Pearce*, 9 Ves. 548.

affidavit of the infant plaintiff, by which the infant, who was of the age of eighteen years, swore positively to facts which it appeared he could not have known himself, but which he could only have been told by other persons, Lord Rosslyn discharged the order, and directed that the next friend should pay the costs of obtaining it.²

There appears to be no doubt, that a solicitor conducting a cause on the part of an infant, has the same lien upon the money recovered in the suit by his means, and at his expense, as he has in the case of an adult;³ and, therefore, if the suit is successful, the next friend is, in general, secure from being put to any charges on the infant's behalf. But it seems that a solicitor who obtains possession of papers, as solicitor to the next friend, has not any lien upon them by virtue of such possession.⁴

It is said, that where a legacy is given to an infant, the testator makes it necessary to come into this Court for directions how to lay it out; and that, therefore, such an application ought to be considered as an incumbrance on the estate, and the costs must be paid out of the assets.⁵ This rule was acted upon by Lord Alvanley M.R., in a case where the executors were plaintiffs, in which case his Lordship said that, if the testator wishes to prevent the costs of such a suit from coming out of his estate, he ought to give the legacy to a trustee for the infant; he, however, said that, for the future, he should not give the costs in such a case: for since the Legacy Act, 36 Geo. III. c. 52, § 32, the executor has nothing to do but, under that Act, to pay the legacy into Court, and then he has done; and the infant, when he comes of age, may petition for it.⁶ Before that Act, an executor could not safely pay an infant's legacy without a decree.

It is presumed that the rule above laid down will not apply, so as to prevent an infant legatee from receiving his costs, in case he is obliged to institute proceedings in consequence of the executor's omitting to avail himself of the Act to pay the money into Court, since there is no power given by the Act by which the executor can be compelled to pay the legacy without a suit; and that where the executors, though admitting assets, have refused or neglected to pay the legacy into Court, they would be decreed to pay the costs.

*82 * With respect to the right of the next friend of an infant to receive any thing beyond his taxed costs out of a general fund, in order to reimburse him for any extra expense he may have been put to, some difference of opinion appears to have existed between Lord Eldon and Sir William Grant M.R. In *Osborne v. Denne*,¹ where a

² *Roddam v. Hetherington*, 5 Ves. 91, 95.

³ *Staines v. Maddox*, Mos. 319.

⁴ *Montague on Lien*, 53; and see *Turner v. Letts*, 20 Beav. 185; 7 De G., M. & G. 243; 1 Jur. N. S. 487, 1057; *Dunn v. Dunn*, 7 De G., M. & G. 25, 29; 1 Jur. N. S. 122; 3 Drew. 17; 18 Jur. 1068.

⁵ *Anon.*, Mos. 5.

⁶ *Whopham v. Wingfield*, 4 Ves. 630. He may now apply for it by summons, where the fund or stock does not exceed 300*l.*, Ord. XXXV. 1 (2).

¹ 7 Ves. 424.

bill had been filed by a legatee on behalf of himself, and as next friend of an infant legatee, in which the usual decree was made, and the costs ordered to be taxed and paid out of the estate, an application was made to the Master of the Rolls, on behalf of the next friend, that he might in some way have costs beyond his taxed costs: either by a direction to have them taxed as between solicitor and client, or by a reference to the Master to see what extra costs he had been put to; but Sir William Grant refused to make the order: saying, that if a next friend is to a certainty to have all that exceeds the taxed costs, it would lead him to be very careless. In *Fearns v. Young*,² where an application was afterwards made to Lord Eldon for the costs of trustees, as between solicitor and client, his Lordship refused to make such an order, on the ground that where the costs of a trustee are directed to be taxed, that means as between party and party, not in the larger way; although, where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses, under the head of just allowances. His Lordship, however, added, "With regard to an infant, this requires great consideration; for as the infant himself cannot incur charges and expenses, if they cannot be claimed under just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept that office."³

SECTION VI. — *Idiots, Lunatics, and Persons of Weak Mind.*

Although, as it has been observed,⁴ in certain cases suits on behalf of idiots or lunatics may be instituted in the form of informations by the Attorney-General, yet the proper course of proceeding to assert their rights in Equity is by bill.⁵

Suits on behalf of a lunatic are usually instituted in the name of the lunatic; but as he is a person incapable in Law of taking any step on his own account, he sues by the committee of his estate, if

* any, or if none, by his next friend, who is responsible for the *83 conduct of the suit.¹ The lunatic must be named a co-plaintiff,

² 10 Ves. 184.

³ For more as to costs of infants' suits, see Beames on Costs, 69-71, 83-87.

⁴ *Ante*, p. 9.

⁵ Or, where applicable, by administration summons, under 15 & 16 Vic. c. 86, §§ 45-47; see *post*, Chap. XXIX.

¹ ["The law of the Court of Chancery undoubtedly is that, in certain cases where there is a person of unsound mind, not found so by inquisition, and therefore incapable of

invoking the protection of the Court, that protection may, in proper cases, and if and so far as it may be necessary and proper, be invoked on his behalf by any person as his next friend." Per Sir W. M. James L. J. in *Beall v. Smith*, L. R. 9 Ch. App. 85, 91; where the proceedings in such a suit were held good up to the appointment of a receiver, but the proceedings after the finding of an inquisition were treated as irregular and void. In *Halfhide v. Robinson*, L. R. 9 Ch. App.

as well in a bill as in an information, on his behalf;² where, however, the object of the suit is to avoid some transaction entered into by the lunatic on the ground of his incapacity at the time, it has been held, that a lunatic ought not to be a co-plaintiff,³ because it is a principle of Law that no man can be heard to stultify himself.⁴ This distinction was recognized and adopted in some early cases,⁵ but it would scarcely be considered important in modern times; and where a bill was brought by a lunatic and his committee, to avoid an act of the lunatic's on the ground of insanity, a demurrer, on the ground that a lunatic could not be allowed to stultify himself, was disallowed:⁶ the Lord Chan-
 *84 cellor observing, that the rule *that a lunatic should not be admitted to excuse himself on pretence of lunacy, was to be understood of acts done by the lunatic to the prejudice of others, but not of acts done by him to the prejudice of himself.

It was said by the Lord Keeper Bridgman, in the case of *Attorney-General v. Woolrich*, above referred to, that the reason why a lunatic is required to be a party to a suit instituted on his behalf is, because he

373. a bill for the partition of land in which a lunatic was one of the tenants in common, filed by the lunatic, by her uncle as next friend, was held by the same eminent Lord Justice to be "altogether irregular." "I wish it to be understood," he added, "that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate." Afterwards, in *Jones v. Lloyd*, L. R. 18 Eq. 265, which was a bill by a lunatic partner by next friend for a dissolution, settlement, and receiver, Sir G. Jessel, Master of the Rolls, thought it clear, both upon reason and authority, that an equity on the part of a lunatic may be asserted by next friend, in the absence of a committee. In addition to *Beall v. Smith*, L. R. 9 Ch. App. 85, he cites, as authority, *Light v. Light*, 25 Beav. 248; *Fisher v. Melles*, L. R. 18 Eq. 268, and the books of practice, in which, he says, "I find the proposition so laid down in the widest sense." See also *Vane v. Vane*, 2 Ch. Div. 124; and *Higginson v. Hall*, 10 Ch. Div. 235, where it was held that a defendant was entitled to an affidavit of documents from the next friend of a lunatic plaintiff. See also *Stephens v. Porter*, 11 Heisk. 348; *Norcom v. Rogers*, 1 C. E. Green, 484. On the other hand, in *Dorsheimer v. Roorback*, 3 C. E. Green, 440, Ch. Zabriskie, on motion for that purpose, ordered a bill filed in the name of an idiot, by next friend, to be taken from the file, saying: "I find no case or authority in which it is held that they (idiots and lunatics) may sue by a next friend, either a volunteer or appointed."

A liquidation petition in bankruptcy cannot be filed by a next friend in the name of the lunatic. *Ex parte Cahen*, 10 Ch. Div. 183.

In some of the United States, Courts of Equity are authorized to appoint committees of idiots and lunatics, while in other States the appointment of guardians is entrusted

to other Courts, usually the County or Probate Courts, Story Eq. Pl. § 65.] See *Matter of Wendell*, 1 John. Ch. 600; *Brasher v. Van Cortlandt*, 2 John. Ch. 242, 246. In Massachusetts, the Courts of Probate have the exclusive authority to appoint guardians of insane persons. Genl. Sts. c. 109, § 8. For Virginia, see *Bolling v. Turner*, 6 Rand. 584; Vermont, see *Smith v. Barnham*, 1 Aik. 84; New Jersey, *Dorsheimer v. Roorback*, 3 C. E. Green (N. J.), 438.

² Story, Eq. Pl. § 64 and note; see *Gorham v. Gorham*, 3 Barb. Ch. 24.

³ A lunatic is not a necessary party plaintiff with his committee, on a bill to set aside an act done by the lunatic under mental imbecility. *Ortley v. Messere*, 7 John. Ch. 139. [See *infra* 175, n. 9.]

⁴ In America, this maxim has seldom, if ever, been recognized in any of the Courts of Common Law. *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203; *Lang v. Whiddon*, 2 N. H. 435; *Seaver v. Phelps*, 11 Pick. 304; *McReight v. Aitken*, 1 Rice, 56; *Rice v. Peet*, 15 John. 503. [It is justly denounced by Mr. Justice Story, 1 Eq. Jur. § 225.] In modern times [it is abandoned in Equity, and] the English Courts of Law seem inclined as far as possible to escape from the maxim. *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Ball v. Mannin*, 3 Bligh (N. S.), 1.

The ground on which Courts of Equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise *non compos mentis*, is fraud. 1 Story Eq. Jur. § 227. [*Alston v. Boyd*, 6 Hum. 504.]

⁵ *Attorney-General v. Woolrich*, 1 Ca. in Cha. 153; *Attorney-General v. Parkhurst*, *ib.* 112.

⁶ *Ridler v. Ridler*, 1 Eq. Cas. Ab. 279, pl. 5; and see *Tothill*, 130; Story Eq. Jur. § 226.

may recover his understanding, and then he is to have his estate in his own disposition; but that it is otherwise of an idiot: from which it seems that an idiot is not a necessary party to a suit instituted on his behalf. But neither an idiot nor a lunatic can institute a suit, nor can one be instituted on his behalf, without the committee, if any, of his estate being a party, either as a co-plaintiff or as a defendant;¹ and therefore where the committee of a lunatic filed a bill on behalf of the lunatic, without making himself a co-plaintiff, Sir Thomas Plumer M.R. directed the case to stand over, with liberty to amend, by making the committee a co-plaintiff;² and in the *Bishop of London v. Nichols*,³ a bill for tithes by the bishop and sequestrator, during the incapacity of the incumbent, was dismissed, because neither the incumbent nor his committee was a party.

If a person exhibiting a bill appear upon the face of it to be either an idiot or a lunatic, and therefore incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur;⁴ but if the incapacity does not appear on the face of the bill, the defendant must take advantage of it by plea.⁵ The objection arising from lunacy extends to the whole bill, and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief; for the defendant in a bill of discovery, being entitled to costs, after a full answer, as a matter of course, would be materially injured by being compelled to answer such a bill by a person whose property is not in his own disposal, and who is therefore incapable of paying the costs.⁶

If the plaintiff became a lunatic after the institution of a suit, it * was formerly requisite that a supplemental bill should be *85 filed, in the joint names of the lunatic and of the committee of his estate, which answered the same purpose as a bill of revivor in procuring the benefit of former proceedings,¹ and if the committee of a lunatic's or idiot's estate died, after a suit had been instituted by him for the benefit of the idiot or lunatic, and a new committee was appointed, the proper way of continuing the suit was by a supplemental bill filed by the idiot or lunatic and the new committee; but under the present practice of the Court, the suit would be continued, in either of these cases, by a supplemental order or order of revivor.² After a decree, and pending proceedings under an inquiry, the Court will stay

¹ Fuller v. Lance, 1 Ca. in Cha. 19; Story Eq. Pl. § 64, and note.

² Woolfryes v. Woolfryes, Rolls, Feb. 17, 1824, MSS.

³ Bunb. 141.

⁴ Ld. Red. 153; Norcom v. Rogers, 1 C. E. Green (N. J.), 484.

⁵ Ld. Red. 153, 229; see Story Eq. Pl. § 725.

⁶ Ld. Red. 153.

¹ See Brown v. Clark, 3 Wooddeson, Lect. 378, *notis*, where the form of such a bill is stated.

² 15 & 16 Vic. c. 86, § 52, and Ord. XXXII. See Seton, 1166, 1170; Dangar v. Stewart, 9 W. R. 266, V. C. K.; Thewlis v. Farrar, cited, Seton, 1166; and see *post*, Chap. XXXIII., *Revivor and Supplement*. For forms of motion paper and petitions, see Vol. III. The practice as to the appointment of new next friends of idiots, lunatics, or persons of weak mind is the same, *mutatis mutandis*, as in the case of infants; see *ante*, pp. 75, 76.

the cause till the issue of a commission of lunacy concerning the plaintiff is known.³

A committee, previously to instituting a suit on behalf of an idiot or lunatic, should obtain the sanction of the Lord Chancellor or Lords Justices, who, by virtue of the Queen's sign manual, are intrusted with the care of lunatics. In order to obtain such sanction, a statement of facts showing the propriety of the suit should be laid before the Master in Lunacy, and a report obtained from him approving the suit; which report must be confirmed by the Lord Chancellor or Lords Justices.⁴

It may be observed here, that the Court of Chancery will not, as a matter of course, interfere to set aside contracts entered into and completed by a lunatic, without fraud in the parties dealing with him, even where such contracts are overreached by the inquisition taken in lunacy, and may be void at Law;⁵ but the interference of the Court will depend very much upon the circumstances of each particular case; and where it is impossible to exercise the jurisdiction in favor of the lunatic so as to do justice to the other party, the Court will refuse relief, and leave the lunatic to his remedy, if any, at Law.⁶ It seems also, that although a contract is entered into by a lunatic subsequent to the date from which he is found by the inquisition to have become lunatic, yet, if the fact of his being a lunatic at the time of the contract is denied by the defendant, the establishment of that fact is indispensably necessary; and formerly when the Court had any doubt upon it, it directed an issue to try it.⁷

*86 *Persons of full age, but who are incapable of acting for themselves, though neither idiots nor lunatics, have been permitted to sue by their next friend, without the intervention of the Attorney-General;¹ and it seems, that if a bill has been filed in the name of a plaintiff who, at the time of filing it, is in a state of mental incapacity,

³ Hartley v. Gilbert, 13 Sim. 596.

⁴ 16 & 17 Vic. c. 70, §§ 70-73, 91-97; and 14th Ord. in Lun. of 7th Nov., 1853, 17 Jur. Pt. II. 445; see Elmer's Prac. 42.

⁵ Price v. Berrington, 3 M. & G. 486, 490; Yauger v. Skinner, 1 McCarter (N. J.), 389.

⁶ Shelf. on Lun. 551; Niell v. Morley, 9 Ves. 478, 481, 482.

⁷ Niell v. Morley, 9 Ves. 478.

¹ *Ld. Red. 30*, cites Elizabeth Liney, a person deaf and dumb, by her next friend, against Witherly and others, in Ch.: Decree, 1 Dec., 1760; ditto on Supplem. Bill, 4 Mar. 1779. If a person have religious scruples against being a party to a suit, he may sue by his next friend. *Malin v. Malin*, 2 John. Ch. 238. A person in dotage, or an imbecile adult, may sue by next friend. *C. D. Owing's case*, 1 Bland, 373; *Bothwell v. Boushelt*, 1 Bland, 373; see *Story Eq. Pl. § 66*. As to the jurisdiction of the Court of Chancery with regard to the property of a lunatic not so found by inquisition, see *Nelson v. Duncombe*, 9 Beav. 211, 216, 219; 10 Jur. 399; *Edwards v. Abrey*, 2 C. P. Coop.

t. Cott. 177, and cases there collected; *Re Burke*, 2 De G., F. & J. 124; *Re Taylor*, *ib.* 125; *Re M'Farlane*, 2 J. & H. 673; 8 Jur. N. S. 208; *Light v. Light*, 25 Beav. 248; *Williams v. Allen*, 33 Beav. 241; *Starbuck v. Mitchell*, 1 W. N. 253, M. R.; *Re Coleman*, 1 W. N. 209, V. C. S.; and see *Seton*, 709, No. 11, and *ante*, p. 9. By the 25 & 26 Vic. c. 86, a summary jurisdiction is conferred in Lunacy over the property of an alleged insane person, for his benefit, where of small amount, without inquisition or issue; and see Ord. in Lunacy thereunder of 7 Nov., 1862, in *Elmer's Prac.* 363; 8 Jur. N. S. Pt. II. 513. In the case of a bill on behalf of a person of weak mind, as in the case of infants and married women, a written authority to use the name of the next friend must be filed with the bill, 15 & 16 Vic. c. 86, § 11. For form, see Vol. III. And see *Attorney-General v. Murray*, 13 W. R. 65, V. C. K., *ante*, pp. 13, n. (4), 69, n. (6). The next friend of a person of weak mind is, in every respect, in the same position as the next friend of an infant.

it may, on motion, be taken off the file.² If, however, a suit has been properly instituted, and the plaintiff subsequently becomes imbecile, that circumstance will not be a sufficient ground for taking the bill off the file. Thus, where a motion was made on the part of the defendant to take a bill off the file, on the ground of the plaintiff having been for some time reduced by age and infirmity to a state of mental imbecility, which rendered her incapable of instituting a suit: the circumstances of the case not appearing, in the opinion of Lord Eldon, to warrant the inference that, at the time of filing the bill, she was incompetent to authorize the proceeding, and the bill appearing to be a proper one with a view to her rights and interests, his Lordship thought, that as the suit was rightly commenced and the further prosecution of it proper, it would be a strong step even to stay the proceedings, merely because her state of mind was such that she could not revoke the authority previously given; but that to take the bill off the file, and make the answer waste paper, could not be done.³

The committee of a lunatic, and the next friend of a person of unsound mind, before he consents to any departure from the ordinary mode of taking evidence, or of any other procedure in the suit, should first obtain the sanction of the Court or Judge;⁴ and the committee should also obtain that of the Lord Chancellor or Lord Justice sitting in Lunacy.⁵

* SECTION VII. — *Married Women.*

*87

By marriage, the husband and wife become as one person in law; and upon this union depend all the legal and equitable rights and disabilities which either of them acquires or incurs by the intermarriage. One of the consequences of this unity of existence and interest between the husband and wife is, that at Common Law a married woman cannot, except in the cases mentioned below, during the continuance of her coverture, institute a suit alone; therefore, whenever it is necessary to apply to a judicial tribunal respecting her rights, the proceeding must be commenced and carried on in their joint names.¹ The excep-

² *Wartnaby v. Wartnaby*, Jac. 377; *Blake v. Smith*, Younge, 596; *Norcom v. Rogers*, 1 C. E. Green (N. J.), 484.

³ *Wartnaby v. Wartnaby*, Jac. 377; *Story Eq. Pl.* § 66.

⁴ For form of summons, see Vol. III.

⁵ Ord. 5th Feb., 1861, r. 24.

¹ See *Hilton v. Lothrop*, 46 Maine, 297; *Williams v. Coward*, 1 Grant (Penn.), 21; *Bradley v. Emerson*, 7 Vt. 369. In Massachusetts, a married woman may sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole. Genl. Sts. c. 108, § 3;

Conant v. Warren, 6 Gray, 562. If property belongs to the wife alone, as her sole and separate property, an action respecting it should be in her name alone, and her husband should not be joined. *Hennessey v. White*, 2 Allen, 48, 49. In Kentucky, a wife may sue alone in an action relating to her separate property. *Petty v. Maher*, 14 B. Mon. 246. So in New Hampshire: *Jordan v. Cummings*, 43 N. H. 134-136, under recent statutes. So by the Code of Procedure in New York; and when the action is between herself and husband, she may sue or be sued alone. In no case need she prosecute by a guardian or next friend. 2 Kent (11th ed.),

tions to this rule are: when the husband can be considered *civiliter mortuus*, and when the wife is judicially separated from her husband, or has obtained a protection order;² in which cases, the wife is looked upon as restored to her rights and capacity as a *feme sole*, and may sue alone.

With respect to what is called a civil death in law, Lord Coke says, that a deportation for ever into a foreign land, like to a profession,³ is a civil death, and that in such cases the wife may bring an action, or may be impleaded during the natural life of her husband; and so, if by an Act of Parliament the husband be attainted of treason or felony, and is banished for ever, this is a civil death, and the wife may sue as

a *feme sole*; but if the husband have judgment to be exiled but *88 for a time, which some call a *relegation*, * this is no civil death.¹

At Law, also, every person who is attainted by ordinary process of treason or felony, is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*;² and where the husband is an alien, and has left this kingdom, or has never been in this country, the wife may, during such absence, sue alone,³ although

154 note. Under the New York Acts of 1860 and 1862, a married woman, trading on her own account, may be sued alone on a note given by her in the course of her trading. *Barton v. Beer*, 35 Barb. (N. Y.) 78. Having a perfect capacity to sue, she will be held responsible for the acts of her attorney or solicitor, and for the want of ordinary diligence on her part. *Cayce v. Powell*, 20 Texas, 767. In Louisiana, in a bill by a wife to be relieved from a mortgage made by her, on the ground of her disability to contract, her husband may properly be joined with her as *prochein ami*. *Bein v. Heath*, 6 How. U. S. 228. A married woman, entitled by law to sue in her own name, may declare without alluding to her husband. *Jordan v. Cummings*, 43 N. H. 134; see *Wheaton v. Phillips*, 1 Beasley (N. J.), 221.

² 20 & 21 Vic. c. 85, §§ 21, 25, 26, 45; 21 & 22 Vic. c. 108, §§ 6-8; 27 & 28 Vic. c. 44; and see 22 & 23 Vic. c. 61, §§ 4, 5; 23 & 24 Vic. c. 144, § 6; *Re Rainsdon's Trusts*, 4 Drew. 446; 5 Jur. N. S. 55; *Re Kingsley*, 26 Beav. 84; 4 Jur. N. S. 1010; *Cook v. Fuller*, 26 Beav. 99; *Rudge v. Weedon*, 4 De G. & J. 216; 5 Jur. N. S. 723; *Bathe v. Bank of England*, 4 K. & J. 564; 4 Jur. N. S. 505; *Re Whittingham's Trusts*, 10 Jur. N. S. 818; 12 W. R. 775, V. C. W.; *Caldicott v. Baker*, 13 W. R. 449, V. C. K.; *Sealey v. Gaston*, *ib.* 577, V. C. W.

³ [The profession of a person as a nun is no longer a civil death, and does not prevent such person from dealing with property, if otherwise *sui juris*. *Metcalfe's Trusts*, 2 De G., J. & S. 122; *Evans v. Cassidy*, 11 Irish Eq. 243; *Blake v. Blake*, 4 Irish Eq. 349.]

¹ Co. Litt. 133 a.; *Story Eq. Pl.* § 61; *Wright v. Wright*, 2 Desaus. 244; *Cornwall v. Hoyt*, 7 Conn. 420; *Troughton v. Hill*, 2 Hayw. 406; *Robinson v. Reynolds*, 1 Aiken, 174.

Mr. Chancellor Kent, 2 Kent (11th ed.),

154, 155, in reference to this point, remarks, that "Lord Coke seems to put the capacity of the wife to sue as a *feme sole*, upon the ground, that the abjuration or banishment of the husband amounted to a civil death. But if the husband be banished for a limited time only, though it be no civil death, the better opinion is, that the consequences, as to the wife, are the same, and she can sue and be sued as a *feme sole*." See also *Ex parte Franks*, 1 M. & Scott, 1. In *Robinson v. Reynolds*, 1 Aiken, 174, this point was considered and the English cases ably reviewed; but the question was, by this case, still left unsettled, whether transportation or banishment of the husband by law, for a limited time only, would be sufficient to give the wife the capacity to sue and be sued as a *feme sole*. It seems, however, from the case of *Foster v. Everard*, *Craw. & Dix*, 135, that a *feme covert*, whose husband has been transported for a limited term of years, will not be allowed to sue in Equity as a *feme sole*.

² 2 B. & P. 231; 4 Esp. 27; *Bac. Ab. tit. Bar. and Feme (M)*; 9 East, 472.

³ 2 Esp. 554, 587; 1 B. & P. 357; 2 B. & P. 226; 1 Bos. & P. N. R. 80; 11 East 301; 3 Camp. 123; 5 T. R. 679, 682; 8 T. R. 545; *Gregory v. Paul*, 15 Mass. 31; *Jordan v. Cummings*, 43 N. H. 134. Where the husband had never been in the United States, and had deserted his wife in a foreign country, and she came here and maintained herself as a *feme sole*, she was held entitled to sue and be sued as a *feme sole*. *Gregory v. Paul*, 15 Mass. 31 (Rand's ed.), p. 35, n. a, and cases cited. So where the husband, a citizen of and a resident in another of the United States, compelled his wife to leave him without providing any means for her support, and she came into Massachusetts and maintained herself there, for more than twenty years, as a single woman, she was held entitled to sue as

in ordinary cases, the absence * of the husband affords no ground *89 for the wife's proceeding separately.¹

In these respects, Courts of Equity follow the rules of law.² Thus, it has been held in Equity, that where a husband has been banished for life by Act of Parliament, the wife may in all things act as a *feme sole*, as if her husband were dead, and that the necessity of the case requires that she should have such power;³ and where a husband was attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate as orphan to a free-man of London, such personal estate was decreed to the wife as a *feme sole*.⁴

In Equity, however, as well as at Law, the general rule, which requires the husband to be joined in a suit respecting the rights of his wife, prevails, except under particular circumstances, which will be hereafter pointed out; but at Law there exists a distinction between actions for property which has accrued to the wife before marriage, and actions for property which has come to her afterwards; which distinction does not prevail in Equity; for with respect to such debts and other *choses in action* as belong to the wife and continue unaltered, since the husband cannot disagree to her interest in them, and as he has only a qualified right to possess them, by reducing them into possession during her life, he is unable to maintain an action for such property without making his wife a party;⁵ but for all personal estate

a *feme sole*. *Abbot v. Bayley*, 6 Pick. 89. The principle of the above decisions has been extended still further by the Genl. Sts. of Mass. c. 108, § 29; [and c. 109, §§ 31, 32.] See Story Eq. Pl. § 61, and note to this point; 2 Kent, 155. In *Beane v. Morgan*, 4 M'Cord, 148; S. C. 1 Hill, 8, it was held, that if the husband leave the State, without the intention of returning, the wife is competent to contract, to sue, and be sued, as if she were a *feme sole*. See *Valentine v. Ford*, 2 Browne, 193; *Robinson v. Reynolds*, 1 Aiken, 174; *Troughton v. Hill*, 2 Hayw. 406; *Rhea v. Rhenner*, 1 Peters, 105; *Edwards v. Davies*, 16 John. 286; *Moore v. Stevenson*, 27 Conn. 14; [*Yeatman v. Bellmain*, 1 Tenn. Ch. 589.] In *Gregory v. Pierce*, 4 Met. 478, it was observed by Chief Justice Shaw, that "the principle is now to be considered as established in this State, as a necessary exception to the rule of the Common Law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the Commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name as a *feme sole*. It is an application of an old rule of the Common Law, which took away the disability of coverture when the husband was exiled or had abjured the realm." *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89. In the latter case, it was held, that, in this re-

spect, the residence of the husband in another State of these United States, was equivalent to a residence in any foreign State; he being equally beyond the operation of the laws of the Commonwealth and the jurisdiction of its Courts. But to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and the intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign State or country, which is held to operate as an abjuration of the realm."

A wife, who is divorced *a mensa et thoro*, may sue as a *feme sole* on causes of action arising after the divorce. *Dean v. Richmond*, 5 Pick. 461; *Pierce v. Burnham*, 4 Met. 303; see 2 Kent, 156.

¹ 11 East, 301; *Du Wahl v. Braune*, 1 H. & M. 178; 4 W. R. 646.

² See Ld. Red. 28; Story Eq. Pl. § 61; *Coop. Eq. Pl. 30*; *Calvert on Parties*, 414.

³ *Countess of Portland v. Prodggers*, 2 Vern. 104; 1 Eq. Ca. Ab. 171, pl. 1.

⁴ *Newsome v. Bowyer*, 3 P. Wms. 37.

⁵ 1 Bright, H. & W. 63, and the cases there cited, *notis*. In *Clapp v. Stoughton*, 10 Pick. 47, it was remarked by Mr. Justice Wilde: "I think the true rule is, that in all cases where the cause of action survives to the wife, the husband and wife must join,

which accrues to the wife, or to the husband and wife jointly, during marriage, and for all covenants made or entered into with them during that period, the husband may, at Law, commence proceedings in his own name; because the right of action having accrued after marriage, the husband may disagree as to his wife's interest, and make his own absolute: an intention to do which he manifests in bringing an action in his own name, when it might have been commenced in the name of both of them;⁶ and in such case it has been held, that if the husband recover a judgment for a debt due to the wife, and die before execution, his personal representative will be entitled to the benefit

*90 of it, and not the wife.⁷ *The distinction above pointed out

does not, however, as has been stated, exist in Courts of Equity, where it seems necessary that in all cases in which the husband seeks to recover the property of the wife, he should make her a party co-plaintiff with himself, whether the right to the property accrued before or after marriage.¹ Thus, in *Clarke v. Lord Angier*,² where a legacy was given to a woman whilst she was covert, and the husband, without her, exhibited a bill for it, to which the defendant demurred, on the ground that the wife ought to have been joined in the suit, the demurrer was allowed.³

[Where a married woman sues as personal representative, the husband ought to be joined as co-plaintiff with her; and if the objection is not made until the hearing, the Court will allow the bill to be amended by making husband and wife co-plaintiffs.⁴]

The ground upon which Courts of Equity require the wife to be joined as co-plaintiff with her husband in suits relating to her own property, is the parental care which such Courts exercise over those individuals who

and he cannot sue alone. This rule will go farther than any other to reconcile all the cases. In all actions for *choses in action* due to the wife before marriage, the husband and wife must join; and among all the conflicting cases, I apprehend not one can be found in which it was held, that the husband could sue alone, where the cause of action would clearly survive to the wife." See *Morse v. Earl*, 13 Wend. 271; *Bryant v. Puckett*, 3 Hay. 252.

⁶ *Id.* 62; and see Add. Cont. 761.

⁷ *Oglander v. Baston*, 1 Vern. 396; *Garrforth v. Bradley*, 2 Ves. S. 675, 677.

¹ See *Cherry v. Belcher*, 5 Stew. & P. 133; *Tribble v. Tribble*, 5 J. J. Marsh. 180; *Bradley v. Emerson*, 7 Vt. 369.

² *Freeman*, 160; *S. C. nom. Clerke v. Lord Anglesey*, Nels. 78; see also *Blount v. Bestland*, 5 Ves. 515; *Anon.*, 1 Atk. 491; *Meales v. Meales*, 5 Ves. 517, n.; *Carr v. Taylor*, 10 Ves. 574, 579.

³ *Chase v. Palmer*, 25 Maine, 348. In such case the husband and wife are necessary parties. *Schuyler v. Hoyle*, 5 John. Ch. 196; *Oldham v. Collins*, 4 J. J. Marsh. 50; *Foster v. Hall*, 2 J. J. Marsh. 546; *Griffith v. Coleman*, 5 J. J. Marsh. 600; *Pyle v. Cravens*, 4

Litt. 18. In the case of *Goddard v. Johnson*, 14 Pick. 352, at Law, it was decided that a husband may sue in his own right, after the death of his wife, for a legacy accruing to the wife during the coverture. In this case the Court said: "We think the husband might have sued alone, had the wife been still living, and consequently that this action may be sustained. It is a well settled principle that a *chose in action* accruing to the wife during coverture, vests absolutely in the husband." In *Haggood v. Houghton*, 22 Pick. 480, the Court confirmed the above decision. See *Sawyer v. Baldwin*, 20 Pick. 378; *Davis v. Newton*, 6 Met. 543-545; *Allen v. Wilkins*, 3 Allen, 322, 323; *Stevens v. Beals*, 10 Cush. 291; *Albee v. Carpenter*, 12 Cush. 382; *Jones v. Richardson*, 5 Met. 249, per Shaw C. J.

The subject of the husband's right to a legacy bequeathed to his wife, or to a distributive share in an estate, in which she is interested, is fully considered, and the authorities collected, in *Blount v. Bestland*, 5 Sumner's Ves. 515, Perkins's note (a); *Carr v. Taylor*, 10 *id.* 574, Perkins's note (c).

⁴ [*Burdick v. Garrick*, L. R. 5 Ch. App. 233.]

are not in a situation to take care of their own rights; and as it is presumed that a father would not marry his daughter without insisting upon some settlement upon her, so, those Courts, standing *in loco parentis*, will not suffer the husband to take a wife's portion, until he has agreed to make a reasonable provision for her,⁵ or until they have given the wife an *opportunity of making her election, *91 whether the property shall go to her husband, or shall be made the subject of a settlement upon her and her children.

⁵ Per Lord Hardwicke, in *Jewson v. Moulson*, 2 Atk. 419. This point is very fully considered in 2 Kent, 138 *et seq.* If the husband wants the aid of Chancery to get possession of his wife's property, or if her property be within the reach of the Court, he must do what is equitable by making a reasonable provision out of it for the maintenance of her and her children. Whether the suit for the wife's debt, legacy, or portion, be by the husband or his assignees, the result is the same, and a proper settlement on the wife must first be made of a proportion of the property. *Ibid.*; *Howard v. Moffatt*, 2 John. Ch. 206; *Duvall v. Farmers' Bank*, Maryland, 4 Gill & J. 282; *Whitesides v. Dorris*, 7 Dana, 106; *Dumond v. Magee*, 4 John. Ch. 318; *Kenney v. Udall*, 5 John. Ch. 464; *Haviland v. Bloom*, 6 John. Ch. 178; *Mumford v. Murray*, 1 Paige, 620; *Fabre v. Colden*, 1 Paige, 166; *Tucker v. Andrews*, 13 Maine, 124; *Glen v. Fisher*, 6 John. Ch. 33; *Cape v. Adams*, 1 Desaus. 567; *Heath v. Heath*, 2 Hill Ch. 104; *Rees v. Waters*, 9 Watts, 90; *Myers v. Myers*, 1 Bailey Eq. 24; *Helm v. Franciscus*, 2 Bland, 545; *Tevis v. Richardson*, 7 Monroe, 660; *Poindexter v. Jeffries*, 15 Grattan (Va.), 363. It has, at length, become the settled rule of the Courts of Equity, in New York, that they will interfere, and restrain a husband from recovering at Law his wife's property, until he makes a provision for her. *Fry v. Fry*, 7 Paige, 462; *Martin v. Martin*, 1 Hoff. Ch. 462; *Udall v. Kenney*, 3 Cowen, 590. Chancery will interfere in such case, on a bill filed by or on behalf of the wife; *Van Epps v. Van Deusen*, 4 Paige, 64; or on a petition. *Davis v. Newton*, 6 Met. 543.

The result of the cases seems to be, that whenever the interests of a married woman are brought before the Court, in opposition to the claims of her husband, they will be attended to, whoever the person applying to the Court may be. 2 Story Eq. Jur. § 1414; *Van Duzen v. Van Duzen*, 6 Paige, 366; *Davis v. Newton*, 6 Met. 543, 544. See a discussion on this subject of settlement, in such cases, in *Parsons v. Parsons*, 9 N. H. 309, 320 *et seq.*

In some of the States the power of affording such protection to the wife does not exist. *Parsons v. Parsons*, 9 N. H. 309, 320 *et seq.*; *Yoke v. Barnet*, 1 Binney, 358; *Matter of Miller*, 1 Ash. 323. In *Sawyer v. Baldwin*, 20 Pick. 387, in reference to securing a provision for the wife, in such cases, the Court remark, that the "practice prevails to some extent in New York, but is repudiated in other

States. It would seem to be repugnant to what we deem the legal rights of the husband, and would never be carried so far here as it has been in England." But in *Davis v. Newton*, 6 Met. 543, speaking of the wife's right to a suitable allowance, in such cases, the Court remark, that it "is an Equity which Courts will uphold in all cases where the husband, his creditors, or his assignees have occasion to come into Court to obtain possession of the property, and wherever a Court of Equity can, in any form, exercise jurisdiction over the subject." "The authority of the Court to make such allowance is a well-established principle of Equity, and has been recognized by this Court." Per *Shaw C. J.* in *Gardner v. Hooper*, 3 Gray, 398, 404; see *Gassett v. Grout*, 4 Met. 488.

Mr. Chancellor Kent, 2 Kent, 141, 142, remarks that, "though such a protection cannot be afforded to the wife in Pennsylvania, where there is no Court of Chancery, nor in New Hampshire, where Equity powers, to a specific extent only, are conferred by Statute upon the Supreme Court of common-law jurisdiction; yet I presume that it exists in most of the other States where Courts are established with distinct Equity powers, according to the English system, or with legal and equitable powers united, according to the more general prevailing practice in the United States. It exists in Georgia, Maryland, and Tennessee, and in the latter State protection is even afforded in their Courts of Law. *Corley v. Corley*, 22 Geo. 178; *M'Elhattan v. Howell*, 4 Hayw. 19; [*Phillips v. Hassell*, 10 Humph. 197;] *Duvall v. Farmers' Bank of Maryland*, 4 Gill & J. 282." So in Maine. *Tucker v. Andrews*, 13 Maine, 124. For other States, see *Heath v. Heath*, 2 Hill Ch. 104; *Myers v. Myers*, 1 Bailey Eq. 24; *Helm v. Franciscus*, 2 Bland, 545; *Tevis v. Richardson*, 7 Monroe, 660; *Durr v. Bowyer*, 2 M'Cord, 368; *Argenbright v. Campbell*, 3 Hen. & M. 144. In North Carolina, if the aid of a Court of Equity is required by the husband to enable him to take possession of his wife's property, he must make reasonable provision for her. But in that State the wife cannot, by a suit in Equity, stop him, though he be insolvent, from taking possession, unless her claim be founded upon a marriage settlement. *Bryan v. Bryan*, 1 Dev. Eq. 47; *Allen v. Allen*, 6 Ired. Eq. 293.

The wife's equity extends as well to real as to personal property. *Moore v. Moore*, 14 B. Mon. 259. In this last case it was allowed to her out of the proceeds of lands which descended to her during coverture; and she

This right of a wife is termed her equity to a settlement; and it attaches whenever proceedings are pending in the Court of Chancery, with reference to her personal property,¹ or her equitable interest *92 in real estate,² except as against the particular assignee of * her life-estate.¹ She may herself institute proceedings for the purpose of raising her equity;² but it cannot be enforced until the Court is about to make a decree or order directing payment, transfer, or application of the property.³

The question whether the right attaches to the wife's life-interest has been much discussed; but it is now determined that, subject to the above-mentioned exception, it does so attach.⁴

The right of a married woman to have a settlement made upon herself and her children, out of her personal property which is the subject of a suit in Equity, is totally distinct from her right by survivorship to such of her *choses in action* as have not been reduced into possession during the joint lives of herself and husband. The right by survivorship is a legal right, applying equally to her legal and equitable interest; but her right to a settlement depends upon the peculiar rule of Courts of Equity before alluded to, which, standing *in loco parentis* with regard to a *feme covert*, will not suffer the husband to take the wife's portion until he has agreed to make a reasonable provision for her and her children, unless they are satisfied that it is with her free consent that it is paid over to him.⁵ This rule of Equity is not of modern adoption, but has been recognized and acted upon from a very early period. In the case of *Tunfield v. Davenport*,⁶ which occurred in the 14 Chas. I., Lord Keeper Coventry takes notice of it; and it has been acknowledged and followed in all subsequent cases, where a wife has had a demand in her own right, and application has been made to a Court of Equity to enforce it.⁷ Where, however, the demand is not one which accrues to the

was permitted to assert this right by original bill. Where a wife joined her husband in the conveyance of lands, and the husband became insolvent before the price was paid, a suitable settlement was decreed to her out of the price. *Lay v. Brown*, 13 B. Mon. 295.

¹ Even where the fund is not in Court, see *Henry v. Ogle*, 1 C. P. Coop. t. Cott. 447.

² *Sturgis v. Champneys*, 5 M. & C. 97; *Hanson v. Keating*, 4 Hare, 1; *Wortham v. Pemberton*, 1 De G. & S. 644; but see *Gleaves v. Payne*, 1 De G., J. & S. 87. In *Smith v. Matthews*, 3 De G., F. & J. 139, it was held that the possible estate by curtesy of the husband could not be interfered with. See *Barnes v. Robinson*, 9 Jur. N. S. 245; 11 W. R. 276, V. C. S.

³ *Tidd v. Lister*, 3 De G., M. & G. 857, 861, 869; 18 Jur. 543; and see *Durham v. Crackles*, 8 Jur. N. S. 1174, V. C. W. [But a married woman is not entitled to a settlement out of her property until her debts incurred before marriage are provided for. *Carrick v. Ford*, L. R. 4 Ch. App. 247.]

² *Lady Elibank v. Montolieu*, 5 Ves. 737; and cases collected in *Bosvil v. Brander*, 1 P.

Wms. 459; *Duncombe v. Greenacre*, 2 De G., F. & J. 509; 7 Jur. N. S. 175; *Postgate v. Barnes*, 9 Jur. N. S. 456; 11 W. R. 356, V. C. S.; *Barnes v. Robinson*, 9 Jur. N. S. 245; 11 W. R. 276, V. C. S.; [*Sotheran v. Smear*, W. N. 296.]

³ *Jewson v. Moulson*, 2 Atk. 419; *De La Garde v. Lempriere*, 6 Beav. 344; *Osborne v. Morgan*, 9 Hare, 432; *Wallace v. Auldjo*, 1 Dr. & Sm. 216; 9 Jur. N. S. 687; 2 N. R. 567, L. JJ.; 1 De G., J. & S. 643.

⁴ *Sturgis v. Champneys*, 5 M. & C. 97; *Wilkinson v. Charlesworth*, 10 Beav. 324; [see *Taunton v. Morris*, 8 Ch. Div. 453, where the rule was applied, and the whole estate was settled on the wife.]

⁵ *Jewson v. Moulson*, 2 Atk. 419.

⁶ *Tothill*, 114; and see 1 *Spence Eq. Jur.* 581, 596.

⁷ *Jewson v. Moulson*, 2 Atk. 419; *Milner v. Colmer*, 2 P. Wms. 641; *Adams v. Peirce*, 3 P. Wms. 11; *Brown v. Elton*, *ib.* 202; *Harrison v. Buckle*, 1 Stra. 239; *Winch v. Page*, *Bunb.* 86; *Middlecome v. Marlow*, 2 Atk. 519.

husband in right of his wife, although he may be entitled to it under a contract made upon his marriage, yet if he alone has the right to sue for it, the equity of the wife to a settlement will not attach.⁸ Thus, where, in contemplation of marriage, the father of the intended wife covenanted to pay 1000*l.* to the husband on marriage, and also

* that his heirs, or executors, should, within six months after his death, pay the further sum of 500*l.* to the husband as the remainder of the wife's portion, it was held, that the wife was not entitled to a settlement out of the 500*l.*, as it never was her money, and was only a debt due to the husband from the father.¹

In order to ascertain whether the married woman waives her equity to a settlement, and consents to her husband taking the property, the practice of the Court is, when she is resident in London, or is willing to attend, for the Judge to examine her apart from her husband, at the time of pronouncing the decree or order disposing of the fund:² in which case, a note of the examination is made by the Registrar in Court, and is embodied in the decree or order. If the married woman is unable or unwilling to attend the Court, owing to her residence in the country or other cause, her examination may be taken by commissioners, under an order specially appointing them for this purpose.³ Such order may be made in various forms, and at different stages of the proceedings. Thus, where, on pronouncing the decree or order dealing with the fund, it is suggested by counsel that an immediate examination of the wife by commissioners is intended, the Court, to save expense, will sometimes direct the fund to be carried over to the separate account of the wife, and by the same order appoint the commissioners, reserving liberty to apply: in which case, on completion of the examination, an application for payment of the fund may be made by petition,⁴ or, in cases where there is jurisdiction at chambers, by summons.⁵ Or, the Court will direct the drawing up of the decree or order to be suspended for a few days, to afford an opportunity of taking the examination in the interval: in the latter case, an *ex parte* summons⁶ is thereupon taken out for an order to appoint the commissioners; and when the examination has been completed, the matter is mentioned again to the Court, and the decree or order is directed to be drawn up, embodying therein the result of the examination.

Where, in any case, a fund has been carried over to the wife's separate account, an application to deal with it may be made by petition,⁷ or, where there is jurisdiction at chambers, by summons.⁸ When made

⁸ *Brooke v. Hickes*, 12 W. R. 703, V. C. S.

¹ *Brett v. Forcer*, 3 Atk. 403. For case of a legacy given to husband and wife jointly, see *Atcheson v. Atcheson*, 11 Beav. 485, 488.

² On this subject see *Seton*, 657, 671; 1 Bright's H. & W. 88; 2 Story Eq. Jur. § 1418, and cases cited; *Ward v. Amory*, 1 Curtis, 419, 432; *Sperling v. Rochfort*, 8

Sumner's Ves. 175, note; *Binford v. Bawden*, 1 *id.* 512 and note (a) and cases cited.

³ See form, *Seton*, 658, No. 4.

⁴ For form, see Vol. III.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

by petition. the usual course is to get the petition answered for a day sufficiently distant to allow of the examination being taken in
 *94 the mean time; on the petition being thus answered, *an *ex parte* summons¹ is taken out at chambers for an order to appoint the commissioners, and the examination is taken thereon before the petition is heard. If the petition, in any case, is brought on before the wife is examined, an order to examine her will be made, and the petition will be ordered to stand over till the return thereto;² after such return, the petition will be placed in the paper and disposed of.

If the application for payment out is made by summons, evidence of the title to the fund should be adduced on the hearing, and the summons will be adjourned till after the examination; to procure which, a summons³ is next taken out for an order to appoint commissioners; and when the examination has been perfected, the summons to pay out is brought on again, and an order made.

The married woman may, however, attend the Court at the hearing of the petition, or the Judge at chambers, on the summons, to pay out the fund, and give her consent, so as to save the expense of an examination by commissioners.⁴

It is usual, but not essential, to appoint professional persons as commissioners; and they must not be concerned for the husband in the matter to which the examination relates; but it does not appear to be the practice to require an affidavit of their fitness, unless, perhaps, where they are to act abroad and do not seem, by their descriptions, to be legal practitioners or public functionaries. Three or four persons are ordinarily appointed, two of whom may, and usually do, act without the rest. An examination by one commissioner only is not deemed sufficient.

The married woman, on attending the commissioners, is examined by them secretly and apart from her husband,⁵ to whom, in what manner, and for what purpose she is willing and desirous that the fund should be disposed of; they read over to her the order under which the examination is taken, and explain to her its purport; the examination is taken in writing, and is signed by her; a certificate of the examination, written at the foot thereof, is then signed by the commissioners; an affidavit verifying all the signatures is made; and the examination, certificate, and affidavit⁶ are filed at the Record and Writ Clerks' Office: whence office copies are procured.

*95 Where the married woman is abroad, an order will be made *appointing commissioners resident there;¹ and the mode of taking

¹ For form, see Vol. III.

² See form of order, Seton, 658, No. 4.

³ For form, see Vol. III.

⁴ It seems a Chief Clerk has no power to take the examination of a married woman: see 15 & 16 Vic. c. 80, § 30. For form of order, where the examination is taken at chambers, see Seton, 658, No. 3.

⁵ The husband, or his solicitor, or any person connected with them, should not be present at this examination; see *Re Bendyshe*, 3 Jur. N. S. 727; 5 W. R. 816, V. C. K.

⁶ For forms, see Vol. III.; and see *Re Tasburgh*, 1 V. & B. 507.

¹ *Parsons v. Dunne*, 2 Ves. S. 60; *Bourdillon v. Adair*, 3 Bro. C. C. 237; *Gibbons v.*

and authenticating an examination out of the British dominions, is exemplified by the following case. In *Minet v. Hyde*,² the order was, that she should appear before some of the plaintiffs, and a magistrate of Leyden, to be privately examined as to her consent: such examination to be in writing, in the French or German language, and to be signed by her, and attested by notaries public, whose certificate thereof was also to be in writing, either in the French or German language. It was also ordered, that such signing and certificate should be verified by the affidavit of some credible witnesses, either in the German or French language, before a proper magistrate of Leyden; and that the examination, certificate, and affidavit should be translated into English by certain notaries public, sworn to the truth of their translation.³

Where, however, the wife is domiciled abroad, and in a country by the law of which there is no equity to a settlement, but the whole is payable to the husband, her consent is not necessary;⁴ that the law is so must, however, be proved as a fact in each case.⁵

Before a fund belonging to a married woman will be paid out of Court,⁶ an affidavit is required to be made by the husband and wife, that no settlement, or agreement for a settlement, has been made; or, if there is any settlement, or agreement, then an affidavit by them identifying the instrument, and stating that there is no other;⁷ and the instrument must be produced. Where produced in Court, the counsel of the husband and wife certifies that he has carefully perused it, and that the fund in question is not affected thereby;⁸ but where produced in chambers, an affidavit by their solicitor to the like effect is required.⁹ On an application for an order to examine the wife, unless the affidavit of no settlement be produced, the order will direct that it be made before the *examination is taken:¹ in which case, it is usual to *96 swear the affidavit before one of the commissioners appointed by

Kibbey, 7 Jur. N. S. 1298; 10 W. R. 55, V. C. K.; Wedderburn v. Wedderburn, M. R. in Chamb. 5 Aug., 1864.

² 2 Bro. C. C. 663.

³ 2 Bro. C. C. ed. Belt, p. 662, n. 1; see also Parsons v. Dunne, Belt's Sup. to Ves. S. 276.

⁴ Campbell v. French, 3 Ves. 321; Dues v. Smith, Jac. 544; Anstruther v. Adair, 2 M. & K. 513; Hitchcock v. Clendinen, 12 Beav. 534; McCormick v. Garnett, 5 De G., M. & G. 278; 18 Jur. 412; see, however, Schwabacher v. Becker, 2 Sm. & G. App. 4; but if the *feme covert* is a ward of Court, the case is different, and the Court will direct a settlement, *In re Tweedale's Settlement*, Johns. 109.

⁵ McCormick v. Garnett, *ubi sup.* In Sutherland v. Young, 5 L. T. N. S. 738, M. R., legacies of 250*l.* each to a Frenchman's daughters, married to French subjects, were ordered to be paid to the wives.

⁶ See Hough v. Ryley, 2 Cox, 157; Elrington v. Elrington, 4 Drew. 545.

⁷ For forms, see Vol. III. When the joint affidavit cannot be obtained, [as where both

husband and wife refused to join in an affidavit in favor of an assignee,] the Court has been satisfied with other evidence, Rowland v. Oakley, 14 Jur. 845, V. C. K. B.; Anon., 3 Jur. N. S. 839, V. C. W. [The fund will be paid out upon affidavit of the wife alone, and other affidavits showing that the husband is resident abroad and refused to join, or that there was difficulty in procuring the usual joint affidavit. Elliott v. Remington, 9 Sim. 502; Wilkinson v. Schneider, L. R. 9 Eq. 423.] As to the affidavit required where the wife was dead, and an affidavit of no settlement could not be obtained, see Clarke v. Woodward, 25 Beav. 455. Where the settlement was Scotch, the Court required the affidavit of a Scotch advocate that it did not affect the fund, *Re Todd*, Shand v. Kidd, 19 Beav. 582.

⁸ See form of recital thereof in Seton, 657, No. 2.

⁹ For form, see Vol. III.

¹ See form of order, Seton, 658, No. 4. The V. C. Kindersley requires the affidavit to be produced before the order to examine is made, Seton, 663.

the order, if he is competent to administer an oath in Chancery. Where the marriage is not otherwise proved, the affidavit should state the time and place of the marriage, and a certificate thereof should be exhibited.²

As a general rule, the consent of the wife will not be taken by the Court until the amount of the fund is clearly ascertained³ except where it is subject only to a deduction for costs;⁴ but her consent has been taken to the part ascertained from time to time.⁵ Formerly, it was not the practice of the Court to direct a fund belonging to a married woman to be paid out of Court at the hearing of the cause;⁶ but it was directed to be transferred to a separate account, usually entitled the account of the husband and wife; and after such transfer, a petition was presented for payment out of Court of the money so transferred.⁷ Now, however, where the wife appears in Court and consents, the fund may be directed to be paid out at the hearing of the cause, or on further consideration.⁸

If the wife be not of full age, she is incapable of giving her consent; in that case, therefore, the Court will not examine her, but will require the husband, in case he applies to this Court, for her equitable property, to make a proper settlement upon her.⁹ If the wife is of age, and persists in giving her consent, and waiving her equity to a settlement, it appears that the Court cannot refuse to act in accordance with her wish.¹⁰ In *Ex parte Higham*,¹¹ however, Lord Hardwicke considered himself entitled to object to the whole fund being paid over to the husband, who was in trade, even though the wife consented; but in the previous case of *Willats v. Cay*,¹² where the wife had appeared in Court, and being examined desired that the whole money might be paid to her husband, the Master of the Rolls, although the parties had married without the consent of the wife's relations, and the husband appeared to be

*97 insolvent, refused to refer it to the Master to consider a scheme for securing a provision for the wife: observing, that it was never done unless circumstances of fraud, or of compulsion on the part of the husband appeared; and that a wife might as well dispose of her personal estate, over which she has an absolute control, as of real estate, which she might do by joining in a fine with her husband.¹

² See form of affidavit in Vol. III.

³ *Sperling v. Rochfort*, 8 Ves. 164, 178; *Woollands v. Crowther*, 12 Ves. 174, 178; *Jernegan v. Baxter*, 6 Mad. 32; *Moss v. Dunlop*, 8 W. R. 39, V. C. W.; S. C. *nom.* Anon., 5 Jur. N. S. 1124.

⁴ *Packer v. Packer*, 1 Coll. 92; *Musgrove v. Flood*, 1 Jur. N. S. 1086, V. C. W.; *Roberts v. Collett*, 1 Sm. & G. 138.

⁵ *Powell v. Merrett*, Seton, 661.

⁶ *Campbell v. Harding*, 6 Sim. 283.

⁷ *Ibid.*

⁸ 13 & 14 Vic. c. 35, § 28; and see *ante*, p. 93.

⁹ *Stubbs v. Sargon*, 2 Beav. 496; *Abraham v. Newcombe*, 12 Sim. 566; [Postell v. Skyring, 1 Des. 158; *Cheatham v. Huff*, 2

Tenn. Ch. 616.] As to the course, where the wife is *non compos*, see *Caldecott v. Harrison*, Seton, 663.

¹⁰ See 2 Story Eq. Jur. § 1418, note; *Murray v. Lord Elibank*, 10 Sumner's Ves. 84, and note; *Ward v. Amory*, 1 Curtis, 419, 432; *Sawyer v. Baldwin*, 20 Pick. 378, 388.

¹¹ 2 Ves. S. 579. The ground of this decision appears to have been, that the lady had been a ward of Court; see also *Biddles v. Jackson*, 26 Beav. 282; 3 De G. & J. 544; 4 Jur. N. S. 1069; 5 *id.* 901; [*Longbottom v. Pearce*, 3 De G. & J. 545, note; *White v. Herrick*, L. R. 4 Ch. App. 345.]

¹² 2 Atk. 67.

¹ See *Milner v. Colmer*, 2 P. Wms. 639, 642; *Lanoy v. Athol*, 2 Atk. 444, 448; *Old-*

It would seem that, as long as the money remains in Court, the wife may claim a settlement out of it, although she has consented to its being paid to her husband; or that, at any rate, this is so where she was not aware of material circumstances at the time of giving her consent.²

It seems that, where a wife's consent has been already given upon her examination before another competent tribunal, she need not be again examined in a Court of Equity; thus, in *Campbell v. French*,³ Lord Rosslyn did not think it necessary to issue a commission to take the examination of a married woman residing in America, as she appeared to have been examined under a commission issued by the government of Virginia, and had consented to a power of attorney to receive the legacy, which had been executed by her husband. And so it has been held, that where a married woman is entitled to a share of money arising from the sale or mortgage of an estate which has been mortgaged or sold, and in order to effect such sale or mortgage she has joined in levying a fine of her share, and for that purpose has undergone the usual examination in the Court where such fine has been levied, she will be barred, by the fine, of her equity for a settlement.⁴

The right of a married woman to have a settlement made of, or out of, a fund in Court, arises, however small the fund may be; but if it is under 200*l.*, or is likely to be reduced thereto by costs,⁵ or produces less than 10*l.* a year,⁶ she may waive her equity to a settlement without being separately examined.⁷

When the Accountant-General is directed to pay or transfer any sum of money or stock to an unmarried woman, and she marries before payment or transfer, and the sum does not exceed 200*l.*, or 10*l.* a year, the Accountant-General may pay or transfer the same * to *98 the woman and her husband, upon proof of the marriage, and such affidavit of no settlement as has been mentioned above;¹ or, in case there has been a settlement, upon the affidavit of the solicitor, that in his judgment the settlement does not affect the fund.² But where the fund in Court exceeds the limit above mentioned, a special order for payment is necessary: which can be obtained at chambers, on *ex parte* summons,³ supported by the production of the order under which the fund was directed to be paid to the woman, the Accountant-General's

ham v. Hughes, *ib.* 452; Hearle v. Greenbank, 3 Atk. 695, 709; Parsons v. Dunne, 2 Ves. S. 60; Minet v. Hyde, 2 Bro. C. C. 663; Dimmock v. Atkinson, 3 Bro. C. C. 195; Ellis v. Atkinson, *ib.* 565; Hood v. Burlton, 4 Bro. C. C. 121.

² Watson v. Marshall, 17 Beav. 363; [Penfold v. Mould, L. R. 4 Eq. 562.]

³ 3 Ves. 321, 323.

⁴ May v. Roper, 4 Sim. 360; Wright v. Arnold, 14 B. Mon. 638. The wife may waive her right by permitting the conveyance: Wright v. Arnold, 14 B. Mon. 638; so by joining in a receipt for the price: Geddes *ex parte*, 4 Rich. Eq. 301; or it may be voluntarily waived: Ward v. Amory, 1 Curtis,

419; see now 3 & 4 Will. IV. c. 74, § 77, substituting an acknowledged deed for a fine: Shelford, R. P. Stat. 389.

⁵ Roberts v. Collett, 1 Sm. & G. 138; but see Sporre v. Barnaby, 10 Jur. N. S. 1142, V. C. S.

⁶ See Seton, 660; Ord. I. 1.

⁷ *Re Kincaid*, 1 Drew. 326. The case of Foden v. Finney, 4 Russ. 428, is not now binding, *Re Cutler*, 14 Beav. 220; and see Doody v. Higgins, 2 Jur. N. S. 1068, V. C. W.

¹ *Ante*, p. 95.

² Ord. I. 1, 2, 3.

³ See form in Vol. III.

certificate, and an affidavit by her and her husband of the marriage, and of no settlement;⁴ or by petition,⁵ on the like evidence, where there is no jurisdiction at chambers.

The Court will not dispense with the separate examination of the married woman, in cases where it is proposed to pay the fund to her separate receipt; as that would be, in effect, the same as payment to the husband.⁶

The rule of the Court appears to be, that the wife can only consent to part with that interest which is the creature of a Court of Equity: viz., the right which she has, in a Court of Equity, to claim a provision by way of settlement on herself and children, out of the property which, at Law, the husband could take possession of in her right.⁷ This equity arises upon the husband's legal right to present possession; and the principle has no application to a remainder or reversion, which can only be passed to the husband when it falls into possession.⁸ With respect to an interest of this description, it has been stated generally, that the Court will not allow her, by any act of hers during coverture, to bind her future rights. Without her consent, the Court will not deal with it or dispose of it at all; and her consent the Court will refuse to take.⁹ Thus, a petition, which had for its object the payment to the husband of a sum of money, to which the wife was entitled in reversion after the death of her mother, was refused.¹⁰

In *Macarmick v. Buller*,¹¹ however, Lord Kenyon M. R. made an order, upon the consent of a married woman given in Court, for the payment of trust money to her husband, which appears to be
 *99 *completely at variance with the rule laid down in the cases just cited. In that case, on the marriage of the plaintiff, a sum of 9000*l.* had been vested in trustees, upon trust to pay the interest to the husband for life, and after his death to the wife for life, and upon the death of the survivor to pay the principal to such persons as such survivor should direct; but the husband, having occasion for the money, joined with the wife in executing a deed-poll, whereby they appointed the money immediately to the husband; and upon personal examination of the wife in Court, the trustees were directed to pay the money to the husband.

Where a *feme covert* was tenant in tail, in remainder after a subsisting life-estate, of money to be laid out in land, it was held by Sir

⁴ See form in Vol. III.

⁵ *Ibid.*

⁶ *Mawe v. Heavyside*, 7 Jur. N. S. 817; 9 W. R. 649, V. C. K.; *Gibbons v. Kibbey*, 7 Jur. N. S. 1298; 10 W. R. 55, V. C. K.; [*White v. Herriek*, L. R. 4 Ch. 345;] and see *Seton*, 664; but see *Clark v. Clark*, 1 W. N. 106; 14 W. R. 449, V. C. S., where, husband consenting, fund was paid on separate receipt of wife.

⁷ *Pickard v. Roberts*, 3 Mad. 385.

⁸ *Ibid.*

⁹ Per Lord Cottenham, in *Frank v. Frank*,

3 M. & C. 178; *Woollands v. Crowcher*, 12 Sumner's Ves. 174, Perkins's note (a) and cases cited; 2 Story Eq. Jur. § 1413, and notes and cases cited; [*Wilks v. Fitzpatrick*, 1 Humph. 54.] She may, however, now release her equity, under the provisions of the 20 & 21 Vic. c. 57.

¹⁰ *Pickard v. Roberts*, 3 Mad. 384; see *Stiffe v. Everitt*, 1 M. & C. 37, 41; *Richards v. Chambers*, 10 Ves. 580; *Ritchie v. Broadbent*, 2 J. & W. 456; *Osborne v. Morgan*, 9 Hare, 434; and *post*, p. 117 *et seq.*

¹¹ 1 Cox, 357.

John Leach M. R. that she could, by an arrangement with the tenant for life, and on a private examination under the 7 Geo. IV. c. 45, consent to the payment of a portion of the money to the husband.¹ But that Act, it is to be remarked, gave to the tenant in tail in remainder an immediate right to apply, in concurrence with the tenant for life, for the payment of the money out of Court; so that the order thus made under the Act was not at variance with the rule above noticed, that the wife can only consent to part with that which the husband, in her right, has an immediate right to reduce into possession.

As a general rule, where the money has arisen from the sale of land, and is liable to be re-invested in land, the Court will take the consent of the married woman, without requiring the usual formalities on a disposition of land.²

In the case of *Whittle v. Henning*,³ the important question came before Lord Cottenham, whether a married woman, entitled under settlement to a reversionary interest in a fund in Court, could, by obtaining assignments of all the interests in the fund previous to that settled upon herself, make herself absolutely entitled to the whole fund, so as to have it paid out of Court. It was held, after *an elab- *100 orate judgment, and a review of all the cases, that she could not do so.

Where property is settled to the separate use of a married woman, her separate examination is not necessary in order to pass her interest to a purchaser. The principle upon which this rule is founded is, that she is, as to that property, a *feme sole*, and, as such, has a disposing power over it;¹ and it applies as much to reversionary property as to property in possession.² Upon the same principle, where a married woman to whom an annuity was bequeathed for her separate use, joined with her husband in assigning part of it for a valuable consider-

¹ *Re Silcock*, 3 Russ. 369. This Act is repealed by 3 & 4 Will. IV. c. 74, § 70. and provisions substituted by § 77 *et seq.*

² See *Binford v. Bowden*, 1 Ves. J. 512; *Re Silcock*, 3 Russ. 369, under the repealed Act; *Ex parte Ellison*, 2 Y. & C. Ex. 528; *Re Tyler*, 8 W. R. 540, V. C. W.; *Re Hayes*, 9 W. R. 769, V. C. K.; *Re Worthington*, *ib. n.*; *Seton*, 660, under the present Act. For other orders for payment out to tenants in tail, without a disentailing assurance, see *Sowry v. Sowry*, 8 Jur. N. S. 890, V. C. S.; *Re South Eastern Railway*, 30 Beav. 215; *Re Holden*, 1 H. & M. 445; *Re Holden*, 10 Jur. N. S. 308, V. C. S.; *Re Watson*, *ib.* 1011, L. J.J.; *Nottley v. Palmer*, L. R. 1 Eq. 241; 11 Jur. N. S. 968, V. C. K. Such an order was refused by V. C. K. in *Re Tylden*, 9 Jur. N. S. 942; but see *Re Watson*, *ubi sup.* For order for payment to the husband, on the wife's election to take money as land, see *Seton*, 660; and after a disentailing assurance and her examination, *ibid.* Where the fund was small, not exceeding 30*l.*, her examination was dispensed with, *Re Clark*, 5 N. R.

32, V. C. S.; 11 Jur. N. S. 7; 13 W. R. 401, *nom.* *Pollock v. Birmingham, Wolverhampton, and Stour Valley Railway Co.*, *Re Clarke*. As to the formalities required by the 3 & 4 Will. IV. c. 74, in the case of a married woman, see *Shelford*, R. P. Stat. 402 *et seq.*, and 717 *et seq.*; and for precedents of disentailing deeds, *ib.* Appx.; 2 *Prideaux Conv.* 431 *et seq.*

³ 2 Phil. 731; 11 Beav. 222; *Story v. Tonge*, 7 Beav. 91. [Nor, *a fortiori*, will the purchase by the husband of the life-estate entitle the wife to the property absolutely. *Caplinger v. Sullivan*, 2 Humph. 547. Or the surrender to him of such life-interest. *Goodwin v. Moore*, 4 Humph. 221. And see *infra*, 119, note 3.]

¹ Unless she is restrained from anticipation, see *Symonds v. Wilkes*, 12 W. R. 541, M. R.

² *Sturgis v. Corp*, 13 Ves. 190; and see *Keene v. Johnston*, 1 Jones & Car. 255; see *Sperling v. Rochfort*, 8 Sumner's Ves. 175 and note (a) and cases cited; 2 *Story Eq. Jur.* § 1413 and notes.

ation, and she, the husband, and the purchaser, afterwards filed a bill against the executors of the testator under whom the annuity was claimed: a doubt having occurred whether, in such a case, a decree could be taken by consent, Sir J. Leach M. R. was of opinion that it could, and directed the decree to be drawn up accordingly.³

But although, where property has been settled to the separate use of a married woman, the Court will give effect to her alienation of such property, in the same manner that it gives effect to an alienation by a *feme sole*, the rule does not extend to transactions with her husband, which are looked upon by the Court with considerable jealousy; so much so, that the Court has refused to pay the separate money of the wife to the husband, without the examination of the wife in Court.⁴ It is not, however, to be understood that a wife may not, in any case, dispose of her separate property to her husband, unless by consent in Court, or before commissioners. Several instances have occurred where wives, by acts *in pais*, have parted with separate property to their husbands.⁵ It should be observed, however, that such gifts are never to be inferred without very clear evidence.⁶

If a married woman, upon being examined apart from her husband, *refuses to give her consent to the money being paid to him, the consequence of such refusal is, that the Court directs a proper settlement to be made, generally determining at once¹ the amount to be settled, and referring it to chambers to approve of the necessary deed; and the proceedings are usually completed there, without further mention to the Court.² If the fund is small, it is usual, for the purpose of saving the expense of a deed, to settle the fund at once by the decree or order.³

It is to be remarked, that although the Court will, in general, oblige the husband to make a settlement upon his wife and children of any

³ *Stinson v. Ashley*, 5 Russ. 4; but it would seem that there must be an affidavit of no settlement, *Anon.*, 3 Jur. N. S. 839, V. C. W.

⁴ 2 Bright, H. & W. 257; *Gullan v. Trimbe*, 2 J. & W. 457, n.; *Wordsworth v. Dayrell*, 2 Jur. N. S. 631, V. C. K.; and see *Milnes v. Busk*, 2 Ves. J. 498. In *Anon.*, 3 Jur. N. S. 839, before referred to, the fund was paid to the wife on her separate receipt, without examination in Court; but, *quære*, whether this was not done in consequence of her living separated from her husband. As to the mode by which the husband can be excluded, where the wife is entitled to stock for her separate use, see *Seton*, 663. But see *Re Crump*, 34 Beav. 570, where a fund settled to the separate use of a married woman was ordered to be transferred into the joint names of herself and her husband.

⁵ *Pawlet v. Delaval*, 2 Ves. S. 663; see *Sherman v. Elder*, 1 Hilton (N. Y.), 178, 476.

⁶ *Rich v. Cockell*, 9 Ves. 369; *Harvey v. Ashley*, cited 2 Ves. S. 671; 3 Atk. 607; *Co. Litt.* by Harg. 3 a. n. A wife may bestow

her separate property upon her husband, by appointment or otherwise, as well as upon a stranger. 2 Story Eq. Jur. §§ 1395, 1396; *Methodist Epis. Church v. Jaques*, 3 John. Ch. 86-114; *Bradish v. Gibbs*, 3 John. Ch. 523; see *Smith v. Sweet*, 1 Cush. 470-473. [See, as to income of separate estate, *infra*, 186, n. 2.]

¹ *Coster v. Coster*, 9 Sim. 597, 605; *Napier v. Napier*, 1 Dr. & War. 407.

² For forms of orders, see *Seton*, 664; and for the practice at chambers, see *post*, Chap. XXIX.

³ *Seton*, 665; *Re Cutler*, 14 Beav. 220; *Bagshaw v. Winter*, 5 De G. & S. 466; *Watson v. Marshall*, 17 Beav. 363; and see abstract of order, *ib.* p. 365; *Re Kincaid*, 1 Drew. 326; *Wright v. King*, 18 Beav. 461; *Duncombe v. Greenacre*, No. 2, 29 Beav. 578; for form of summons for the settlement of a fund, see Vol. III. Where the husband refused to execute the settlement, and the trustees declined to act, the fund was ordered to remain in Court as settled, and the interest to be paid to the wife for her separate use for life, *Re Butt*, cited, *Seton*, 671.

property which he may be entitled to in right of his wife, for the recovery of which it is necessary to resort to a Court of Equity, yet, where there is no suit pending, the husband is authorized to lay hold of his wife's property, wherever he can find it.⁴

There is no doubt that, previously to a bill, a trustee who is in possession of the wife's property, real or personal, may pay the rents of the real estate to the husband, or may hand over to him the personal estate;⁵ and the Court will not, upon bill filed, recall it.⁶ But the trustee may equally refuse to pay the husband till compelled by the filing of a bill, in order that the wife may obtain the full benefit of the protection afforded her by a Court of Equity; and the circumstance that the wife joined with the husband in making the demand is of no weight whatever.⁷ Where, however, a bill has already been filed, a trustee cannot exercise his discretion upon this point; as the bill makes the Court the trustee, and takes away from the actual trustee his right of dealing with the property, without its sanction.

With respect to the nature of the settlement made by the Court, and the proportion of the interest given to the wife, no certain rule can be laid down: the amount being entirely in the discretion of the Court,⁸ and depending upon the particular circumstances of *each case. If the husband is living with her, and maintaining *102 her and her children, he will, in the absence of any special circumstances, be allowed the interest on the whole, so long as he maintains her.¹ When the husband is not living with the wife and maintaining her and her children, as when he has become bankrupt or insolvent, or has deserted her, the whole, or some portion of the fund will be settled, immediately, upon the wife and children. With regard to the amount which will be settled, it has been before observed, that this depends upon all the circumstances of each particular case;² but it may

⁴ *Jewson v. Moulson*, 2 Atk. 419; 2 Kent (11th ed.), 141; *Howard v. Moffat*, 2 John. Ch. 206; *Thomas v. Sheppard*, 2 M'Cord Ch. 36; *Matter of Hume Walker*, 1 Lloyd & G. 159, cases Temp. Plunket; 2 Story Eq. Jur. § 1403, and notes; see *Van Epps v. Van Deusen*, 4 Paige, 64; *Fry v. Fry*, 7 Paige, 462; *Wiles v. Wiles*, 3 Md. 1; *Pool v. Morris*, 29 Geo. 374.

⁵ *Murray v. Lord Elbank*, 10 Ves. 90.

⁶ *Glaister v. Hewer*, 8 Ves. 206; *Macaulay v. Philips*, 4 Ves. 15; *Murray v. Elbank*, 10 Ves. 90; 2 Story Eq. Jur. § 1410.

⁷ *Re Swan's Settlement*, 12 W. R. 738, V. C. W.; 2 H. & M. 34; but see *May v. Armstrong*, 1 W. N. 233, V. C. S.; [*Re Roberts*, W. N. 88; 17 W. R. 639.]

⁸ *Kenney v. Udall*, 5 John. Ch. 464; 2 Kent (11th ed.), 140, 141. This equity of the wife stands upon the peculiar practice of the Court, and not on any general reasoning. *Kenney v. Udall*, *supra*; 2 Story Eq. Jur. § 1407; 2 Kent (11th ed.), 140, 141.

¹ *Bullock v. Menzies*, 4 Ves. 798; *Sleech v. Thornton*, 2 Ves. S. 560. Where the husband lives with his wife, and maintains

her, and has not misbehaved, the course is to allow him to receive the interest and dividends on all property. *Kenney v. Udall*, 5 John. Ch. 464.

² The Court may, in its discretion, give the whole, or part only of the property to the wife, according to the circumstances of the case. *Kenney v. Udall*, 5 John. Ch. 464; *Haviland v. Bloom*, 6 John. Ch. 178, 180, 181. The amount of such provision must depend on circumstances, amongst which the amount of the property, the age, health, and condition of the wife, the number, age, sex, and health of her children, if any, would be fit subjects of consideration. In this respect, in a case directly before the Court, it would be proper for the Court to avail itself of the aid of a Master, to inquire into and report the circumstances, and to report what would be a suitable provision for the wife. Cases may be supposed, in which, if the property were small, and had been kept entirely distinct from that of the husband, and where the exigencies of the family were such as to require it, it would be proper to appropriate the whole of such property to the use of the

be mentioned, that the whole fund has been settled: where the husband was bankrupt, and had received large advances from the wife's father;³ where the husband deserted his wife, and contributed nothing to her support;⁴ where the husband was insolvent, and had received large sums in right of his wife;⁵ and where the husband was bankrupt, and had deserted his wife;⁶ and in the recent reports, numerous cases will be found in which, under the circumstances, the whole fund was settled.⁷

In other cases, the fund has been divided;⁸ and in the older cases *103 one-half has been frequently settled;⁹ but the rule that one-

half is generally the proportion settled, which is often referred to in the older reports, is, it would seem, not much regarded in the more recent cases;¹ where, however, the fund is under 200*l.*, it is the usual practice not to divide it.¹

The Court, however, will not permit the equity of the wife, to maintenance out of her own fortune, to be defeated by any trick or contrivance for that purpose on the part of her husband. If, therefore, as in *Colmer v. Colmer*,² he, with an intention to desert her (which he afterwards carries into effect), makes a fraudulent conveyance of his and her property, upon trust to pay his own debts, the transaction will not prejudice her right to maintenance; but the Court will follow her property into the hands of the trustees, and order her an allowance suitable to her fortune, and the circumstances of her husband, although it may be necessary, in order to effect that purpose, to resort to part of his own property so vested in trust.

It is to be observed, that the Court will, as has been shown, not only appropriate the interest of a wife's equitable property, for her support,

wife and her children. *Davis v. Newton*, 6 Met. 544. "The Court may, in its discretion, give the whole, or part only, of the property to the wife, according to the circumstances of the case." 2 Kent (11th ed., 140, 141; *Haviland v. Bloom*, 6 John. Ch. 178, 180, 181.

³ *Gardner v. Marshall*, 14 Sim. 575, 584.

⁴ *Gilchrist v. Cator*, 1 De G. & S. 188; *Re Ford*, 32 Beav. 621; 9 Jur. N. S. 740. In *Kernick v. Kernick*, 4 N. R. 533, V. C. W., where the husband had deserted the wife, but maintained their children, the whole fund was settled on her for life; but leave was reserved to him to apply, on her death, in respect of the payment to him of any part of the income during his life.

⁵ *Scott v. Spashett*, 3 M. & G. 599.

⁶ *Dunkley v. Dunkley*, 2 De G., M. & G. 390, 396.

⁷ *Re Cutler*, 14 Beav. 220; *Marshall v. Fowler*, 16 Beav. 249; *Re Kincaid*, 1 Drew. 32; *Watson v. Marshall*, 17 Beav. 362; *Francis v. Brooking*, 19 Beav. 347; *Barrow v. Barrow*, 5 De G., M. & G. 782; *Gent v. Harris*, 10 Hare. 384; *Re Wilson*, 1 Jur. N. S. 569, V. C. S.; *Koeber v. Sturgis*, 22 Beav. 588; *Re Disney*, 2 Jur. N. S. 206, V. C. W.; *Re Welchman*, 1 Giff. 31; 5 Jur. N. S. 866; *Smith v. Smith*, 3 Giff. 121; *Ward v. Yates*, 1 Dr. & S. 80; *Duncombe v. Greenacre*, 29

Beav. 578; 7 Jur. N. S. 650; *Re Tubbs*, 8 W. R. 270, V. C. K.; and see *Re Grove*, 3 Giff. 575; 9 Jur. N. S. 38; *Re Merriman*, 10 W. R. 334; *Kernick v. Kernick*, 4 N. R. 533, V. C. W. [*Taunton v. Morris*, 8 Ch. Div. 453.]

⁸ *Napier v. Napier*, 1 Dru. & War. 407; *Coster v. Coster*, 9 Sim. 597; *Ex parte Pugh*, 1 Drew. 202; *Bagshaw v. Winter*, 5 De G. & S. 466; *Walker v. Drury*, 17 Beav. 482. [*Re Suggett*, L. R. 3 Ch. App. 215.]

⁹ *Jewson v. Moulson*, 2 Atk. 417, 423; *Worrall v. Marlur*, 1 Cox, 153; 2 Dick. 647; *Brown v. Clark*, 3 Ves. 166; *Pringle v. Hodgson*, *ib.* 617, 620; *Steinmetz v. Halthin*, 1 Glyn & J. 64; *Ex parte O'Ferrall*, *ib.* 347; *Archer v. Gardner*, C. P. Coop. 340; *Spirett v. Willows*, 12 W. R. 734, V. C. S.; affirmed by L. C., L. R. 1 Ch. App. 520; 12 Jur. N. S. 538. [In *Spirett v. Willows*, L. R. 4 Ch. App. 407, the settlement made was of three-fourths of the fund.]

¹ *Re Kincaid*, 1 Drew. 326; *Ward v. Yates*, 1 Dr. & S. 80; *Archer v. Gardner*, C. P. Coop. 340; *Spirett v. Willows*, 12 W. R. 734; *Re Tubbs*, 8 W. R. 270, V. C. K.; but see *Re Grove*, 3 Giff. 575; 9 Jur. N. S. 38; *Re Grant*, 14 W. R. 191, V. C. S.

² Mos. 118, 121; see also *Atherton v. Nowell*, 1 Cox, 229.

in cases where she has been deserted by her husband, or obliged to leave him in consequence of his improper conduct towards her, but it will, under similar circumstances, if a stranger has advanced to the wife money for her maintenance, order it to be repaid to him out of her estate.³ Thus, in *Guy v. Pearkes*,⁴ where it appeared that the wife was unprovided for; that her husband, after having gone to sea and deserted her, had subsequently to his return neither cohabited with her, nor afforded her any support, but had since gone to the East Indies, and had not been again heard of; and that it was unknown whether he were living or dead; and it also appeared that A. had made advances to her of 30*l.* a year during the above period, which were her only support: upon application being made to the Court, that so much of the wife's stock standing in the Accountant-General's name as would raise 210*l.* might be sold, and the proceeds paid to A. in satisfaction of his debt, and that a further sum of 50*l.* might be paid to the wife, and that the dividends upon the remaining fund might in future be paid to her for her support, the application was granted: A. having made an affidavit, that he was induced to make the advances upon the faith of being repaid them out of the above property. In pronouncing his judgment, Lord Eldon thus *expressed himself: "I have a strong impres- *104 sion upon my mind that this has been done, and, independently of precedent, I think the Court may do it: as the husband, deserting his wife, leaves her credit for necessaries, and would be liable to an action; and although execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself, except by giving his consent to the application of this fund."

If a husband be willing, and offer to maintain his wife, and she, without sufficient reason, refuse to reside with him: upon his application for the interest of her fortune, the Court will order payment of it to him, even though he decline to make a settlement upon her.¹

As to the effect of the wife's misconduct upon her equity for a maintenance, it is a trite observation, that persons appealing to a Court of justice ought to enter it with clean hands; *i.e.*, they must be worthy and proper to receive the redress which they seek: hence it follows, that if the wife has been guilty of gross misconduct, a Court of Equity will not consider her to be entitled to protection. If, therefore, she has committed adultery, or has eloped from her husband without a sufficient reason, the Court will remain passive, and not interfere at her suit to allow her a maintenance out of her equitable property.²

³ 1 Bright, H. & W. 258. [And will, moreover, enforce it as a debt against the husband. *Harris v. Lee*, 1 P. W. 482; *Deare v. Scutten*, L. R. 9 Eq. 151; *Jenner v. Morris*, 3 De G., F. & J. 45, the last expressly overruling *May v. Skey*, 16 Sim. 588.]

⁴ 18 Ves. 196; and see *Re Ford*, 32 Beav. 621; 9 Jur. N. S. 740.

¹ *Bullock v. Menzies*, 4 Ves. 798; see, however, *Eedes v. Eedes*, 11 Sim. 569; see *Fry v. Fry*, 7 Paige, 462; *Martin v. Martin*, 1 Hoff. Ch. 462; 2 Kent (11th ed.), 140; 2 Story Eq. Jur. § 1426 and notes.

² 1 Bright, H. & W. 249 *et seq.*; *Ball v. Montgomery*, 2 Ves. J. 191; *Duncan v. Campbell*, 12 Sim. 616; *Carr v. Eastbrooke*, 4 Sumner's Ves. 146, note (a); 2 Story Eq.

The question whether, in the case of a particular assignee claiming by purchase from the husband for a valuable consideration, the Court would or would not impose upon him the condition of making a settlement, was long considered doubtful;³ it is now settled, however, that such an assignee of a capital fund is bound to make a provision, out of the fund, for the wife and her children;⁴ but the assignment for value by a husband, of his wife's life-estate, will prevail against her,⁵ though he desert her, or leave her destitute,⁶ during their joint lives, but not after his death.⁷ On principle, however, it seems difficult to distinguish between the case of a capital fund and a life-interest.⁸

Although, in general, the Court allows the husband, whilst he maintains his wife, the income of her property, yet it must not be supposed that this is an absolute right on his part, or that, upon * the death of the husband, his representative is entitled to the arrears of income accrued during his life. As a general rule, the wife surviving is entitled to all property of her own not reduced into possession during the coverture; and this applies to the arrears upon life income which accrued, but were not received during the coverture.¹

It is to be observed that, under the Marriage Acts, 4 Geo. IV. c. 76, § 23, and 19 & 20 Vic. c. 119, § 19,² in the case of a marriage solemnized between parties under age, by false oath or fraud, the guilty party is to forfeit all property accruing from the marriage; but such property may, by order of the Court, made upon information filed by the Attorney-General, be secured for the benefit of the innocent party, or the issue of the marriage, as the Court shall think fit, so as to prevent the offending party from deriving any interest, in any estate, or pecuniary benefit from the marriage. Under the Act, 4 Geo. IV. c. 76, it has been held, that the Court has no discretion to mitigate the penalty, but in the case of the property being that of the wife, is bound to settle and secure all such property, past, present, and future, for the benefit of herself, or the issue of the marriage.³

It appears formerly to have been considered, that if the husband had made a settlement upon his wife upon their marriage, the wife would be debarred of her right to a further provision out of any property which might subsequently accrue to her.⁴ This is not the rule,⁵ but in

Jur. §§ 1419, 1426; but see *Re Lewin's Trusts*, 20 Beav. 378; *Kernick v. Kernick*, 4 N. R. 353, V. C. W.; *Greedy v. Lavender*, 13 Beav. 62.

³ Like *v. Beresford*, 3 Ves. 506, 511; *Pryor v. Hill*, 4 Bro. C. C. 139; *Macaulay v. Philips*, 4 Ves. 19.

⁴ *Macaulay v. Philips*, 4 Ves. 19; *Franco v. Franco*, 4 Ves. 515, 530; *Johnson v. Johnson*, 1 J. & W. 472; *Carter v. Taggart*, 5 De G. & S. 49; 1 De G., M. & G. 286; *Tidd v. Lister*, 3 De G., M. & G. 357; 18 Jur. 543; [*Wilks v. Fitzpatrick*, 1 Hum. 54.]

⁵ *Elliott v. C. dell*, 5 Mad. 149; *Stanton v. Hall*, 2 R. & M. 175.

⁶ *Tidd v. Lister*, 3 De G., M. & G. 357; 18 Jur. 543.

⁷ *Stiffe v. Everitt*, 1 M. & C. 37.

⁸ *Re Duffy*, 28 Beav. 386.

¹ *Wilkinson v. Charlsworth*, 10 Beav. 324.

² See *ante*, p. 10.

³ *Attorney-General v. Mullay*, 4 Russ. 329; 7 Beav. 351; *Attorney-General v. Lucas*, 2 Hare, 566; 2 Phil. 753; *Attorney-General v. Severn*, 1 Coll. 313.

⁴ *Lanoy v. Duke of Athol*, 2 Atk. 448; see *Poindexter v. Jeffries*, 15 Grattan (Va.), 363.

⁵ *March v. Head*, 3 Atk. 720; *Tompkins v. Ladbroke*, 2 Ves. S. 591, 595; *Stackpole v. Beaumont*, 3 Ves. 89, 98; *Lady Elibank v. Montolieu*, 5 Ves. 737; [*Barrow v. Barrow*, 18

such cases it depends upon the terms of the settlement; for if it appears, either by express words or by fair inference, that it was the intention of the parties that the husband should be the purchaser of the future as well as the present property of the wife, the Court will not require the husband to make an additional settlement.⁶ In such cases, however, the settlement, for this purpose, must either express it to be in consideration of the wife's fortune, or the contents of it, altogether, must import it, and plainly import it, as much as if it were expressed.⁷ But in *determining the amount to be settled, any previous set- *106 tlement is always taken into consideration;¹ as is also the amount of property received by the husband in right of his wife.²

The wife's equity to a settlement is not for her benefit only, but for that of herself and children;³ and though, as has been before stated,⁴ she may, upon her examination, waive it, she cannot take the benefit of it for herself, and relinquish it on behalf of her children.

But though the equity which compels the husband to make a settlement out of the wife's personal estate is the right of the children, as well as of the wife, yet it does not survive to the children, after her death;⁵ but in such case, the whole fund will go to the husband by survivorship.⁶ It has been thought that Sir Thomas Sewell M. R. in the case of *Cockel v. Phipps*,⁷ acted in direct contradiction to Lord Northington's decision upon this point in *Scriven v. Tapley*. It appears, however, from the very elaborate judgment of Sir Thomas Plumer V. C. in *Lloyd v. Williams*,⁸ that the former case has been erroneously reported, and that it does not bear upon the question.

In *Murray v. Lord Elibank*,⁹ and particularly in the above-cited case of *Lloyd v. Williams*, all the previous cases, and the reasoning upon the subject, have been collected and commented upon; and it appears from them to have been the opinion, both of Lord Eldon, and of Sir Thomas Plumer, that the children have no equity after the death of the mother, unless there has been a contract, or a decree or order, for a

Beav. 529; S. C. 5 De G., M. & G. 782; *Spirett v. Willows*, 3 De G., J. & S. 293.]

⁶ *Brooke v. Hickes*, 12 W. R. 703, V. C. S. In *Haviland v. Bloom*, 6 John. Ch. 178, the rule in Equity was considered as settled, that the wife's equity to a suitable provision for the maintenance of herself and her children, out of her separate estate, living in action, was a valid right, and extended, not only to property which she owned *dum sola*, but to property descended or devised to her during coverture. A new equity arises to the wife upon property newly acquired, and attaches upon it equally as upon that which she brought with her upon marriage. In *Ex parte Beresford*, 1 Desaus. 263, the Court, after a full discussion, ordered a new settlement in favor of the wife on a new accession of fortune. See *Carr v. Taylor*, 10 Sumner's Ves. 574.

⁷ Per Lord Eldon, in *Druce v. Denison*, 6 Ves. 395.

¹ *Lady Elibank v. Montolieu*, 5 Ves. 737;

Freeman v. Fairlie, 11 Jur. 447, V. C. E.; *Re Erskine*, 1 K. & J. 302.

² *Green v. Otte*, 1 S. & S. 250, 254; *Napier v. Napier*, 1 Dr. & War. 407.

³ *Murray v. Lord Elibank*, 10 Ves. 84; *Lloyd v. Williams*, 1 Mad. 450, 459; *Re Walker*, L. & G. t. Sug. 299; *Hodgens v. Hodgens*, 4 Cl. & F. 323; 11 Bli. 62; 2 Kent, 140; *Johnson v. Johnson*, 1 J. & W. 472, *contra*, would not now, it is apprehended, be followed.

⁴ *Ante*, p. 92.

⁵ *Scriven v. Tapley*, 2 Eden. 337; *Amb. 509*; *Fenner v. Taylor*, 2 R. & M. 190; *De la Garde v. Lemprière*, 6 Beav. 344; *Baker v. Bayldon*, 8 Hare, 210; *Lovett v. Lovett*, John. 118; *Wallace v. Auldjo*, 2 N. R. 567, L. JJ.; 2 Dr. & Sm. 216; 9 Jur. N. S. 687; 1 De G., J. & S. 643; 2 Story Eq. Jur. § 1417 and note.

⁶ *Wallace v. Auldjo*, *ubi sup.*

⁷ 1 Dick. 391.

⁸ 1 Mad. 450, 464.

⁹ 10 Ves. 84, 92.

settlement, in her lifetime.¹⁰ Where there has been a decree, it appears that under the former practice, the children carried on the suit by supplemental bill, and now it is apprehended that it would be done by an order under the 52d section of 15 & 16 Vic. c. 86.

The wife may, at any time before the settlement has been finally ordered, appear in Court, or before commissioners, and waive her right, so as altogether to defeat her children.¹¹ She cannot, *107 however, *after insisting upon her right to a settlement as against her husband's assignees in bankruptcy, subsequently waive her equity, and defeat her children's interest except it be in favor of the assignees.¹ After a contract entered into on the part of the husband to make a settlement, it would seem that the wife can waive it as far as her own interest is concerned, but not for her children.²

It seems that if, after a reference to approve of a settlement, one of the parties die before the settlement be approved of by the Court, and there are no children of the marriage, the right of survivorship, as between the husband and the wife, is not affected. Thus, in *Macaulay v. Philips*,³ Lord Alvanley M. R. laid it down, that if the wife had died even after a proposal had been made by the husband under such an order, the husband would have been entitled. His Lordship, however, said, that he did not mean to determine what the case would have been if the proposal had been approved of by the Court, and a settlement ordered to be made, as perhaps then the Court would have considered it as actually made; and that he was far from determining that, in such a case, the settlement would be entirely at an end; on the contrary, he thought it would be binding, and that the accident would make no difference. However, in *Baldwin v. Baldwin*,⁴ Sir James Parker V. C. held, that after the Master had approved of a settlement, the wife, upon the death of her husband, might still repudiate the settlement, or set up her claim by survivorship.

It may be observed here, that, as a general rule, if the wife be an adulteress, living apart from her husband,⁵ a Court of Equity will not interfere, upon her application for a settlement out of her own *choses in action*. In some cases, however, under special circumstances, a settlement in her favor has been made, notwithstanding the adultery;⁶ and,

¹⁰ 1 Mad. 467; and see *Lloyd v. Mason*, 5 Hare, 149, 152; *Groves v. Clarke*, 1 Keen, 132, 136; S. C. *sub nom.* *Groves v. Perkins*, 6 Sim. 576, 584; but see *Vaughan v. Parr*, 20 Ark. 600.

¹¹ *Barrow v. Barrow*, 4 K. & J. 409, 424; and see *Rower v. Jackson*, 2 Dick. 604; *Murray v. Lord Elibank*, 10 Ves. 84; *Martin v. Mitchell*, cited, *ib.* 89; *Steinmetz v. Halthum*, 1 Glynn & J. 64.

¹ *Whitten v. Sawyer*, 1 Beav. 593; *Barker v. Lea*, 6 Mad. 330.

² *Anon.*, 2 Ves. S. 671; and *Fenner v. Taylor*, 2 R. & M. 190, reversing S. C. 1 Sim. 169; *Lovett v. Lovett*, John. 118.

³ 4 Ves. 19.

⁴ 5 De G. & S. 319; and see *Heath v. Lewis*, 10 Jur. N. S. 1093; 13 W. R. 129, V. C. S., where the wife, being subsequently divorced, was allowed to repudiate the settlement.

⁵ 1 Bright, H. & W. 252; *Carr v. Eastbrooke*, 4 Ves. 146; *Ball v. Montgomery*, 2 Ves. J. 191, 199; *Watkins v. Watkins*, 2 Atk. 97; and see judgment of L. J. Turner in *Barrow v. Barrow*, 5 De G., M. & G. 795.

⁶ *Greedy v. Lavender*, 13 Beav. 62; *Re Lewin's Trust*, 20 Beav. 378.

of course, if she is not an adulteress, her living apart from her husband is no bar to her equity.⁷ In cases of this description, the fact of the husband living apart from his wife, and not supporting her, is a reason against the fund, or the income, being paid to him;⁸ but, nevertheless, in some cases, this has been done.⁹

Where, however, female wards of Court are married without its * consent, although they afterwards live in adultery, the Court *108 will enforce a settlement:¹ because, the marriage being a contempt, the Court thereby obtained jurisdiction to commit the husband, in consequence of his misconduct, until he should make a proper settlement, and will not part with that power until that act be done, whatever may be the irregularity of the wife's conduct: which may be attributed, in some degree, to her husband's conduct in procuring such a clandestine marriage.

With reference to the form of settlement, it is to be observed, that the practice is to settle the property in trust for the wife, for her separate use, for life, without power of anticipation, and after her death, for her children; and in default of children, for her absolutely, if she survives her husband; but if she dies in his lifetime, then in trust for her husband, or his assignees.²

Having now treated of the subject of a married woman's equity to a settlement, into which we have been led in considering the ground on which the Court of Chancery requires a wife to be joined as co-plaintiff with her husband in suits relating to her own property: we may return to the subject of suits by *femes covert* generally.³ It is now settled, that all cases in which the husband and wife sue as co-plaintiffs together, or in which the husband sues as next friend of his wife, are regarded as suits of the husband alone.⁴ And upon this principle, where a mar-

⁷ Eedes v. Eedes, 11 Sim. 569; and see Kernick v. Kernick, 4 N. R. 533, V. C. W.

⁸ Carr v. Eastabrooke, 4 Ves. 146.

⁹ Ball v. Montgomery, 2 Ves. J. 191; Duncan v. Campbell, 12 Sim. 616, 635, 638.

¹ Ball v. Coutts, 1 V. & B. 292, 301, 304; *Re Walker*, L. & G. t. Sug. 299; and see, generally, as to the mode in which the Court deals with the property of a female ward marrying without consent. Field v. Moore, 7 De G., M. & G. 691; 2 Jur. N. S. 145.

² Carter v. Taggart, 1 De G., M. & G. 286; Bagshaw v. Winter, 5 De G. & S. 466; Gent v. Harris, 10 Hare, 383; Seton, 666; Ward v. Yates, 1 Dr. & S. 80; but see Spirett v. Willocks, L. R. 1 Ch. App. 420; 12 Jur. N. S. 538, S. C. [L. R. 4 Ch. App. 407], where it was held that, except under special circumstances, the ultimate remainder in default of issue should be to the husband; and see form of order, where fund was settled by the order. Watson v. Marshall, 17 Beav. 365; Duncombe v. Greenacre, No. 2, 29 Beav. 578; *Re Tubbs*, 8 W. R. 270, V. C. K.; Seton, 665; [*Re Suggett*, L. R. 3 Ch. App. 215; Croxton v. May, L. R. 9 Eq. 404; and see *ib.* 409 for order.]

³ A wife may, in a Court of Equity, sue her husband, and be sued by him. 2 Story Eq. Jur. §§ 1368, 1414; Van Duzen v. Van Duzen, 6 Paige, 366; Story Eq. Pl. § 61, and note, and cases cited to this point; Long v. White, 5 J. J. Marsh. 230; Dowell v. Covenhoven, 5 Paige, 581. [Bennett v. Winfield, 4 Heisk. 440.] A husband, who has received the rents and profits of real estate, held in trust for the separate use of the wife, who has separated from him, is rightly joined as a defendant in a bill by her against the trustees to enforce the trust. Ayer v. Ayer, 16 Pick. 327.

⁴ Wake v. Parker, 2 Keen, 59, 70; Davis v. Prout, 7 Beav. 288, 290; Johnson v. Vail, 1 McCarter (N. J.), 423. [*A fortiori*, if the wife be insane, the bill being in the joint name of husband and wife for partition and sale of her land. Stephens v. Porter, 11 Heisk. 341. And see Kerchner v. Kempton, 47 Md. 568. In Tennessee, the husband, it seems, in matters of business, represents the wife. Kindell v. Titus, 9 Heisk. 727; Stephens v. Porter, 11 Heisk. 348.] A plea of insolvency of the husband, was disallowed to a bill by him and his wife for payment of an annuity bequeathed

ried woman, having a separate interest, joins as a co-plaintiff with her husband, instead of suing by her next friend, the suit will not prejudice a future claim by the wife in respect of her separate interest;⁵ and it has been decided, that a suit by a husband and wife against the trustees of the wife's separate property, cannot be pleaded in bar to a
 *109 subsequent suit * by her by her next friend against the trustees and her husband, although the relief prayed in both suits is the same.¹

In general, therefore, where the suit relates to the separate property of the wife,² it is necessary that the bill should be filed in her name, by her next friend,³ otherwise, the defendant may demur,⁴ upon the ground that the wife might at any future time institute a new suit for the same matter, and that, upon such new suit being instituted, a decree in a cause over which her husband had the exclusive control and authority, would not operate as a valid bar against her subsequent claim.⁵ Where, however, the suit is for a *chose in action* of the wife, not settled to her separate use, the defendant cannot object to the husband's suing jointly with her as co-plaintiff; nor will her right to a settlement be prejudiced by the fact of her husband being so joined with her in the suit.

Where the wife sues by her next friend, the husband must still be a party, and it is usual to make him a defendant;⁶ but a husband having no adverse interest to his wife, may be made a co-plaintiff.⁷

for the benefit of the latter, which had fallen into possession after the insolvency, the assignees declining to interfere. *Glover v. Weedon*, 3 Jur. N. S. 903, V. C. S.

⁵ *Hughes v. Evans*, 1 S. & S. 185; *Turner v. Turner*, 2 De G., M. & G. 28, 37; *Johnson v. Vail*, 1 McCarter (N. J.), 423, 426, and cases there cited to this point.

¹ *Reeve v. Dalby*, 2 S. & S. 464. On this principle, a plea of release by the husband, to a bill by the husband and wife for property limited to her separate use, was held good. *Stooke v. Vincent*, 1 Coll. 527.

² Where the bill is filed to rectify a marriage settlement, the wife ought to be a party independently of her husband. *McGill-downey v. Pemberton*, 10 L. T. N. S. 292, V. C. W.

³ See *Hunt v. Booth*, 1 Freem. Ch. 215; *Bridges v. McKenna*, 14 Md. 258; *Knight v. Knight*, 2 Hayw. 101; *Grant v. Van Schoonhoven*, 9 Paige, 255; *Sherman v. Burnham*, 6 Barb. S. C. 403; *Heck v. Vollmer*, 29 Md. 507, 511. In *Bein v. Heath*, 6 How. U. S. 228, Mr. Justice McLean said, "Where the wife complains of the husband, and asks relief against him, she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the Court."

⁴ See *Johnson v. Vail*, 1 McCarter (N. J.), 423. [*Barrett v. Doughty*, 10 C. E. Green, 379. But, if the objection be only raised on

final hearing, an amendment will be permitted. *Paulison v. Van Iderstein*, 1 Stew. Eq. 306; *Roberts v. Evans*, 7 Ch. Div. 830. And see *Doherty v. Stevenson*, 3 Tenn. Ch. 25.]

⁵ *Wake v. Parker*, 2 Keen, 59, 70; *Story Eq. Pl. § 63*, and note; see also *Warren v. Buck*, 4 Beav. 95, as to the time when the objection can be taken by the defendant; and see *Hope v. Fox*, 1 J. & H. 456; 7 Jur. N. S. 186, where the suit related to the execution of a power vested in a married woman; and see *Me. des v. Guedalla* (No. 2), 10 W. R. 485, V. C. W. If the husband and wife join in a suit as plaintiffs, or in an answer as co-defendants, it will be considered as the suit, or the defence of the husband alone, and it will not prejudice a future claim by the wife in respect of her separate interests, nor will the wife be bound by any of the allegations therein in any future litigation. *Johnson v. Vail*, 1 McCarter (N. J.), 423; *Bird v. Davis*, 1 McCarter (N. J.), 467, 479.

⁶ *Wake v. Parker*, 2 Keen, 59; *England v. Downs*, 1 Beav. 96; *Davis v. Prout*, 7 Beav. 288, 290; and see *Hope v. Fox*, *ubi sup.*; *Richards v. Millett*, 11 W. R. 1035, M. R.; 9 Jur. N. S. 1066. The practice, when the husband improperly joins with the wife as plaintiff, is not to dismiss the bill, but to give permission to the wife to amend by adding a next friend, and making the husband a defendant; and when no objection is interposed, to decree the fund to be paid to a trustee for the use of the wife. *Johnson v. Vail*, 1 McCarter (N. J.), 423.

⁷ *Beardmore v. Gregory*, 2 H. & M. 491;

As a wife may sue her husband in respect of her separate property,⁸ so may a husband in a similar case sue his wife.⁹ Such *suit, however, can only be in respect of his wife's separate *110 estate: for a husband cannot have a discovery of his own estate against his wife.¹ In those cases where it is necessary that a suit respecting the property of a married woman should be instituted against her husband, or that the husband should be one of the defendants: as the wife, being under the disability of coverture, cannot sue alone, and she cannot sue under the protection of her husband, she must seek other protection, and the bill must be exhibited in her name, by her next friend,² who is named as such in the bill, as in the case of an infant.³ A bill, however, cannot, as in the case of an infant, be filed by a next friend on behalf of a married woman, without her consent;⁴ and if a suit should be so instituted, upon special motion, supported by her affidavit of the matter, it will be dismissed.⁵

As in the case of an infant, a written authority from the next friend to use his name must be filed with the bill.⁶ So also, in all applications

11 Jur. N. S. 363; and see *Meddowcroft v. Campbell*, 13 Beav. 184; *Platel v. Craddock*, C. P. Coop. 469, 481; *Smith v. Etches*, 1 H. & M. 558; 9 Jur. N. S. 1228; 10 *id.* 124.

⁸ See *Woodward v. Woodward*, 9 Jur. N. S. 882, L. C.; [Powell v. Powell, 9 Humph. 477.] In a suit by a wife for her separate estate, the husband is a necessary defendant. *Johnson v. Vail*, 1 McCarter (N. J.), 423.

⁹ *Warner v. Warner*, 1 Dick. 90; *Ainslie v. Medlicott*, 13 Ves. 266; and making her a defendant is an admission that the suit relates to her separate estate. *Earl v. Ferris*, 19 Beav. 67; 1 Jur. N. S. 5; 2 Story Eq. Jur. § 1368; Story Eq. Pl. § 62; [Copeland v. Granger, 3 Tenn. Ch. 487.] In a suit to set aside a will securing to the testator's daughter, who is a married woman, and to her issue, a share of the testator's property, for her separate use during coverture, the husband and wife should not join as parties plaintiff, their interests being in conflict; but the wife should be made a defendant. *Alston v. Jones*, 3 Barb. Ch. 397. Where a suit is instituted by a wife for the protection of her separate property against creditors of the husband, the husband cannot legally be joined as plaintiff, his interest claimed by the creditors being adverse to that of his wife. *Johnson v. Vail*, 1 McCarter (N. J.), 423; [Tunnard v. Littell, 8 C. E. Green, 264.] A married man may sue his wife in her character of executrix, for a debt due to him by the testator. The institution of the suit by the husband will be considered as an authority to her to be sued. *Alexander v. Alexander*, 12 La. An. 588.

¹ *Brooks v. Brooks*, Prec. Ch. 24.

² *Griffith v. Hood*, 2 Ves. S. 452; Story Eq. Pl. §§ 61, 63; *Dowell v. Covenhoven*, 5 Paige, 581; *Wood v. Wood*, 8 Wend. 357; *Garlick v. Strong*, 3 Paige, 440. Leave to file bill by a married woman without next

friend refused, although the validity of the marriage was contested. *Caldicott v. Baker*, 13 W. R. 449, V. C. K.; and see *Sealey v. Gaston*, *ib.* 577, V. C. W. A defendant cannot act as next friend, *Payne v. Little*, 13 Beav. 114; but a married woman defendant may appeal by a co-defendant as her next friend. *Elliot v. Ince*, 7 De G., M. & G. 475; 3 Jur. N. S. 597. She cannot, however, present a petition of appeal without a next friend, although another person joins in the petition, and the suit relates to her separate estate. *Picard v. Hine*, L. R. 5 Ch. Ap. 274.

³ *Ld. Red.* 28. Where the husband is under any of the disabilities enumerated, *ante*, p. 87, the wife is considered as a *feme sole*, and may sue without the intervention of a next friend; and where he is out of the jurisdiction, see *Postgate v. Barnes*, 9 Jur. N. S. 456; 11 W. R. 356, V. C. S. Any objection for want of a next friend should be made as soon as possible. *Sealey v. Gaston*, 13 W. R. 577, V. C. W.

⁴ *Ld. Red.* 28. For form of consent, see Vol. III. If she is an infant, her consent is unnecessary. *Wortham v. Pemberton*, 1 De G. & S. 644; 9 Jur. 291.

⁵ *Andrews v. Craddock*, Prec. Ch. 376; *Gilb.* 36; *Cooke v. Fryer*, 4 Beav. 13; Story Eq. Pl. § 61; *Randolph v. Dickerson*, 5 Paige, 751. The objection cannot be taken by a defendant; it must be by a next friend on behalf of the married woman. *Davies v. Whitehead*, 1 W. N. 162, M. R. For form of notice of motion, see Vol. III.

⁶ 15 & 16 Vic. c. 86, § 11. For form of authority, see Vol. III. In an injunction case, an information was allowed to be filed, on an undertaking to file the authority the following day. *Attorney-General v. Murray*, 13 W. R. 65, V. C. K. And see, as to liability of next friend, whose name had been used without his knowledge previously to

to the Court, by petition or otherwise, by a married woman with respect to her separate estate, she must apply by her next friend.⁷

*111 *The next friend of a married woman need not be a relation,¹ but he must be a person of substance, because he is liable to costs;² and in this respect there is a material difference between the next friend of a *feme covert* and of an infant: for any person may file a bill in the name of an infant, but the suit of a *feme covert* is substantially her own suit, and her next friend is selected by her.³ In the former case, therefore, as we have seen,⁴ the Court does not require that the next friend should be a person of substance, because if the friends of an infant are poor, the infant might, by such a rule, be deprived of the opportunity of asserting his right; but in the case of a *feme covert*, as the object for which a next friend is required is, that he may be answerable for the costs,⁵ the Court expects that the person she selects to fill that office should be one who can pay the costs, if it should turn out that the proceeding is ill-founded; and, therefore, if the next friend is in insolvent circumstances, it will order the suit to be stayed until he gives security for costs.⁶

It is obvious that cases might arise where the rule, that the next friend of a *feme covert* must be a person of substance, would be, practically, a denial of justice. In such cases the Court, as we have seen,⁷ allows her to sue, or continue a suit, without a next friend; and, if need be, *in formâ pauperis*;⁸ or to present a petition, in a case where the Court has jurisdiction without suit.⁹

If the next friend of a married woman dies, or becomes incapable of acting, or if for any reason the plaintiff desires to remove her next

this Act, *Bligh v. Tredgett*, 5 De G. & S. 74.

⁷ *Re Waugh*, 15 Beav. 508; but she may apply without a next friend, where she has obtained a protection order under 20 & 21 Vic. c. 85, § 21. *Bathe v. Bank of England*, 4 K. & J. 564; 4 Jur. N. S. 505; *Re Rainsdon*, 5 Jur. N. S. 55, V. C. K.; 4 Drew. 446. If a motion on behalf of a married woman be made without a next friend, the solicitor instructing may be ordered to pay the costs. *Pearse v. Cole*, 16 Jur. 214, V. C. K.

¹ The husband may be joined with his wife, as next friend, in a suit in which he has no interest, in *Louisiana. Bein v. Heath*, 6 How. U. S. 228. See *Johnson v. Vail*, 1 McCarter (N. J.), 423.

² *Anon.*, 1 Atk. 570; *Pennington v. Alvin*, 1 S. & S. 264; *Drinan v. Mannix*, 3 Dr. & War. 154; [*Beech v. Sleddon*, 39 L. J. Ch. 123;] *Jones v. Fawcett*, 2 Phil. 278; *Stevens v. Williams*, 1 Sim. N. S. 545; *Wilton v. Hill*, 2 De G., M. & G. 807-809; *Hind v. Whitmore*, 2 K. & J. 458, where all the cases are reviewed; *Re Wills*, 9 Jur. N. S. 1225; 12 W. R. 97, V. C. S.; *Elliott v. Ince*, 7 De G., M. & G. 475; 3 Jur. N. S. 597; see also *Dowden v. Hook*, 8 Beav. 399, 402, which must now be looked upon as overruled.

³ *Gambie v. Atlee*, 2 De G. & S. 745; but

see, where she is an infant, *Wortham v. Pemberton*, 1 De G. & S. 644; 9 Jur. 291.

⁴ *Ante*, p. 74.

⁵ See *Re Wills*, 9 Jur. N. S. 1225; 12 W. R. 97, V. C. S.

⁶ *Smith v. Etches*, 1 H. & M. 711; 9 Jur. N. S. 1228; 10 *id.* 124. A next friend has been ordered to give security for costs, though the husband, who had, however, no substantial interest, was a co-plaintiff. *S. C.*; but see *Caldicott v. Baker*, 13 W. R. 449, V. C. K. [See as to waiver of right to apply for security, *Macann v. Borradaile*, W. N. (1867), 252; 16 W. R. 74, 175.]

⁷ *Ante*, p. 37.

⁸ *Wellesley v. Wellesley*, 16 Sim. 1; 1 De G., M. & G. 501; *Wellesley v. Mornington*, 18 Jur. 552, V. C. K.; *Re Foster*, 18 Beav. 525; *Re Lancaster*, 18 Jur. 229, L. C. and L. JJ.; *D'Oechsner v. Scott*, 24 Beav. 239; *Crouch v. Waller*, 4 De G. & J. 43; 5 Jur. N. S. 326; *Re Barnes*, 10 W. R. 464, V. C. S.; *Smith v. Etches*, *ubi sup.* An order for this purpose is necessary, which may be obtained on special application by *ex parte* motion, see *Coulsting v. Coulsting*, 8 Beav. 463. For form of motion paper, see Vol. III.

⁹ *In re Hakewell*, 3 De G., M. & G. 116; 17 Jur. 334.

friend, she may, at any time before the defendants have entered an appearance to the bill, introduce into the record the *name *112 of a new next friend, under an order as of course to amend.

After appearance, the same may be done, where a new next friend is to be named in the place of a deceased next friend, if the application for the order is made by the solicitor who acted in the suit for the deceased next friend; but in other cases, the order to appoint a new next friend is special, and must be obtained either in Court on motion, of which notice must be given, or on a summons in Chambers, which must be served.¹

Where, however, a married woman applies for leave to change her next friend, it is in the discretion of the Court to grant or refuse the application; and it will be refused, where there is reason to believe that the defendant's security for costs will be thereby prejudiced;² and if the order be made, the new next friend is usually required to give security to answer the past costs, and to abide by the order of the Court as to future costs;³ and in *Payne v. Little*,⁴ the retiring next friend was required to give security for the costs incurred up to the time of the change.

Upon an application to appoint a new next friend, the Court or Judge usually requires to be satisfied of his willingness to act; this may be evidenced by the production of his written consent.⁵

If the plaintiff neglects or refuses to obtain the order in the case of the next friend's death, the defendant may apply to the Court, by motion upon notice, for an order directing her to name a new next friend within a limited time, or in default that the bill may be dismissed with costs;⁶ and where the next friend becomes bankrupt, an order will, in like manner, be made, staying the proceedings until a solvent next friend is appointed, or the plaintiff has obtained leave to sue *in formâ pauperis*.⁷

Wherever a new next friend is appointed, the order appointing him must be served on the solicitors of the defendants, and be left for entry in the cause books kept by the Clerks of Records and Writs; and thereupon, in all future proceedings in the cause, the name of the new next friend so appointed will be introduced, in the place and stead of the former next friend.⁸

The next friend of a married woman, before he consents to any departure from the ordinary mode of taking evidence, or of any other procedure in a suit, should obtain the sanction of the Court, or of a

¹ For forms of notice of motion and summons, see Vol. III.; and for form of order, see Seton, 1252.

² *Jones v. Fawcett*, 2 Phil. 278; and see *Greenaway v. Rotheram*, 9 Sim. 88.

³ *Lawley v. Halpen*, Bunb. 310; *Percy v. Percy*, M. R. in Chamb. 9 Dec., 1863. For form of order, see Seton, 1252.

⁴ 14 Beav. 647; 16 Beav. 563.

⁵ For form of consent, see Vol. III.

⁶ *Barlee v. Barlee*, 1 S. & S. 100. For form of notice, see Vol. III.

⁷ *Wilton v. Hill*, 2 De G., M. & G. 807; *D'Oechsner v. Scott*, 24 Beav. 239; see also *Pennington v. Alvin*, 1 S. & S. 264; *Drinau v. Mannix*, 3 Dr. & War. 154. For form of notice of motion, see Vol. III.

⁸ *Braithwaite's Pr.* 558.

Judge in Chambers.⁹ The application at Chambers is made by summons.¹⁰

*113 *If the next friend of a married woman goes to reside out of the jurisdiction, the practice with respect to giving security for costs is the same as if the next friend had been himself the actual plaintiff.¹

Upon filing a bill in Chancery, either by her next friend or *in formâ pauperis*, a married woman, in respect of the suit, is held to have taken upon herself the liabilities of a *feme sole*, and therefore may be attached;² and her separate estate becomes liable to pay the costs incurred.³

If a bill has been filed by a *feme sole*, and she intermarry pending the suit, the proceedings are thereby abated, and cannot properly be continued without an order of revivor.⁴ If, however, a female plaintiff marries, and afterwards proceeds in the suit as a *feme sole*, the mere want of an order of revivor is not an error for which a decree can be reversed, upon a bill of review brought by a defendant: because, after a decree made in point of right, a matter which may be pleaded in abatement is not an error upon which to ground a bill of review.⁵

It has been determined, that if a female plaintiff marries pending a suit, and afterwards before revivor her husband dies, an order of revivor becomes unnecessary: her incapacity to prosecute the suit being removed; yet the subsequent proceedings ought, however, to be in the name and with the description which she has acquired by the marriage.⁶

Where a bill has been filed by a man and his wife touching the personal property of the wife, and the husband dies pending the suit, no abatement of the suit takes place, but the wife becomes entitled to the benefit of the suit by survivorship,⁷ unless any act has been done which may have the effect of depriving her of that right; and she may

⁹ Ord. 5 Feb., 1861, r. 24.

¹⁰ For form of summons, see Vol. III.

¹ *Alcock v. Alcock*, 5 De G. & S. 671, ante, p. 28.

² *Ottway v. Wing*, 12 Sim. 90.

³ *Barlee v. Barlee*, 1 S. & S. 100; *Murray v. Barlee*, 4 Sim. 82, 91; 3 M. & K. 209, 219; see, however, *Re Pugh*, 17 Beav. 336. [And an undertaking as to damages may in such case be required of her. *Holden v. Waterlow*, 15 W. R. 139. Where a married woman has consented to an order of Court, she is bound by it as far as it extends. *Thrupp v. Goodrich*, 18 W. R. 125. And her consent may be given by counsel of herself and husband. *Crookes v. Whitworth*, 10 Ch. Div. 289.] As to the liability of the wife's separate estate for her debts and engagements, see *Johnson v. Gallagher*, 7 Jur. N. S. 273; 9 W. R. 506, L. J.J.; 3 De G., F. & J. 494, where the cases are reviewed; *Greenough v. Shorrock*, 4 N. R. 40, L. J.J.; 3 N. R. 599, M. R.; [*MacHenry v. Davies*, L. R. 10 Eq. 88;

Chubb v. Stretch, L. R. 9 Eq. 555; *Sharpe v. Foy*, L. R. 4 Ch. App. 35.]

⁴ See *Trezevant v. Broughton*, 5 W. R. 517; *Seton*, 1165, 1170, M. R. Where a woman filed her bill as a spinster, and it afterwards appeared she had a husband living, proceedings were stayed, on motion by the defendant, till the appointment of a next friend. *Grant v. Mills*, 29 L. T. 11; and see *Pyke v. Holcombe*, 9 Jur. 368, V. C. K. B.; *Davey v. Bennett*, 3 W. R. 353, V. C. W.

⁵ *Viscountess Cranborne v. Dalmahey*, Nels. 85; 1 Ch. R. 231. So at Law, if a woman sues or is sued as *sole*, and judgment is against her as such, though she was *covert*, she shall be estopped, and the sheriff shall take advantage of the estoppel. 1 Salk. 310; 1 Roll. Abr. 869, pl. 50. See *infra*, 186.

⁶ *Ld. Red. 60*; and *Godkin v. Earl Ferrers*, there referred to.

⁷ And it extends to interest accrued during the life of the husband, and not received. *Wilkinson v. Charlesworth*, 10 Beav. 324; 11 Jur. 644.

continue the suit without an order of revivor.⁸ *If, however, *114 she does not think proper to proceed with the cause, she will not be liable to the costs already incurred: because a woman cannot be made responsible for any act done by her husband during the coverture; but if she take any step in the cause, subsequent to her husband's death, she will make herself liable to the costs from the beginning.¹

A different rule, with respect to the right to continue a suit instituted by a husband and wife, prevails when the wife dies in the lifetime of her husband, from that which is acted upon when the husband dies in the lifetime of his wife; for in the former case, although the husband, upon the death of his wife, becomes entitled to all her *choses in action*, he does not acquire such title by survivorship, but in a new character, and an absolute abatement of the suit takes place; so that, to entitle himself to continue it, the husband must first clothe himself with the character of her personal representative, by taking out administration to her effects,² and then obtain an order of revivor.³ And here it is to be observed, that if, after the death of the wife, the husband were to die before the termination of the suit, the party to continue the suit is the person to whom administration has been granted. According to the present practice of the Court of Probate, administration is granted to the representatives of the husband, unless next of kin of the wife are the persons beneficially entitled: the former practice having been otherwise.⁴

But, although it is in general necessary that a husband, after the death of his wife, pending a suit instituted by them for the recovery of her personal property, should, in order to entitle him to proceed with the cause, take out administration to his wife, and then obtain an order of revivor, yet if any act has been done the effect of which would

⁸ *M'Dowl v. Charles*, 6 John. Ch. 132; *Vaughan v. Wilson*, 4 Hen. & M. 453. The executor of a deceased husband cannot maintain a suit upon a *chose in action* which accrued during coverture to the wife of the deceased, who survived him, and which was not reduced into possession by him. *Bond v. Conway*, 11 Md. 512; *Snowhill v. Snowhill*, 1 Green Ch. 30.

¹ *Ld. Red. 59*; see also 3 Atk. 726; *Bond v. Simmons*, *ib.* 21; *Mills v. Barlow*, 11 W. R. 351, L. JJ.

² See *Pattee v. Harrington*, 11 Pick. 221; *Needles v. Needles*, 7 Ohio (N. S.), 432; *McCasker v. Golden*, 1 Bradf. (N. Y.) 64; *Williams v. Carle*, 2 Stockt. (N. J.) 543. A right of the husband to administer on his wife's *choses in action*, for his own benefit, is held to be incompatible with the legislation of Vermont. *Holmes v. Holmes*, 28 Vt. 765. It has been held in Massachusetts, that the administrator of the estate of a married woman may maintain an action upon a note given and made payable to her during coverture, if during her life her husband did not reduce it to possession, or do any act indicat-

ing an intention to take it to himself. *Allen v. Wilkins*, 3 Allen, 321. *Bigelow C. J.* said: "His right to reduce it to possession was at an end on the dissolution of the marriage by her decease. It was then a *chose in action*, and, being a promissory note payable to the order of the wife, no one could sue upon it, unless he could trace a title to it under the original payee," pp. 322, 323. See 2 Kent (11th ed.), 135, 136; *Garforth v. Bradley*, 2 Ves. S. 675; *Richards v. Richards*, 2 B. & Ad. 447; *Gaters v. Madeley*, 6 M. & W. 423; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 Q. B. 864; *Jones v. Richardson*, 5 Met. 247, 249; *Bryan v. Rooks*, 25 Geo. 622; *Vaughan v. Parr*, 20 Ark. 600.

³ For form of order, where husband, being defendant in wife's suit, revives as her administrator, see *Murray v. Newbon*, Set-n, 1164. The order can be obtained on motion or petition of course. See post, Chap. XXXIII., *Revivor and Supplement*.

⁴ *Wms. on Executors*, 360. See *Bryan v. Rooks*, 25 Geo. 622; but see *Vaughan v. Parr*, 20 Ark. 600.

have been to deprive the wife, in case she had outlived her husband, of her right by survivorship, and to vest the property in *115 *the husband absolutely. the husband may, it is apprehended, continue the suit in his individual character, without taking out administration to his wife. In such case, however, it will be necessary, if such act has taken place subsequently to the institution of the suit, to bring the fact before the Court by means of an amendment or a supplemental statement or bill, unless it appears upon the proceedings which have already taken place in the cause.

This distinction renders it important to consider what the circumstances are which will have the effect of so altering the property, as to vest the right to the wife's personal property absolutely in the husband, and entitle him to proceed in a suit without assuming the character of her personal representative.

Upon this subject it is to be observed, that a mere intention¹ to alter the property will not have the effect of giving the husband the absolute right in it; and therefore, the mere bringing an action at Law, or filing a bill in Equity, will not alter the property, unless there be a judgment or decree for payment to the husband alone.² And it has been decided, that an appropriation by an executrix of so much of the assets of her testator as was necessary to discharge a legacy bequeathed to a married woman, was not such a change of the property as would vest it in the husband.

But it seems, that if a person indebted to a married woman, or holding money belonging to her, pay such money into Court, in a cause to which the husband and wife are parties, such payment will be considered as an alteration of the property; for, as properly it could only have been paid during coverture to the husband, the circumstance of its having been paid into Court will not alter the rights of the parties, and it will be considered as a payment made to him.³ For the same reason, where the jewels of the wife had been deposited in Court by the husband under an order, they were considered as belonging to the husband's executors, and not to the representative of the wife who had survived: because, having been in the possession of the husband, even a tortious act could not divest that property, and turn it into a *chose in action*; ⁴ much less could a payment into Court under an order. And so, where a married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock which was standing in the

¹ See *Forrest v. Warrington*, 2 Desaus. 254, 261; *Barber v. Slade*, 30 Vt. 191.

² See *Strong v. Smith*, 1 Met. 476. To constitute a reduction to possession, and a change of property of the wife's *choses in action*, the husband must do some positive and unequivocal act to reduce them to his own possession. *Barber v. Slade*, 30 Vt. 191; *Elms v. Hughes*, 3 Desaus. 155; *Hall v. Young*, 37 N. H. 134; *Andover v. Merrimack Co.*, 37 N. H. 437; *Snowhill v. Snowhill*, 1

Green Ch. 36, 37; *Glann v. Younglove*, 27 Barb. (N. Y.) 480; *Lockhart v. Cameron*, 29 Ala. 355; *Walden v. Chambers*, 7 Ohio (N. S.), 30; *Wallace v. Taliaferro*, 2 Call, 447. The reduction necessary is that into possession, not of the thing itself, but of the title to it. *Strong J. in Tritt v. Caldwell*, 31 Penn. St. 233.

³ *Packer v. Wyndham*, Prec. Ch. 412.

⁴ *Ibid.*

name of a trustee for her, and this stock was, by an order *made *116 in the lunacy, transferred into the name of the Accountant-General, in the matter of the lunacy, and part of it was afterwards sold out and applied in payment of costs in the lunacy, Lord Lyndhurst held, that the mode in which the stock had been dealt with amounted to a reduction into possession by the husband: because, as payment by the trustee to the lunatic, or to the committee, would have been a reduction into possession, so payment into Court, to the credit of the lunacy, was equally a reduction into possession for the lunatic; and upon this ground his Lordship refused to grant a petition, presented by the wife after the death of the lunatic, praying that the stock might be transferred to her, as belonging to her by survivorship.¹ If, however, money paid into Court be carried, by order, to the joint account of the husband and wife, the case will be different, and the wife will not be deprived of her right of survivorship, in the case of the husband dying before he has procured an order for the payment of it out of Court;² and it seems, that a mere payment or transfer of money or stock to trustees for the benefit of the wife, will not give the husband the absolute right to the money, to the exclusion of the wife.³

It appears formerly to have been held, that a promissory note given to a wife during coverture became the property of the husband absolutely, as the wife could not acquire property during coverture; and upon this principle, Lord Hardwicke, in *Lightbourne v. Holyday*,⁴ held, that upon the death of the husband, in a suit respecting a note of this description, the suit abated; and in *Hodges v. Beverley*,⁵ it was determined, that a note given to a *feme covert* was, upon her husband's death, to be considered as his assets.⁶ But in *Nash v. Nash*,⁷ Sir Thomas Plumer V. C. held, *that a note given to a wife was a *chose in action* *117

¹ *In re Jenkins*, 5 Russ. 183, 187. The right of a husband to reduce to his possession the *choses in action* of the wife, cannot be exercised by a guardian appointed over him as an insane person, but the property continues vested in the wife. *Andover v. Merri-mack Co.*, 37 N. H. 437.

² *Ibid.*; and see *Baldwin v. Baldwin*, 5 De G. & S. 319; *Laprimandaye v. Teissier*, 12 Beav. 206; 13 Jur. 1040. [*Prole v. Soady*, L. R. 4 Ch. App. 220.]

³ *Pringle v. Pringle*, 22 Beav. 631; and see *Ex parte Norton*, 8 De G., M. & G. 258; 2 Jur. N. S. 479; see, however, *Hansen v. Miller*, 14 Sim. 22, 26; 8 Jur. 209, 352; *Cunningham v. Antrobus*, 16 Sim. 436, 442; 13 Jur. 28; *Burnham v. Bennett*, 2 Coll. 254; 9 Jur. 888.

⁴ 2 Eq. Ca. Ab. 1, pl. 5; 2 Mad. 135, n.

⁵ *Bunb.* 188; see *Yates v. Sherrington*, 11 M. & W. 42, and 12 M. & W. 855, as to the effect of bankruptcy of the husband upon a promissory note given to the wife *dum sola*.

⁶ So it has been held in Massachusetts, both as to promissory notes and as to legacies and distributive shares in intestate estates, the separate property of the wife; the neces-

sity for a reduction to possession seems to have been overlooked. Thus in *Commonwealth v. Manley*, 12 Pick. 173, it was determined by the Court that a promissory note given to a *feme covert* for her separate use, for the consideration of her distributive share in an intestate estate, becomes immediately the property of the husband. This was afterwards confirmed in *Stevens v. Beals*, 10 Cush. 291. See *Shuttleworth v. Noyes*, 8 Mass. 229; *Tryon v. Sutton*, 13 Cal. 490; *Holland v. Moody*, 12 Ind. 170. And in *Goddard v. Johnson*, 14 Pick. 352, it was even decided, that a husband might sue in his own right, after the death of his wife, for a legacy accruing to the wife during the coverture, although he had done nothing to reduce it to possession during her lifetime. The same was maintained in *Hapgood v. Houghton*, 22 Pick. 480, and in *Albee v. Carpenter*, 12 Cush. 382, 386. See *Strong v. Smith*, 1 Met. 476. But the Court seem to have receded from the doctrine in *Jones v. Richardson*, 5 Met. 247, 249, and admitted that it was "contrary to decided cases." And in *Allen v. Wilkins*, 3 Allen,

⁷ 2 Mad. 133, 139.

of the wife, and survived to her on the death of her husband,¹ and that the circumstance of the husband having received the interest and part of the capital in his lifetime, for which he gave a receipt, did not alter the nature of the property, but that the remainder of the money still remained a *chose in action*.²

In the last case, a receipt of part of the money by the husband was not, as we have seen, held sufficient to alter the nature of the property in the remainder, so as to deprive the wife of her right to it by survivorship. In general, however, if the husband, either alone or jointly with his wife, authorize another person to receive the property of the wife, whether it be money, legacy, or other thing, and such person actually obtain it, such receipt will change the wife's interest in the property, and be a reduction into possession by the husband.³ Thus, in *Doswell v. Earle*,⁴ where an executor, with the wife's consent, had paid a legacy, to which the wife was entitled on the death of her mother, to the husband, upon his undertaking to pay the interest to the mother during her life, and the wife, having survived her and her husband, filed a bill claiming the money against the husband's executors, the bill was dismissed.

*118 *The mere proof, in bankruptcy, of a debt due to the wife by the husband, will not alter the property of the debt, and it still

321, 322, Bigelow C. J. said: "*In a certain sense, a chose in action which becomes the property of the wife during coverture, may be said to be the absolute property of the husband. He has the right to do any act to reduce it into his own possession. So long as he and his wife are both living. The entire jus disponendi is in him.*" And it was decided in this case, that the administrator of the estate of a married woman may maintain an action on a note given and made payable to her during coverture, if during her life her husband did not reduce it to possession, or do any act indicating an intention to take it to himself. See *Yates v. Sherrington*, 11 M. & W. 42, and 12 M. & W. 855, as to the effect of bankruptcy of the husband upon a promissory note given to the wife *dum sola*.

¹ *Allen v. Wilkins*, 3 Allen, 321; *Jones v. Richardson*, 5 Met. 247, 249; 2 Kent (11th ed.), 135; *Barber v. Slade*, 30 Vt. 191; *Barron v. Barron*, 24 Vt. 375; *Hall v. Young*, 37 N. H. 134, 145, 146; *Coffin v. Morrill*, 22 N. H. 352; *Snowhill v. Snowhill*, 1 Green Ch. 30; *Dane v. Allen*, 1 Green Ch. 415; *Poin-dexter v. Blackburn* 1 Ired. Ch. 286.

In *Hall v. Young*, 37 N. H. 146, it is stated as the settled law of New Hampshire, that the personal property of the wife at the time of the marriage, or accruing to her, in her own right, subsequently, whether it consists in specific chattels, money, or *chooses in action*, and however it may fall to her, whether by legacy, gift *inter vivos* or *causa mortis*, as her distributive share in the estate of a person deceased, or otherwise, if it accrues independently of her husband, and not upon any con-

sideration moving from or connected with him, it remains her's until he exercises his marital right by reducing it to possession.

[If stock be taken by the husband in the name of himself and wife, the wife will take by survivorship, unless the gift be rebutted by evidence of a contrary intent. *Dummer v. Pitcher*, 2 M. & K. 262; S. C. 5 Sim. 35; *Fowkes v. Pascoe*, L. R. 10 Ch. App. 343; *Marshall v. Crutwell*, L. R. 20 Eq. 328. So, if a note be taken payable to husband and wife on a consideration passing from the husband. *Johnson v. Lusk*, 6 Coldw. 113; S. C. 1 Tenn. Ch. 3. So, of the undivided interest of the wife as distributee in chattels, although the chattels be reduced to possession by the husband. *Ross v. Wharton*, 10 Yer. 190.]

² *Hunter v. Hallett*, 1 Edw. Ch. 388. The receipt by a husband of dividends accruing from stock standing in his wife's name, is evidence of a reduction to possession of the dividends, but not of the stock. *Burr v. Sherwood*, 3 Bradf. (N. Y.) 85. See *Taggart v. Boldin*, 10 Md. 104. If the husband takes a new security, in his own name, for a debt due to his wife, while sole, her right by survivorship is thereby destroyed. *Searing v. Searing*, 9 Paige, 283.

³ 2 Kent (11th ed.), 137; *Schuyler v. Hoyle*, 5 John Ch. 196; *Johnston v. Johnston*, 1 Grant (Penn.), 468.

⁴ 12 Ves. 473; see also *Burnham v. Bennett*, 2 Coll. 254; 9 Jur. 888; *Hansen v. Miller*, 14 Sim. 22, 26; 8 Jur. 209, 352; and *Cunningham v. Antrobus*, 16 Sim. 436, 442; 13 Jur. 28; but see *Pringle v. Pringle*, 22 Beav. 631.

remains a *chose in action*.¹ It seems, however, that an award by an arbitrator giving money to the husband, to which he was entitled in right of his wife, will have the effect of altering the property, and giving it to the husband absolutely.²

With respect to the effect of a judgment at Law in altering the property of a wife's *chose in action*, much depends, as we have seen,³ upon whether the wife is or is not named in the proceeding. If the wife be not a party (which she need not be at Law, if the right accrued to her during coverture),⁴ a judgment in an action commenced by the husband will vest the property in him; so that, in the event of his death before execution, the wife would be deprived of her right by survivorship;⁵ this, however, will not be the case if the wife be a party: in which case, if the husband die after judgment and before execution sued out, the judgment will survive to her.⁶

Decrees in Equity, as we have seen,⁷ so far resemble judgments at Law in this respect, that, until the money be ordered to be paid, or declared to belong to the one or the other, the rights of the parties will remain undisturbed;⁸ but an order for payment of a sum of money to the husband, in right of his wife, changes the property, and vests it in the husband.⁹

Where, however, a decree or order has been made by the Court for the payment of a sum of money to the husband and wife, and either party dies before payment, the money will belong to the survivor. Thus, where a plaintiff and his wife brought their bill against an executor for a legacy bequeathed to the wife before marriage, and a decree was made that the money should be paid to the plaintiffs: upon a question whether the money should go to the wife or to the administratrix of the husband, the Court referred it to one of the Judges to certify, who gave it as his opinion that a decree in Chancery for money or any other personal thing, being a judgment in Equity, was of the like nature with, and ought to be governed by, the same rules as a judgment for a debt or damages at Common Law, and consequently that the interest or benefit of the decree, and the money due thereby, ought to go and *be to such of *119 the parties as should have the right thereto in case it were a judgment for debt or damages at Common Law: according to which, if a judgment be had by husband and wife, in an action brought by them for a debt due to the wife before marriage, and the husband dies after the judgment, and before execution sued, the debt due on the judgment belongs

¹ Anon., 2 Vern. 707.

² Oglander v. Baston, 1 Vern. 396.

³ Ante, p. 89.

⁴ Ibid.

⁵ Oglander v. Baston, *ubi sup.*; see *Pier-son v. Smith*, 9 Ohio (N. S.), 554; *Needles v. Needles*, 7 Ohio (N. S.), 432.

⁶ *Garforth v. Bradley*, 2 Ves. S. 676; see 2 Kent (11th ed.), 137, 138; *McDowl v. Charles*, 6 John. Ch. 132; *Searing v. Sear-*ing, 9 Paige, 283.

⁷ Ante, p. 115.

⁸ See *Heygate v. Annesley*, 3 Bro. C. C. (Perkins's ed.), 362, Mr. Eden's note (a), where the cases on this subject are cited and considered; *Knight v. Bawner*, 14 Md. 1.

⁹ *Heygate v. Annesley*, 3 Bro. C. C. 362; and see *Tidd v. Lister*, 3 De G., M. & G. 857, 871; 18 Jur. 543; *Walker v. Walker*, 25 Mis. (4 Jones) 367; *Walden v. Chambers*, 7 Ohio (N. S.), 30.

to the wife, and she may sue execution upon the judgment, and not the executor or administrator of the husband.¹ Upon the same principle, in *Forbes v. Phipps*,² where a decree was made that one-sixth of the residue to which the wife was entitled should be paid to her and her husband, and the wife died before the money was received, it was determined by Lord Northampton that the husband was entitled to the money, not as administrator to the wife, but as survivor under the decree.

With respect to the effect of an assignment by the husband of his wife's *chose in action* upon her right of survivorship, it has been for some time settled, that where the *chose in action* is not capable of immediate reduction into possession, as where it is in reversion or expectancy, an assignment of it will not bar the right which the wife would otherwise have had to possess it, in the event of her surviving her husband, unless it is actually reduced into possession before his death. And where a prior life-interest is assigned to the wife, there will be no equitable merger, so as to enable the husband and wife to deal with the reversion, and bar her right of survivorship.³

By the 20 & 21 Vic. c. 57, a husband and wife can now, however, in the manner and subject to the restrictions therein mentioned, effectually assign her reversionary interest in personal estate.

It appears formerly to have been considered that, in this respect, there existed a difference between legal and equitable *choses in action*, or, to speak more correctly, between *choses in action* and equitable interests in the nature of *choses in action*. With respect to the latter it appears to have been thought, that an assignment of them by *120 the husband would, in certain cases, without any *reduction into possession before his death, have the effect of defeating the wife's right to them by survivorship; and attempts have been made to establish distinctions in this respect between assignments for valuable consideration, and assignments without consideration or by operation of law: the former having been considered as barring the right of the surviving wife, and the latter as not having that effect. The decisions,

¹ *Nanney v. Martin*, 1 Ch. Rep. 234; *Coppin v. —*, 2 P. Wms. 496. If there be a decree in equity in favor of the husband and wife, and the husband dies, the decree will survive to the wife, though her name might not have been necessarily joined in the proceedings. *Muse v. Edgerton*, C. W. Dud. Eq. 179; *Knight v. Brawner*, 14 Md. 1.

² 1 Eden, 502. [And see *Prole v. Soady*, L. R. 4 Ch. App. 220, where an order for payment to the assignee of husband and wife of a fund standing to their joint account, made after a decree nisi for a dissolution of the marriage, but before decree absolute, was held not to be equivalent to a reduction into possession, and not to bar wife's survivorship.]

³ *Whittle v. Henning*, 2 Phil. 731, 735; 12 Jur. 1079; *ib.* 298; 11 Beav. 222, overruling *Creed v. Perry*, 14 Sim. 592, and *Hall v. Hu-*

gonin, *ib.* 595; 10 Jur. 940; and see *Bisshop v. Colebrook*, 11 Jur. 793, V. C. E.; *Hanehett v. Briscoe*, 22 Beav. 496; *Crittenden v. Posey*, 1 Head (Tenn.), 311; *Duberley v. Day*, 16 Beav. 33; *Rogers v. Acaster*, 14 Beav. 445; *Lynn v. Bradley*, 1 Met. (Ky.) 232; *Hair v. Avery*, 28 Ala. 267. [*Ante* 99, n. 3.] But it is held in Pennsylvania, that a husband may assign for a valuable consideration the wife's *choses in action* whether they be presently reducible, or be reversionary interests, or possibilities. *Webb's Appeal*, 21 Penn. 248; *Smith's Estate*, 22 Penn. 130.

[The Court, it seems, has the power to bind a married woman, by sanctioning, in a proceeding to which she is a party, the compromise of a suit instituted by her for the recovery of trust funds in which she has a reversionary interest. *Wall v. Rogers*, L. R. 9 Eq. 58.]

however, of Sir Thomas Plumer, in *Hornsby v. Lee*,¹ and *Pardner v. Jackson*,² have removed all doubts upon this subject; and have shown that no such distinction as that supposed between legal and equitable *choses in action*, or between assignments of the latter for valuable consideration, and voluntary or general assignments, exists.³ In the latter case, Sir Thomas Plumer, after long argument, and a diligent and careful investigation of all the cases which had occurred upon the point, expressed his opinion to be, "that all assignments made by the husband of the wife's outstanding personal chattel which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy or under the Insolvent Act, or to trustees for the payment of debts or to a purchaser for a valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by survivorship."⁴

It will have been observed, that the rule, as laid down by Sir Thomas Plumer, is confined to such outstanding personal chattels of the wife as are not, or cannot, be reduced into possession; from whence an opinion at one time prevailed, that the rule did not apply to assignments for valuable consideration of such *choses in action* as at the time of the assignment were capable of reduction into possession, or as became reducible into possession before the death of the husband. This opinion had the high authority of Lord Lyndhurst, who, in *Honner v. Morton*,⁵ thus explained the principle: "Equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done; and therefore, where the husband has the power of reducing the property into possession, his assignment of the *chose in action* of the wife will be regarded as a reduction of it into possession."⁶ It appears, however, from later cases, that the distinction * which has been thus pointed out, between the effect of *121

¹ 2 Mad. 16; see also *Hutchings v. Smith*, 9 Sim. 137; 2 Jur. 231.

² 1 Russ. 1, 24, 42.

³ It is said by Mr. Chancellor Kent, 2 Kent (11th ed.), 137, that a voluntary assignment by the husband of the wife's *choses in action*, without consideration, will not bind her, if she survives him; see also to the same effect, *Hartman v. Dowdel*, 1 Rawle, 279; *Parsons v. Parsons*, 9 N. H. 321, 322; *Saddington v. Kinsman*, 1 Bro. C. C. (Perkins's ed.) 51, and notes; *Mitford v. Mitford*, 9 Sumner's Ves. 87, note (b).

⁴ 1 Russ. 70; see also *Honner v. Morton*, 3 Russ. 65; *Watson v. Dennis*, *ib.* 90; *Stamper v. Barker*, 5 Mad. 157, 164.

⁵ 3 Russ. 68.

⁶ The husband may assign, for a valuable consideration, his wife's *choses in action* to a creditor, free from the wife's contingent right of survivorship. Such an appropriation of the property is the exercise of an act of ownership for a valuable purpose, and an actual appropriation of the chattel which the hus-

band had a right to make. *Schuyler v. Hoyle*, 5 John. Ch. 196; *Kenney v. Udall*, 5 John. Ch. 464; *Lawry v. Houston*, 3 Howard (Miss.), 394; *Siter v. Jordan*, 4 Rawle, 463; *Tritt v. Colwell*, 31 Penn. St. 228. The doctrine that the husband may assign the wife's *choses in action* for a valuable consideration, and thereby bar her of her right by survivorship in the debt, but subject, nevertheless, to the wife's equity, has been frequently declared, and is understood to be the rule best sustained by authority. 2 Kent (11th ed.), 137; *Bryan v. Spruill*, 4 Jones Eq. (N. C.) 27; see *Tobin v. Dixon*, 2 Met. (Ky.) 422; *Sherman v. Reigart*, 7 W. & S. 169; *Webb's App.*, 21 Penn. St. 248; *Smilie's Estate*, 22 Penn. St. 130. It is held in Alabama, that the husband's assignee for valuable consideration is not entitled as against the wife to her *choses in action*, unless he reduces them to possession during coverture. *George v. Goldsby*, 23 Ala. 326; *Arrington v. Yarborough*, 1 Jones Eq. 72; but see *Tuttle v. Fowler*, 22 Conn.

an assignment for valuable consideration by the husband, upon a *chose in action* which is capable of being reduced into possession and one which is not, can no longer be relied upon.¹ This point came before Sir J. L. Knight Bruce V. C., in *Ashby v. Ashby*,² who, after stating that he agreed in the opinion expressed in the last-mentioned case of *Ellison v. Elwin*, decided, that an assignment by a husband for valuable consideration of a wife's *chose in action*, which had fallen into his power during his life, but had not been in fact reduced into possession by him, did not prevent the right to the *chose in action* from surviving to the wife.

In the case, moreover, of assignments by act of law, no distinction exists between assignments of *choses in action* capable of immediate reduction into possession, and those which are not so. Thus, in *Pierce v. Thornly*,³ where a married woman had a vested interest in possession in a legacy, and her husband became bankrupt and died, it was decided that the widow, and not the assignee, was entitled to the money: because the assignment in bankruptcy could not pass to the assignee a larger right, or better title, than the husband himself had,⁴ which was a right to reduce the legacy into possession, but which was not done in his lifetime. Of course, the assignment under bankruptcy *122 passes the whole * interest of the husband in the wife's *chose in action*, at the time of the bankruptcy.¹

It follows, therefore, that an assignment by the husband of his wife's equitable *chose in action*, will neither have the effect of depriving the wife of her right to it in the event of her surviving her husband, nor of depriving her of her equitable right to a settlement out of it, should any application for that purpose be made by her during the lifetime of her husband.² And even the wife's concurrence in the assignment by

58, and *Marion v. Titworth*, 18 B. Mon. 582; *Hill v. Townsend*, 24 Texas, 575.

² Kent (11th ed.), 138, 139, notes; *Siter v. Jordan*, 4 Rawle, 468; *Meriwether v. Booker*, 5 Litt. 256; *Pinkard v. Smith*, Litt. Sel. Cas. 331; *Houck v. Camplin*, 25 Miss. (4 Jones) 378; *Needles v. Needles*, 7 Ohio (N. S.), 432.

[The wife's interest in reversion or remainder in personality survives to the husband. *Dade v. Alexander*, 1 Wash. 30; *Ewing v. Handley*, 4 Litt. 346; *Tune v. Cooper*, 4 Sneed, 236; *Wade v. Boxly*, 5 Leigh, 442. And in such case a previous conveyance by husband and wife will clothe the assignee with a good title. *McCaleb v. Crichfield*, 5 Heisk. 288.]

¹ *Ellison v. Elwin*, 13 Sim. 309, 315; *S. C. nom. Elwyn v. Williams*, 7 Jur. 337.

² 1 Coll. 553; 8 Jur. 1159; see also *Box v. Jackson*, Dru. 42, 83; 2 Con. & L. 605; *Le Vasseur v. Scrutton*, 14 Sim. 116; *Michelmore v. Mudge*, 2 Giff. 183.

³ 2 Sim. 167, 176; and see *Gayner v. Wilkinson*, 2 Dick. 491; 1 Bro. C. C. 50, n.; *Mitford v. Mitford*, 9 Ves. 87, 95, 100.

⁴ A general assignment in bankruptcy or under insolvent laws, passes the wife's property, and her *choses in action*, but subject to her right by survivorship; and if the husband dies before the assignees have reduced the property to possession, it will survive to the wife, for the assignees possess the same rights as the husband before the bankruptcy, and none other. *Van Epps v. Van Deusen*, 4 Paige, 64; *Outwell v. Van Winkle*, 1 Green Ch. 516; *Mitford v. Mitford*, 9 Sumner's Ves. 87; *Perkins's notes (a)*, and (c); *Saddington v. Kinsman*, 1 Bro. C. C. (Perkins's ed.) 44, notes; *Mitchell v. Winslow*, 2 Story, 630; *Moore v. Moore*, 14 B. Mon. 259; *Poor v. Hazleton*, 15 N. H. 564; *Mann v. Higgins*, 7 Gill, 265.

¹ *Ripley v. Woods*, 2 Sim. 165; *Lynn v. Bradley*, 1 Met. (Ky.) 232; *Duke v. Palmer*, 10 Rich. Eq. 380; *Bugg v. Franklin*, 4 Sneed (Tenn.), 129.

² *Ante*, p. 89; *Bryan v. Spruill*, 4 Jones Eq. (N. C.) 27. In *Kenney v. Udall*, 5 John. Ch. 464; *S. C. 3 Cowen*, 590, it was held, that the wife's equity attached upon her per-

her husband during coverture (unless under the powers conferred by the Act above referred to),³ will not have the effect of rendering such assignment valid against her claim by survivorship, in cases where an assignment by her husband alone would not have had that consequence.⁴ Where, also, a *feme covert* is an infant, the circumstance of her father being party to the deed will not alter the interest of the wife.⁵

With respect to the effect of a release by the husband, in depriving his wife of her right by survivorship to her *choses in action*, not reduced into possession during the coverture, it appears that he can release debts due to her before marriage; legacies absolutely given to her;⁶ and interests accruing to her under the *Statutes of Dis- *123 tributions, and the like,¹ and that these acts might be done by him, although he and his wife were divorced *à mensâ et thoro*, because the marriage still subsisted.² In the case of *Hore v. Becher*,³ a single woman being entitled to an annuity secured by bond, married; her husband executed a release of the annuity, and died, leaving his wife

sonal property, whenever it was subject to the jurisdiction of the Court, and was the object of a suit, in any hands to which it might come, or in whatever manner it might have been transferred. It makes no difference whether the application to the Court for the property be by the husband, or his representatives, or assignees, or by the wife, or her trustee, seeking a provision out of the property. This equity is equally binding, whether the transfer of the property be by operation of law, under a commission of bankruptcy, or by levy of an execution, or by act of the party to general assignees, or to an individual, or whether the particular transfer was voluntary, or made upon a good and valuable consideration, or in payment of a just debt. *Durr v. Bowyer*, 2 M'Cord Ch. (S. C.) 368; *Duvall v. Farmers' Bank of Maryland*, 4 Gill & J. 282; *Earl of Salisbury v. Newton*, 1 Eden, 370; *Bosvil v. Brander*, 1 P. Wms. 458; *Lynn v. Bradley*, 1 Met. (Ky.) 232; *Bradley v. McKenna*, 14 Md. 258.

In *Davis v. Newton*, 6 Met. 537, the Court held, that while an assignee of an insolvent debtor, under the Statute of Massachusetts, 1838, c. 163, is proceeding to reduce the *choses in action* of the debtor's wife to possession, or after he has obtained payment thereof, and before distribution of the debtor's estate, the wife may apply to the Court, by bill or petition, for a suitable provision to be made for her, out of the proceeds of such *choses in action*, and the Court will make such provision according to the circumstances of the case. See also to the same point, *Mitford v. Mitford*, 9 Ves. 87, Perkins's notes; *Pryor v. Hill*, 4 Bro. C. C. (Perkins's ed.) 143, note (a); *Van Epps v. Van Deusen*, 4 Paige, 64; *Smith v. Kane*, 2 Paige, 303; *Steinmetz v. Halthen*, 1 Glyn & Jam. 64; *Elliot v. Waring*, 5 Monroe, 341; *Saddington v. Kinsman*, 1 Bro. C. C. (Perkins's ed.) 44,

and notes; *Perryclear v. Jacobs*, 9 Watts, 509; *Mumford v. Murray*, 1 Paige, 620; *Fry v. Fry*, 7 Paige, 462; *Martin v. Martin*, 1 Hoff. Ch. 462; *Burden v. Dean*, 2 Sumner's Ves. 607, note (a); *Lumb v. Milnes*, 5 Ves. 517, note (b), and cases cited; *Dearin v. Fitzpatrick*, 1 Meigs, 551.

³ 20 & 21 Vic. c. 57.

⁴ See *Re Whittingham*, 10 Jur. N. S. 818; 12 W. R. 775, V. C. W., as to effect of protection order, in defeating an assignment of reversionary interest which fell into possession after the order had been obtained. *Re Insole*, L. R. 1 Eq. 470; 11 Jur. N. S. 1011, M. R. [See, as to the effect of judicial separation, *Johnson v. Lander*, L. R. 7 Eq. 228. But the wife's fraud will prevent her from claiming her equity to a settlement against a purchaser. *In re Lush's Trusts*, L. R. 4 Ch. App. 591. So fraud will give a mortgagee of husband and wife a preference over the wife and others claiming under a marriage settlement. *Sharpe v. Foy*, L. R. 4 Ch. App. 35.]

⁵ *Stamper v. Barker*, 5 Mad. 157, 164.

⁶ *Gilb. Eq. 88*; 2 Roll. 134; 1 Bright, H. & W. 72; *Sir L. Shadwell V. C.* held, however, in the case of *Harrison v. Andrews*, 13 Sim. 595, that a receipt was insufficient.

¹ 2 Kent (11th ed.), 135, 136, 137; *Commonwealth v. Manley*, 12 Pick. 175; *Marshall v. Lewis*, 4 Litt. 141; *Tentle v. Muncey*, 2 J. J. Marsh. 82; *Schuyler v. Hoyle*, 5 John. Ch. 196; *Manion v. Titsworth*, 18 B. Mon. 582; *Lowery v. Craig*, 30 Miss. (Geo.) 19; *Needles v. Needles*, 7 Ohio (N. S.), 432.

² *Stephens v. Totty*, Noy, 45; *Cro. Eliz.* 908; but this cannot be done after a dissolution of marriage, nor after a judicial separation or protection order. *Wells v. Malbon*, 31 Beav. 48; 8 Jur. N. S. 249; *Heath v. Lewis*, 10 Jur. N. S. 1093; 13 W. R. 128, V. C. S.

³ 12 Sim. 465; 6 Jur. 93.

surviving; it turned out that the release had been executed under a mistake and was inoperative, so that it was not necessary to decide upon its effect on the wife's right by survivorship. Sir Lancelot Shadwell V. C., however, observed, "If a man gives a bond, or a promissory note, to secure an annuity to a single woman, and she afterwards marries, her husband may release the bond or note; and if he releases the security, there is an end to the annuity."⁴

Where, however, the interest of the wife in the *chose in action* is reversionary, the release of the husband is as inoperative as his assignment, to affect the wife's right by survivorship.⁵ It seems also that the assignment or release by the husband during coverture of his wife's annuity, does not prevent her right by survivorship to payments accruing after his death; it being considered that each successive payment thereof constitutes a separate reversionary interest.⁶

It is to be observed, that the rules above laid down apply to those interests of the wife which are of a strictly personal nature. In the case of those interests which fall under the description of chattels real, important distinctions exist with respect to the effect of an assignment by a husband, in barring his wife of her right in them by survivorship.⁷

The interest given by the law to the husband in the chattels real which a wife has, or may be possessed of during marriage, is a qualified title: being merely an interest in right of his wife, with a power of alienating during coverture;⁸ so that, if he do not dispose of his wife's terms for years or other chattels real in his lifetime, her right by survivorship will not be defeated; if, however, he do not alien them, and he survive his wife, the law gives them to him: not as representing the wife, but as a marital right.¹ Thus, if a *feme covert* has a term for years, and dies, the lease is the husband's, and he may maintain ejectment without taking out letters of administration;² and if a wife, tenant for a term of years of a copyhold, marries and dies before the term is expired, the husband shall continue without any new admission or fine.³ These rules equally apply where the interest of the wife in the chattel is only equitable; thus, where a term of years determinable upon lives, was assigned to trustees in trust for a woman who married and died: upon a question whether this trust went to the husband, who survived, or to the wife's administrator, it was held clearly, that the trust of a term, as well as the term itself, survived to the hus-

⁴ See *Shepard v. Shepard*, 7 John. Ch. 57.

⁵ *Rogers v. Acaster*, 14 Beav. 445; see *Terry v. Brunson*, 1 Rich. Ch. 68.

⁶ *Stille v. Everitt*, 1 M. & C. 37, 41; *Thompson v. Butler*, Moore, 522; *Whitmarsh v. Robertson*, 1 Y. & C. C. 715; 6 Jur. 921; *Whittle v. Henning*, 2 Phil. 731; 12 Jur. 1076; and see *Tidd v. Lister*, 3 De G., M. & G. 857, 874; 18 Jur. 543.

⁷ On this subject, see 1 Bright, H. & W. 94-111.

⁸ In a marginal abstract, 9 Mod. 104, it is said that a wife being possessed of a term of years, and having married an alien, the marriage is not a gift in law of the term.

¹ 2 Kent (11th ed.), 134. The wife's interest in a chattel real may be assigned by the husband. *Meriwether v. Booker*, 5 Litt. 256.

² *Pale v. Mitchell*, 2 Eq. Ca. Ab. 138, pl. 4, n. (a).

³ *Earl of Bath v. Abney*, 1 Dick. 263, arg.

band, and that he need not take out administration;⁴ and so, as we have seen in the last case, if a man assign over the trust of a term which he has in right of his wife, this shall prevail against the wife, though she survives.⁵ This doctrine, as far as regards the trusts of a term assigned to a trustee for a wife before marriage, appears to have been first laid down by the House of Lords, on appeal in *Sir E. Turner's* case,⁶ which, from the report of the subsequent case of *Pitt v. Hunt*, appears to have excited the surprise of Lord Chancellor Nottingham; who, however, after some hesitation, said he must be concluded by the Lords' judgment, and decreed accordingly.⁷ The ground of the decision in *Sir E. Turner's* case appears to have been this: that as the husband can at Law dispose of a term for years, so he may dispose of the trust of a term in Equity, because the same rule of property must prevail in Equity as well as at Law;⁸ and this has ever since been considered as the law of the Court.⁹

In *Walter v. Saunders*,¹⁰ a distinction was attempted to be drawn, in argument, between a term in trust to raise money for a woman, and a trust of the term itself for the woman; but the Master of the Rolls determined that no such distinction could be taken.¹¹ It has also been held, that if the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without consideration. * So, *125 if a judgment be given in trust for a *feme sole* who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if she has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree and marries, the husband may assign it without any consideration, for it is in the nature of an extent.¹ A husband may, as we have seen, assign his wife's mortgage for a term; but if the mortgage be in fee, then it seems clear that the wife's right to the debt by survivorship is not affected by any assignment made by the husband, or by his bankruptcy: unless the debt is reduced into possession in his lifetime.²

It is an established principle, in deciding upon the effect of mortgages, whether of the estate of the wife, or the estate of the husband, that if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation, in the proviso for redemp-

⁴ *Pale v. Mitchell*, *ubi sup.*

⁵ *Packer v. Wyndham*, Prec. Ch. 412, 418; *Sanders v. Page*, 3 Ch. Rep. 223; *Pitt v. Hunt*, 1 Vern. 18; 2 Cha. Ca. 73; *Donne v. Hart*, 2 R. & M. 360, 364.

⁶ 1 Vern. 7.

⁷ 1 Vern. 18; 2 Cha. Ca. 73.

⁸ Per Lord Hardwicke, in *Jewson v. Moulson*, 2 Atk. 417, 421.

⁹ *Bates v. Dandy*, 2 Atk. 207; more fully reported, 3 Russ. 72, n.; *Incedon v. Northcote*, 3 Atk. 430; see *Marshall v. Lewis*, 4 Litt. 141; *Hunter v. Hallett*, 1 Edw. Ch. 388.

¹⁰ 1 Eq. Ca. Ab. 58, pl. 5.

¹¹ See also *Packer v. Wyndham*, Prec. Ch. 412, 418.

¹ *Lord Carteret v. Paschall*, 3 P. Wms. 200.

² *Burnett v. Kinnaston*, 2 Vern. 401; *Mitford v. Mitford*, 9 Ves. 87, 95; *Packer v. Wyndham*, *ubi sup.*; *Purdew v. Jackson*, 1 Russ. 68; *Honner v. Morton*, 3 Russ. 65; *Ellison v. Elwin*, 13 Sim. 309; S. C. *nom.* *Elwyn v. Williams*, 7 Jur. 337; overruling *Bosvill v. Brander*, 1 P. Wms. 458; *Bates v. Dandy*, *ubi sup.*

tion of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage: there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case.³

It is to be observed, that although the husband is considered entitled to assign the trust of a term or other real chattel created for the benefit of his wife, yet, where a term or chattel real has been assigned in trust for a wife, with the privity or consent of her husband, then without doubt he cannot dispose of it.⁴ *A fortiori* he may not, if he make a lease or term of years for the benefit of his wife.⁵ And where a term was raised out of the wife's inheritance, and vested in trustees for purposes which were satisfied, and subject thereto for the benefit of the wife, her executors, administrators, and assigns, it was held, that the particular purpose being served for which the term was raised, the trust did not go to the husband, who was the administrator of the wife, but followed the inheritance.⁶ From this it may be inferred, that the assignment of the trust of such a term by the husband in the

*126 * lifetime of the wife, would not affect the wife's interest in it by survivorship.

In an anonymous case which occurs in 9 Modern Reports,¹ it appears that a *feme covert*, but who had been divorced *à mensâ et thoro*, and had alimony allowed to support her, applied to the Court to restrain her husband from proceeding to sell a term of years of which she was possessed before her marriage, and that the Court at first refused the injunction, because the separation *à mensâ et thoro* did not destroy the marriage, and during the time the marriage continued, the husband had the same power to dispose of the term which he had in right of his wife, as he would have had if it had been in his own right; but afterwards, upon counsel still pressing for an injunction, in order that the merits of the cause might come before the Court, and insisting very much upon the hardship of the case, the Court granted it, on the ground that, though the marriage continues notwithstanding the divorce, yet, under such circumstances, the husband does nothing in his capacity of husband, nor the wife in that of wife. It is to be remarked, however, that this was merely an interlocutory order, to prevent the term being parted with by the husband till the question should be properly discussed. and it does not appear that any further proceedings were ever had in the cause.

It seems, that an absolute transfer or assignment by the husband of his wife's term of years, or other chattel real, is not requisite to deprive

³ Lord Redesdale, in *Jackson v. Innes*, 1 Bligh, 126, cited by Sir J. L. Knight Bruce V. C. in *Clark v. Burgh*, 2 Coll. 227; 9 Jur. 679; and see 3 De G., M. & G. 15; [*Pigott v. Pigott*, L. R. 4 Eq. 549. And see *Edmondson v. Harris*, 2 Tenn. Ch. 434.]

⁴ Sir E. Turner's case, 1 Vern. 7; see also *Bosvil v. Brander*, 1 P. Wms. 458; *Pitt v.*

Hunt, 1 Vern. 18, where Lord Nottingham, however, said, that to prevent a husband, he must be a party to the assignment.

⁵ *Wiche's case*, Seacc. Pasc. 8 Jac., cited 1 Vern. 7, Ed. Raithby, *notis*.

⁶ *Best v. Stampford*, 2 Freem. 288; 2 Vern. 520; Prec. Ch. 252.

¹ 9 Mod. 43.

the wife of her right by survivorship; but that, since an agreement to do an act is considered in Equity the same as if the act were done, so, if the husband agree or covenant to dispose of his wife's term of years, such covenant will be enforced, although he dies in her lifetime.²

The power which the law gives the husband to alien the whole interest of his wife in her chattels real, necessarily authorizes him to dispose of it in part; if, therefore, the husband be possessed of a term of years in right of his wife or jointly with her, and demise it for a less term, reserving rent, and dies, such demise or underlease will be good against her, although she survive him: but the residue of the original term will belong to her, as undisposed of by her husband.³

So also, if the husband alien the whole of the term of which he is possessed in right of his wife, upon condition that the grantee pay a sum of money to his executors, and then dies, and the condition is broken, upon which his executors enter upon the lands, this disposition by the husband will be sufficient to bar the wife of *her *127 interest in the term: it having been wholly disposed of by him during his life, and vested in the grantee.¹ It seems, however, that if the condition had been so framed that it might have been broken in the husband's lifetime, and he had entered for the breach, and had then died before his wife, without making any disposition of the term, she would be entitled to it by survivorship: because the husband, by re-entry for a breach of the condition, was returned to the same right and interest in the term as he was possessed of at the time of the grant: viz., in right of his wife.²

In cases of assignments by the husband of his wife's chattels real, the wife will be equally barred of her survivorship, whether the assignment be for a valuable, or without any consideration;³ but it is to be observed, that there is a great distinction where the disposition is of the whole or part of the property, and where it is only a collateral grant of something out of it; for although, if a husband pledge a term of years of his wife for a debt, and either assign or agree to assign all or part of such term to the creditor, the transaction will bind the wife,⁴ yet, if the transaction be collateral to, and do not change the property in the term, as in the grant of a rent out of it, then, if the wife survive the husband, her right being paramount, and her interest in the chattel not having been displaced, she will be entitled to the term, discharged from the rent.⁵

Moreover, it has been decided, that the husband cannot assign a reversionary interest of his wife's in chattels real, of such a description as that it cannot by possibility vest during the coverture.⁶

² *Bates v. Dandy*, 2 Atk. 207; 3 Russ. 72, n.; see also *Steed v. Cragh*, 9 Mod. 43; *Shannon v. Bradstreet*, 1 Sch. & Lef. 52.

³ *Sym's case*, Cro. Eliz. 33; Co. Litt. 46 b.

¹ Co. Litt. 46 b.

² See *Watts v. Thomas*, 2 P. Wms. 364, 366.

³ *Lord Carteret v. Paschall*, 3 P. Wms. 197, 200; *Mitford v. Mitford*, 9 Ves. 99.

⁴ *Bates v. Dandy*, 2 Atk. 207; 3 Russ. 72, n.

⁵ Co. Litt. 184 b.

⁶ *Duberley v. Day*, 16 Beav. 33; 16 Jur.

In regard to the right of the husband's executors, or his surviving wife, to rent reserved upon underleases of her chattels real, and to the arrears of rent due at the husband's death, there is a difference of opinion in the books, which may probably be reconciled by attending to the manner in which the rents were reserved. Accordingly, if the husband alone grant an underlease of his wife's term of years, reserving a rent, that would be a good demise, and bind the wife as long as the sub-demise continued: the husband's executors, therefore, would, as it is presumed, be entitled not only to the subsequent accruing rents, but to the arrears due at his death.⁷ And it would seem, that the principle of the last case would entitle the executors, to the exclusion of the surviving wife, to subsequent rents and all arrears at the husband's death,

although the wife was a party to the underlease, provided the
 *128 rent were *reserved to the husband only: because the effect of the sub-demise and reservation was an absolute disposition, *pro tanto*, of the wife's original term, which she could not avoid, and the rent was the sole and absolute property of the husband.¹ But if, in the last case, the rent had been reserved by the husband to himself and wife, then, as their interests in the term granted and the rent reserved were joint and entire, it is conceived that the wife, upon surviving her husband, would be entitled to the future rents, and that she would be equally entitled to the arrears of rent at her husband's death: because they remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal the term, survive to the wife.² It may lastly be remarked that, by the law of Scotland, the *choses in action* of the wife become the property of the husband, without any condition on his part of reducing them into possession. If, therefore, an English testator leaves a legacy to a married woman domiciled in Scotland, and her husband dies before payment, the legacy is the property of the husband's representatives, and not of the widow. Where, however, in such a case, the executors paid the legacy to the widow, in ignorance of the law of Scotland, the payment to her was held to be good.³

581; *Rogers v. Acaster*, 14 Beav. 445; and see *Sale v. Saunders*, 24 Miss. 24.

⁷ 1 Roll. Abr. 344, 345; Co. Litt. 46 b.; 2 Lev. 100; 3 Keb. 300; 1 Bright H. & W. 43-47.

¹ The rents and profits of a wife's real estate, which accrue during coverture, belong absolutely to the husband, and do not survive to the wife after his death. *Clapp v. Stoughton*, 10 Pick. 463; *Bennett v. Bennett*, 34 Ala. 53; [*Matthews v. Copeland*, 79 N. C. 493. It is otherwise with the rents and profits of land for which husband and wife are suing in right of the wife; these rents, as well as damages for waste, upon the husband's death, survive to the wife. *King v. Little*, 77 N. C. 138.] In Kentucky, even under Rev. Sts. art. 2, § 1, p. 387, the wife has not

a separate estate in the rents of her lands, though she may have an equity to a settlement out of the rents, as against her husband's vendees. *Smith v. Long*, 1 Met. (Ky.) 486.

[So, in Tennessee the rents of the wife's realty belong to the husband, and may be subjected by his creditors, although the husband's interest in the land cannot, by statute, be sold during coverture by virtue of any judgment, decree, or execution against him. *Lucas v. Rickerrich*, 2 Memph. L. J. 86. But the law has been since changed by statute of 1879.]

² 4 Vin. Abr. 117, D. a.

³ *Leslie v. Baillie*, 2 Y. & C. C. C. 91, 95; 7 Jur. 77.

PERSONS AGAINST WHOM A SUIT MAY BE INSTITUTED.

SECTION I. — *Generally.*

HAVING pointed out the persons who are capable of instituting suits in Equity, and considered the peculiarities of practice applicable to each description of parties complainant, we come now to the consideration of the persons against whom suits may be commenced and carried on, and the practice of the Court as applicable to them.

A bill in Equity may be exhibited against all bodies politic and corporate, and all other persons whatsoever, who are in any way interested in the subject-matter in litigation,¹ except only the Sovereign, the Queen-consort, and the Heir-apparent; whose prerogatives prevent their being sued in their own names, though they may in certain cases, as we shall see presently, be sued by their respective Attorneys or Solicitors-General.²

¹ Story Eq. Pl. § 68.

² In England, the King and Queen, though they may sue, are not liable to be sued; and in America a similar exemption generally belongs to the Government or State. Story Eq. Pl. § 69. This rule applies only where the State is a party to the record, and not where the State is only interested in the subject-matter of a suit brought against her officers in their official capacity in a Court of Chancery. *Michigan State Bank v. Hastings*, 1 Douglass, 225; *Osborn v. United States Bank*, 9 Wheat. 738.

No direct suit can be maintained against the United States, without the authority of an Act of Congress, nor can any direct judgment be awarded against them for costs. *Marshall C. J. in Cohens v. Virginia*, 6 Wheat. 411, 412; *United States v. Clarke*, 8 Peters, 444; *United States v. Barney*, C. C. Maryland, 3 Hall, Law J. 128; *United States v. Wells*, 2 Wash. C. C. 161. But if an action be brought by the United States, to recover money in the hands of a party, he may, by way of defence, set up any legal or equitable claim he has against the United States, and need not in such case be turned round to an application to Congress. Act of Congress, March 3d, 1797, c. 74, §§ 3, 4; *United States v. Wilkins*, 6 Wheat. 135, 143; *Walton v. United States*, 9 Wheat. 651; *United States v. McDaniel*, 7 Peters, 16; *United States v. Ringgold*, 8 Peters, 163; *United States v. Clarke*, 8 Peters, 436; *United States v. Robeson*, 9 Peters, 319; *United States v. Hawkins*, 10 Peters, 125; *United States v. Bank of the Metropolis*, 15 Peters, 377.

[Without an Act of Congress, no direct

proceedings will lie at the suit of an individual against the United States or its property; and no officer of the Government can waive its privileges in this respect, nor lawfully consent that such a suit may be prosecuted so as to bind the Government. *Carr v. United States*, 98 U. S., S. C. 19 A. L. J. 219. The rule is the same in relation to the State and its officers, except in those cases specially provided for by the Constitution of the United States, *Ex parte Dunn*, 8 S. C. 207; *Owen v. State*, 7 Neb. 108; *State v. Hill*, 54 Ala. 67; *State v. Ward*, 9 Heisk. 100; *State v. Bank of Tennessee*, 3 Baxt. 395. And, therefore, the Court of Chancery cannot entertain a bill by a public creditor against the State to compel a set-off of a demand due to him from the State against an independent demand which the State holds against him. *Raymond v. State*, 54 Miss. 562.]

Formerly one of the United States might be sued by the citizens of another State, or by citizens or subjects of any foreign State. See *Chisholm v. State of Georgia*, 2 Dallas, 419. The law in this respect was, however, changed by an amendment of the Constitution of the United States, which (Art. XI. of the Amendments) declares that the judicial power of the United States shall not be construed to extend to any suit in Law or Equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State. This inhibition applies only to citizens or subjects, and does not extend to suits by a State or by foreign States or Powers. The *Cherokee Nation v. Georgia*, 5 Peters, 1; *New Jersey v. New York*, 5 Peters, 284. They re-

*130 * But although all persons are subject to be sued in Equity, there are some individuals whose rights and interests are so mixed up and blended with those of others, that a bill cannot be brought against them, unless such other persons are joined with them as co-defendants; and there are other individuals who, although their interests are distinct and independent, so that they may be sued alone upon the record, are yet incapable, from the want of maturity or weakness of their intellectual faculties, of conducting their own defence, and must, therefore, apply for and obtain the assistance of others to do it on their behalf.

In the first class are included married women, whose husbands must be joined with them as co-defendants upon the record: unless they are plaintiffs or exiles, or have abjured the realm, or the wife has been judicially separated or has obtained a protection order;¹ and persons who have been found idiots or lunatics, whose committees must be made co-defendants with the persons whose property is intrusted to their care.²

Under the second head are comprised infants, and all persons who, although they have not been found idiots or lunatics by inquisition, are nevertheless of such weak intellects as to be incapable of conducting a defence by themselves; in both which cases the Court will appoint guardians, for the purpose of conducting the defence on their behalf.

There is another class of persons, who, although they are under no personal disability which prevents their being made amenable to the jurisdiction of the Court, yet from the circumstances of their property being vested in others, either permanently or temporarily, are not only incapable of being made defendants alone, but as long as the disability under which they labor continues, ought not, as a general rule, to be parties to the record at all. In this class are included bankrupts, outlaws, and persons attainted or convicted of treason or felony.

SECTION II. — *The Queen's Attorney-General.*

Although the Queen's Attorney-General, as representing the interests of the Crown, may, in certain cases which will be presently pointed out, be made a defendant to a bill in Equity, yet this is to be understood as only applicable to cases in which the interests of the Crown are incidentally concerned; for where the rights of the Crown are imme-

*131 diately in question, as in cases in * which the Queen is in actual possession of the property in dispute, or where any title is

tain the capacity to sue a State as it was originally granted by the Constitution; and the Supreme Court of the United States has original jurisdiction in the case of suits by a foreign State against one of the members of the

Union. See *Chisholm v. State of Georgia*, 2 Dallas, 418. See also *Ex parte Madrazzo*, 7 Peters, 627; *ante*, 17, note.

¹ See *ante*, p. 87.

² *Ld. Red.* 30.

vested in her which the suit seeks to divest, a bill will not in general lie, but the party claiming must apply for relief to the Queen herself by Petition of Right.¹

A Petition of Right to the Queen is a document in which the petitioner sets out his right, legal or equitable, to that which is demanded by him, and prays the Queen to do him right and justice, and, upon a due and lawful trial of his right and title, to make him restitution. The proceeding by Petition of Right exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject, and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights.²

The law relating to Petitions of Rights, and the procedure therein, is amended and simplified by a recent Act of Parliament:³ the object of which is, to assimilate the proceedings, as nearly as may be, to the practice in actions and suits between subject and subject, and to provide for the recovery of costs. This statute enacts, that a Petition of Right may be intituled in any one of the superior Courts of Common Law or Equity at Westminster, in which the subject-matter, or any material part thereof, would have been cognizable between subject and subject; and shall state the Christian and surname, and usual place of abode, of the suppliant, and of his attorney, if any, and set forth, with convenient certainty, the facts entitling him to relief; be signed by him, his counsel, or attorney; and be then left with the Home Secretary for her Majesty's fiat that right be done.⁴

The Act and the General Order issued in pursuance thereof,⁵ also provide, that upon such fiat being obtained to a Petition of Right in Chancery, the petition and fiat, together with a printed copy thereof, where it is in writing, shall be filed at the Record and Writ Clerk's Office, and be marked with the name of the Judge before whom it is intended to be prosecuted;⁶ that printed copies for service shall be sealed in the same manner as bills;⁷ that interrogatories may be filed and marked, and served with the petition, for the examination of the respondents, other than the * Attorney-General;¹ that a copy *132 of the petition and fiat shall be left at the office of the Solicitor to the Treasury, with an indorsement thereon, praying for a plea or answer

¹ *Reeve v. Attorney-General*, 2 Atk. 223, cited 1 Ves. S. 446; Ld. Red. 31, 102; *Ryes v. Duke of Wellington*, 9 Beav. 579, 600; see also *Felkin v. Lord Herbert*, 1 Dr. & S. 608; 8 Jur. N. S. 90; *Story Eq. Pl.* § 69. Mr. Justice Story, in a note to this section in his *Equity Pleading*, remarks that, "In America no such general remedy by petition of right exists against the Government, or, if it exists at all, it is a privilege created by Statute in a few States only. In cases where the Government has an interest in the subject as a matter of public trust, it is presumed that the Attorney-General may be made a defendant, as he may be in England." [See *Elliot*

v. Van Voorst, 3 Wall. Jr. 299; *Fifth Natl. Bank v. Long*, 9 Chi. Leg. News, 381, per *Blodgett*, U. S. Dist. J.]

² Per Lord Cottenham, in *Monckton v. Attorney-General*, 2 M.N. & G. 412.

³ 23 & 24 Vic. c. 34.

⁴ *Ibid.* §§ 1, 2. For form of petition, see *ib.*, Sched. No. 1; and Vol. III.

⁵ Ord. 1 Feb. 1862; 7 Jur. N. S. Pt. 2, 283.

⁶ Ord. rr. 1, 2.

⁷ Ord. r. 3.

¹ Ord. r. 4. For form of interrogatories, see Vol. III.

on behalf of her Majesty within twenty-eight days;² that a copy of the petition, allowance, and fiat shall be served upon, or left at the last or usual or last known place of abode of the person in the enjoyment of the property or right, indorsed with a notice, requiring him to appear within eight days, and to plead or answer within fourteen days, after service; that such person, if he intends to contest the petition, must enter an appearance to the same;³ that further time to plead or answer, or to demur, may be allowed by the Court or a Judge;⁴ that in default of plea, answer, or demurrer in due time, the Court or Judge may, on the application of the suppliant, order the petition to be taken as confessed;⁵ that a decree may be made thereupon, or upon demurrer, or after hearing;⁶ that costs may be recoverable by or against the Crown, the suppliant, and any other parties to the proceedings;⁷ that the Judge shall, on the application of the suppliant, certify to the Lords of the Treasury, or to the Treasurer of the Household, any decree entitling the suppliant to relief, and they may thereupon satisfy him the same;⁸ that persons may sue and defend *in formâ pauperis*;⁹ and generally, that the practice and course of proceeding in reference to suits shall be applicable to Petitions of Right: which in this respect are to be considered as bills;¹⁰ but the Act is not to prevent any suppliant proceeding as before the passing thereof.¹¹

According to the practice before the passing of the Act, the petition was to be determined in Chancery, and the method was this: the petition was presented to the Queen, who subscribed it, with these words, "*soit droit fait al partie*:" i.e., let right be done to the party; and thereupon it was delivered to the Chancellor, *in formâ juris exequend*; i.e., to be executed according to law; and directions were given that the Attorney-General should be made a party to the suit;¹² upon the petition, however, the Court would neither adjudicate upon the merits, nor inquire into the facts. The whole duty of the Court, at that stage of the proceedings, was to permit the party to pursue the usual course of prosecuting his suit, and for that purpose a commission was directed to * issue, to inquire into the allegations of the petition. The order for the commission could not, however, be obtained without direct application to the Court, and notice to the Attorney-General.¹

The case of *Viscount Canterbury v. The Attorney-General*,² was a

² Act, §§ 3-5. For forms of indorsement, see *ib.*, Sched. Nos. 2, 3; and Vol. III.

³ For form of appearance, see the Act, Sched. No. 4; and Vol. III. No time is limited for the entry of an appearance on behalf of the Queen.

⁴ Act, §§ 4, 5. For forms of pleas, answers, and demurrers, see Vol. III.

⁵ Act, § 8.

⁶ *Ibid.* §§ 8, 9.

⁷ *Ibid.* §§ 11, 12.

⁸ Act, §§ 13, 14. For form of certificate, see *ib.*, Sched. No. 5; and Vol. III.

⁹ Ord. rr. 5, 6.

¹⁰ Act, § 7; Ord. r. 7; by r. 8, the officers of the Court are to perform similar duties, and the fees and allowances are to be the same, as in suits between subjects.

¹¹ Act, § 18.

¹² Coop. Eq. Pl. 23; Ld. Red. 31; and see Anstey on Petitions of Right.

¹ *Re* Robson, 2 Phil. 84.

² 1 Phil. 306, 324.

Petition of Right, in which the petitioner, Viscount Canterbury, claimed compensation from the Crown for damages alleged to have been done in the preceding reign, to some property of the petitioner, while Speaker of the House of Commons, by the fire which, in the year 1834, destroyed the two Houses of Parliament. To this petition, a general demurrer was filed by the Attorney-General, and was allowed by Lord Lyndhurst: from whose judgment it would appear, that the Petition of Right is the remedy which the subject has for an illegal seizure on the part of the Crown, of lands or goods; but that there is no such form of proceeding applicable to a case which, as between subject and subject, would be a claim for unliquidated damages.³

Although, in general, a bill cannot be filed against the Attorney-General for the purpose of enforcing equitable rights against the direct interests of the Crown, yet, in certain cases, bills were entertained on the Equity side of the Court of Exchequer, as a Court of Revenue, against the Attorney-General, as representing the Queen, for the purpose of establishing claims against the estates or revenues of the Crown, which, in the Court of Chancery or other Courts, could not have been instituted without proceeding in the first instance by Petition of Right.⁴ There is another class of suits against the Attorney-General, which were frequently instituted on the Equity side of the Court of Exchequer, as a Court of Revenue; *viz.*, suits for the purpose of relieving accountants to the Crown against the decisions of the Commissioners for auditing the Public Accounts, under the 25 Geo. III. c. 52. It was decided, before the abolition of the equitable jurisdiction of the Court of Exchequer,⁵ that when public accountants had reason to be dissatisfied with the determination of such Commissioners, either in disallowing their articles of discharge or in imposing surcharges, they might proceed on the Equity side of the Exchequer, against the Attorney-General, and not against the Commissioners; and that the proper mode of proceeding in such cases was by bill only, and not by motion or petition.⁶ It was also held, that the Statutes *providing for *134 the relief of accountants to the Crown were not confined to cases where the accountant had actually been sued or impeded; but that he might proceed immediately, even during the passing of his accounts, by bill in Equity, as it were *quia timet*.¹ There seems no reason to doubt, that accountants to the Crown are now entitled to the same relief; and it also appears, that the jurisdiction in all the above cases is still re-

³ In addition to the cases above referred to, the following are some of the recently reported cases of Petitions of Right: *Re Baron de Bode*, and *Re Viscount Canterbury*, 2 Phil. 85; 1 C. P. Coop. t. Cott. 143, where the practice was fully considered by Lord Cottenham; *Re Carl Von Frantzius*, 2 De G. & J. 126; *Re Rolt*, 4 De G. & J. 44; *Re Holmes*, 2 J. & H. 527; 8 Jur. N. S. 76; *Tobin v. The Queen*, 16 C. B. N. S. 310, 315; 10 Jur. N. S. 1039.

⁴ *Luthwich v. Attorney-General*, referred to in *Reeve v. Attorney-General*, 2 Atk. 223; *Casberd v. Attorney-General*, 6 Pri. 411; and see 5 Vic. c. 5, *ante*, p. 5.

⁵ By 5 Vic. c. 5, *ante*, p. 5.

⁶ *Colebrooke v. Attorney-General*, 7 Pri. 146; *Crawford v. Attorney-General*, *ib.* 1; *Ex parte Colebrooke*, 7 Pri. 87; *Ex parte Durrand*, 3 Anst. 743.

¹ *Colebrooke v. Attorney-General*, *ubi sup.*

tained by the Court of Exchequer;² but that the Court of Chancery has concurrent jurisdiction.³

It is to be observed, that where an accountant to the Crown seeks relief by means of a bill against the Attorney-General, the Attorney-General cannot, if the accountant is entitled to relief, protect himself by demurrer from making the discovery sought by the bill; and in the case of *Deare v. The Attorney-General*, such a demurrer was overruled.⁴ In that case, the Attorney-General had filed an information, in the Court of Exchequer, against an army agent, for an account of his dealings with the War-office; upon which the defendant filed a cross-bill against the Attorney-General and the Secretary-at-War, alleging that certain transactions had taken place between him and the War-office which amounted to a settlement of accounts, and praying a *quæritus*. To this bill the Attorney-General and Secretary-at-War put in general demurrers: alleging, as the cause of demurrer, that it appeared by the bill that they were sued as officers of his Majesty's government, acting for and on behalf of his Majesty, and concerning matters arising out of and within their duty and employment as such public officers, and not in any manner in their private character as individuals. On the argument of the demurrer, it was alleged on the part of the Attorney-General, that the plaintiff in the cross-bill was not entitled to the relief he prayed; and it was strongly urged that, not being entitled to the relief, he was not entitled to the discovery; but Lord Abinger L. C. B. held, that, although the plaintiff was not entitled to the specific relief prayed, yet that, inasmuch as taking the facts stated in the bill to be true, they amounted to a clear defence to the information exhibited against him by the Attorney-General, he was entitled to this sort of relief; namely, to have the benefit of the discovery, for the purpose of adducing those facts before the Court in a specific and distinct form, when both the causes should come on together. His Lordship further

said, he was not prepared to say that a bill of discovery ever
 *135 had or ever could be filed against the Attorney-General, * for a discovery of facts that could be neither in his personal nor in his official knowledge, or that the Crown would be bound, through the medium of the Attorney-General, to make that discovery; but, at the same time, it had been the practice, which he hoped never would be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point that required judicial decision had occurred.

In cases in which the rights of the Crown are not immediately concerned, that is, where the Crown is not in possession, or a title vested

² *Attorney-General v. Halling*, 15 M. & W. 687, 700; *Attorney-General v. Hullett*, *ib.* 97; 8 Beav. 288, n.; *Attorney-General v. Kingston*, 6 Jur. 155, Ex.

³ *Attorney-General v. The Corporation of*

London, 8 Beav. 270, 285; 1 H. L. Ca. 440; [*Attorney-General v. Edmunds*, L. R. 6 Eq. 381;] and see *ante*, p. 5.

⁴ 1 Y. & C. Ex. 197, 207.

in it is not sought to be impeached, but its rights are only incidentally involved in the suit, it is the practice to make the Queen's Attorney-General a party in respect of those rights.¹ Indeed, it seems that in all cases of this description, in which any right appears to be in the Crown, or the interest of the Crown may be in any way affected, the Court will refuse to proceed without the Attorney-General,² unless it is clear the result will be for the benefit of the Crown,³ or at least that it will not be in disaffirmance or derogation of its interests.⁴

Thus, in *Balch v. Wastall*,⁵ and in *Hayward v. Fry*,⁶ where, in consequence of the outlawry of the defendants, it was held that all the defendants' interest was forfeited to the Crown, the Court directed the plaintiff to obtain a grant of it from the Exchequer, *and to make *136 the Attorney-General a party to the suit. In *Burgess v. Wheate*,¹ Lord Hardwicke directed the case to stand over, in order that the Attorney-General might be made a party; and in *Penn v. Lord Baltimore*,² which was a suit for the execution of articles relating to the boundaries of two provinces in America, held under letters-patent from the King, the cause was ordered to stand over for the same purpose. In like manner, in *Hovenden v. Lord Annesley*,³ in which the parties claimed under two distinct grants from the Crown, each reserving a rent, but of different amounts, it was held that, inasmuch as the rights of the Crown

¹ *Ld. Red. 30, 31.* In a suit pending in the Supreme Court of the United States, relative to disputed boundary between two States, a motion made by the Attorney-General on behalf of the United States, before a replication had been filed, for leave to intervene, not technically as a party to the suit, was allowed and leave was given him, without becoming a party to the suit, to file testimony and be heard on the argument, but not to interfere with the pleadings or evidence on behalf of either of the States. *Florida v. Georgia*, 17 How. U. S. 478. This course of procedure was admitted to be at variance with the English practice in cases where the Government have an interest in the issue of the suit, but it was adopted to obviate an objection, that seemed to arise, that the United States could not, under the provisions of the Constitution, become parties in the United States Courts, in the legal sense of the term, to a suit between two States. The other States were held to be concerned in the adjustment of the boundary in dispute, and their interests are represented by the United States. Taney C. J. said: "It would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a Court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the Constitution, become a party to this suit, in the legal sense

of that term, and the English mode of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice." Several of the Judges dissented.

² By 5 & 6 Vic. c. 69, § 2, the Attorney-General is to be made a party defendant in all suits under that Act touching any honor, &c., in which the Queen may have any estate or interest. As to the necessity of making the Attorney-General a party in the cases of aliens, felons, no heir-at-law, no next of kin, lunatics and idiots: see *ante*, Chap. II. § 1; Calvert on Parties, 388 *et seq.* [See, where no heir-at-law can be found. *Humbertson v. Humbertson*, 1 P. W. 332; *Burgess v. Wheate*, 1 Eden, 177; *Smith v. Bicknell*, 1 V. & B. 51, 53, note; *Miller v. Warmington*, 1 J. & W. 484. And where no next of kin can be found. *Jones v. Goodchild*, 3 P. W. 33; *Middleton v. Spicer*, 1 Bro. C. C. 201.] Where next of kin of lunatic are unknown, petition under Trustee Act, 1850, should be served on Attorney-General, and not on Solicitor to the Treasury. *Re Rourke*, 2 De G., J. & S. 426.

³ *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 618.

⁴ *Stafford v. Earl of Anglesey*, Hardres, 181.

⁵ 1 P. Wms. 445.

⁶ *Id.* 446; and see *Rex v. Fowler*, Bunb. 38.

¹ 1 Eden, 177, 181.

² 1 Ves. S. 444.

³ 2 Sch. & Lef. 607.

were concerned, the Attorney-General ought to be before the Court.⁴ In *Barclay v. Russell*,⁵ Lord Rosslyn dismissed the bill, because a title appeared upon the record for the Crown, although no claim had been made on its behalf; and upon the same principle, in *Dodder v. The Bank of England*,⁶ Lord Eldon refused to order the dividends of stock purchased by the old Government of Switzerland, which had been received before the filing of the bill, to be paid into Court by the trustees, on the application of the new Government, which had not been recognized by the Government of this country, until the Attorney-General was made a party to the suit. But although, in cases where a title in the Crown appears upon the record, the Court will not make a decree unless the Attorney-General be a party to the suit, yet it seems that the circumstance of its appearing by the record that the plaintiff has been convicted of manslaughter, and that a commission of attainder has been issued, will not support a plea for not making the Attorney-General a party; because an inquisition of attainder is only to inform, and does not entitle the Crown to any right.⁷ It seems, however, that in this respect an inquisition of attainder differs from a commission to inquire whether a person under whom the plaintiff claims was an alien: the former being only for the sake of informing the Crown, but the latter to entitle.⁸

The necessity of making the Attorney-General a party is not confined to those cases in which the interests of the Crown in its own right are concerned, but it extends also to cases in which the Queen is considered as the protector of the rights of others. Thus, as we have seen,⁹ the grantee of a *chose in action* from the Crown may either institute proceedings in the name of the Attorney-General, or in his own name, making the Attorney-General a defendant to the suit; and so, in *137 suits in which the Crown may be interested in its character of protector of the rights of others, the Attorney-General should be made a party. Thus, the Attorney-General is a necessary party to all suits where the subject-matter is, either wholly or in part, money appropriated for general charitable purposes; because the Queen, as *parens patriæ*, is supposed to superintend the administration of all charities, and acts in this behalf by her Attorney-General.¹ Where, however, a legacy is given to a charity already established, as where it is given to the trustees of a particular foundation, or to the treasurer or other officer of some charitable institution, to become a part of the general funds of

⁴ Sch. & Lef. 617.

⁵ 3 Ves. 424, 436.

⁶ 10 Ves. 352, 354.

⁷ *Burke v. Brown*, 2 Atk. 399.

⁸ *Ibid.*

⁹ *Ante*, p. 7.

¹ "The duty of maintaining the rights of the public, and of a number of persons too indefinite to vindicate their own, has vested in the Commonwealth, and is exercised in Massachusetts, as in England, through the

Attorney-General. *Going v. Emery*, 16 Pick. 119; *County Attorney v. May*, 5 Cush. 338-340; *Genl. Sts. c. 14, § 20*. It is upon this ground, that, in a suit instituted by the trustees of a charity to obtain the instructions of the Court, the Attorney-General should be made a party defendant, as he has been by order of the Court in this case." *Gray J. in Jackson v. Phillips*, 14 Allen, 539, 579, 580; see *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280.

such foundation or institution, the Attorney-General need not be a party, because he can have no interference with the distribution of their general funds.² And it seems that there is a distinction where trustees of the charity are appointed by the donor, and where no trustees are appointed, but there is a devise immediately to charitable uses; in the latter case, there can be no decree unless the Attorney-General be made a party, but it is otherwise where trustees are appointed by the donor.³ Therefore where a bill was filed to establish a will and to perform several trusts, some of them relating to charities in which some of the trustees were plaintiffs, and other trustees and several of the *cestui que trusts* were defendants, an objection, because the Attorney-General was not made a defendant, was overruled: it being considered that some of the trustees of the charity⁴ being defendants, there might be a decree to compel the execution of trusts relating to these charities.⁵ In that case, it was said by Lord Macclesfield, that if there should be any collusion between the parties relating to the charity, the Attorney-General might, notwithstanding a decree, bring an information to establish the charity and set aside the decree, and that he might do the same, though he were made a defendant, in case of collusion between the parties. But it seems that the mere circumstance of the Attorney-General not having been made a party to the proceeding, will not be a sufficient ground to sustain an information for the purpose of setting aside a decree made in a former suit, unless the decree is impeached upon other grounds.⁶

* When it is said that, in cases where a legacy is given to the trustees of a charity already in existence, for the general purposes of the charity, it will not be necessary, in a suit concerning it, to make the Attorney-General a defendant, the rule must be understood to apply only to those charities which are of a permanent nature, and whose objects are defined; for it has been determined that where legacies are given to the officers of a charitable institution which is not of a permanent nature, or whose objects are not defined, it is necessary to make the Attorney-General a party to a suit relating to them. Thus, in the case of *Wellbeloved v. Jones*,¹ where a legacy was given to the officers, for the time being, of an academical institution, established at York for the education of dissenting ministers, which officers, with the addition of such other persons as they should choose (in case they should think an additional number of trustees necessary), were to stand possessed of the money, upon trust, to apply the interest and dividends for the augmentation of the salaries of dissenting ministers, a preference being given to those who should have been students in the York

² *Wellbeloved v. Jones*, 1 S. & S. 40, 43; *Chitty v. Parker*, 4 Bro. C. C. 38.

³ 4 Vin. 500, pl. 11, *notis*; 2 Eq. Ca. Ab. 167, pl. 13, n.

⁴ It appears from a subsequent part of the case that one of the trustees of the charity was abroad.

⁵ *Monil v. Lawson*, 4 Vin. 500, pl. 11; 2 Eq. Ca. Ab. 167, pl. 13.

⁶ *Attorney-General v. Warren*, 2 Swanst. 291, 311.

¹ 1 S. & S. 40, 43.

institution, and in case such institution should cease, then upon trust that the persons in whose names the fund should be invested, should transfer the same to the principal officers for the time being of such other institution as should succeed the same, or be established upon similar principles: Sir John Leach V. C. upon a bill filed by the officers of the institution, praying to have the fund transferred to them, to which the Attorney-General was no party, ordered the case to stand over, with leave to amend by making the Attorney-General a party: his Honor observing that the Court could never permit the legacy to come into the hands of the plaintiffs, who happened to fill particular offices in the society, but would take care to secure the objects of the testator by the creation of a proper and permanent trust, and upon hearing the cause, would send it to the Master for that purpose; and that it would be one of the duties of the Attorney-General to attend the Master upon the subject. And even in cases where a legacy is given to the trustees of a charity already in existence, the trusts of which are of a permanent and definite nature, unless it appears, from the terms of the bequest, that the trusts upon which the legacy is given are identical with those upon which the general funds of the corporation are held, it is necessary to make the Attorney-General a party.²

It is to be observed also, that the Attorney-General is a *139 necessary *party only where the charity is in the nature of a general charity; and that where it is merely a private charity, it will not be necessary to bring him before the Court. Thus, where the suit related to a voluntary society, entered into for the purpose of providing a weekly payment to such of the members as should become necessitous, and their widows, Lord Hardwicke overruled the objection that the Attorney-General was not a party: because it was in the nature only of a private charity.¹

When the Attorney-General is made a defendant to a suit, it is entirely in his discretion whether he will put in a full answer or not.² Formerly, the usual course was for him to put in a general answer, stating merely that he was a stranger to the matters in question, and that, on behalf of the Crown, he claimed such rights and interests as it should appear to have therein, and prayed that the Court would take care of such rights and interests of the Crown in the same.³ In cases, however, in which the interest of the Crown, or the purposes of public justice require it, a full answer will be put in: ⁴ as in *Craufurd v. The Attorney-General*,⁵ in

² *Corporation of the Sons of the Clergy v. Mose*, 9 Sim. 610, 613. A bill in Equity for the transfer of a public charity to new trustees may be filed by the present trustees in their own names, making the Attorney-General a defendant. *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 289; *Governors of Christ's Hospital v. Attorney-General*, 5 Hare, 257; see *Jackson v. Phillips*, 14 Allen, 539.

¹ *Anon.*, 3 Atk. 277.

² *Davidson v. Attorney-General*, 5 Pri. 398, n. [See *Stevens v. Stevens*, 9 C. E. Green, 77, 86.]

³ See Bunb. 303; 1 Hare, 223.

⁴ *Colebrooke v. Attorney-General*, 7 Pri. 192.

⁵ 7 Pri. 1.

which case the Lords of the Treasury had directed that the question might be brought before the consideration of a Court of justice; and it would, therefore, have been unbecoming in the Attorney-General to urge any matter of form which might prevent the case from being properly submitted to the Court before which it was brought.⁶ In *Errington v. The Attorney-General*,⁷ the Attorney-General, being one of the defendants to a bill of interpleader, put in the usual general answer, upon which the other defendants moved that the bill might be dismissed, and the injunction dissolved; the Attorney-General opposed the motion, and at the same time prayed that he might be at liberty to withdraw his general answer, and put in another, insisting upon the particular right of the Crown to the money in question: which was granted.

The answer of the Attorney-General is put in without oath, but is usually signed by him. And it seems that such an answer is not liable to be excepted to, even though it be to a cross-bill filed by the defendant in an information, for the purpose of obtaining a discovery of matters alleged to be material to his defence to the information. We have, however, seen before that where a cross-bill is filed against the Attorney-General, praying relief as well as discovery, he cannot protect himself from answering by means of a demurrer:⁸ but whether he could, by such means, protect himself *from answering a mere bill of dis- *140covery, does not appear to have been decided; it is most probable that he might, and that the Court would, in such a case, if discovery were wanted from the Crown, leave the party to prefer his Petition of Right.¹

Under the present practice, the usual course is for the Attorney-General to put in no answer; but in cases of the description above mentioned, it is presumed that the proper course is to file interrogatories for his examination, and that he would then put in a full answer.

The right of the Attorney-General to receive his costs, where he is made a defendant to a suit, has been before noticed;² it will suffice, therefore, here to repeat, that there seems to be no rule against the Attorney-General receiving his costs, where he is made a defendant in respect of legacies given to charities; and that in *Moggridge v. Thackwell*,³ costs were given to all parties, including the Attorney-General, as between solicitor and client, out of the fund in Court. It appears also that he frequently receives his costs where he is made a defendant in respect of the rights of the Crown, in cases of intestacy.⁴ There is no invariable practice of giving him his costs in all cases out of the fund, the subject-matter of the suit.⁵

⁶ See also *Deare v. Attorney-General*, 1 Y. & C. Ex. 197.

⁷ Bunb. 303.

⁸ *Deare v. Attorney-General*, *ubi sup.*; *ante*, p. 134.

¹ *Ibid.*

² *Ante*, p. 12.

³ 7 Ves. 36, 88, affirmed by H. L.; see 13 Ves. 416.

⁴ *Attorney-General v. Earl of Ashburnham*, 1 S. & S. 397; *ante*, p. 12; see now 18 & 19 Vic. c. 90, § 1, as to costs of Attorney-General in revenue suits; and 24 & 25 Vic. c. 92, § 1, in cases as to succession duty. And see 23 & 24 Vic. c. 34, §§ 11, 12, *ante*, p. 132.

⁵ *Perkins v. Bradley*, 1 Hare, 219, 234.

During the vacancy of the office of Attorney-General, the Solicitor-General may be made a defendant to support the interests of the Crown ;⁶ and where there has been an information by the Attorney-General, the object of which has been to set up a general claim on behalf of the Crown at variance with the interests of a public charity, the Solicitor-General has been made defendant, for the purpose of supporting the interests of such charity against the general claim of the Attorney-General. On the other hand, where an information was filed by the Attorney-General, claiming certain property for charitable purposes, inconsistent with the rights of property of the Crown, the Solicitor-General was made a defendant, as the officer on whom the representation of such rights had devolved.⁷

The means of obtaining the appearance or answer of the Attorney-General, will be found in the subsequent Chapters upon Process.⁸

*141 *SECTION III. — *Governments of Foreign States and Ambassadors.*

It has before been stated, that the Sovereign of a foreign country recognized by this Government, may sue either at Law or in Equity, in respect of matters not partaking of a political character ;¹ and it has been determined, that if he files a bill, a cross-bill may be filed against him ; because, by suing here, he submits himself to the jurisdiction of the Court ; and, in such a case, if required, he is bound to answer upon oath.²

The question whether a foreign Sovereign, who has not submitted to the jurisdiction, can be sued in the Courts of this country, was raised in the case of the *Duke of Brunswick v. The King of Hanover*.³ It was an important feature in this case, that the defendant, as a subject of this kingdom, had renewed his allegiance after his accession to the throne of Hanover, and exercised the rights of an English peer. The general object of the suit was to obtain an account of property belonging to the plaintiff, alleged to have been possessed by the defendant, under color of an instrument creating a species of guardianship unknown to

⁶ *Id.* 102.

⁷ *Attorney-General v. Dean and Canons of Windsor*, 24 How. 679; 4 Jur. N. S. 818; 1 H. L. Ca. 201; 6 Jur. N. S. 823; and see *Attorney-General v. Mayor of Bristol*, 2 J. & W. 412; *Attorney-General v. Ironmongers' Company*, 2 M. & K. 778.

⁸ See *Part. Chap. VIII.* § 4; *Chap. X.* § 2.

¹ *Id.* 17.

² *Hunt v. King of Spain*, 2 Bligh, N. S. 47; 3 How. & C. 100; 8 C. 7 Bligh, N. S. 100; *United States of America v. Wagner*, L. R. 2 C. 31, 392. The Court may stay proceedings in the original suit, until the means of defence are secured in the cross-suit. See *Canadian Government v. Rothschild*, 1

Sim. 94; *Prioleau v. United States of America and Andrew Johnson*, L. R. 2 Eq. 659; S. C. *nom.* *United States of America v. Prioleau*, 12 Jur. N. S. 724; *United States of America v. Wagner*, L. R. 3 Eq. 724. [And may dismiss the suit if its order be not properly obeyed. *Republic of Liberia v. Royce*, L. R. 1 App. Cas. 139. *Ante*, 19, n. 4; 20, n. 1.]

³ 6 Beav. 1; affirmed 2 H. L. Ca. 1; and see *Wadsworth v. Queen of Spain*, 17 Q. B. 171; *Gladstone v. Musurus Bey*, 1 H. & M. 495; 9 Jur. N. S. 71. [An English Court has no jurisdiction to enforce the contracts of a foreign government in England. *Smith v. Weguelin*, L. R. 8 Eq. 198.]

the law of England. None of the acts complained of took place in this country, or were done by the defendant before he became King of Hanover. Moreover, though it was not necessary to decide the question, the Court seemed to consider that those acts were of a political character. The defendant demurred to the bill; and in giving judgment upon the demurrer, Lord Langdale M. R. after elaborately reviewing all the authorities and arguments upon the subject, said: "His Majesty the King of Hanover is, and ought to be, exempt from all liability of being sued in the Courts of this country, for any acts done by him as King of Hanover, or in his character of Sovereign prince; but being a subject of the Queen, he is and ought to be liable to be sued in the Courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged, as such subject. And in respect of any act done out of the realm, or any act as to which it may be doubtful *whether it ought to be attributed to the character of *142 Sovereign, or to the character of subject, it appears to me, that it ought to be presumed to be attributed rather to the character of Sovereign, than to the character of subject."¹ Accordingly, as it did not appear that the alleged acts and transactions of the defendant were of such a description as could render him liable to be sued in this country, the demurrer was allowed. It further appears from the last-mentioned case, that as a Sovereign prince is *primâ facie* entitled to special immunities, it ought to appear on the bill that the case is not one to which such special immunities extend.²

There have, moreover, been cases in which, the Court being called upon to distribute a fund in which some foreign Sovereign or State may have had an interest, it has been thought expedient and proper to make such Sovereign or State a party. The effect has been to make the suit perfect as to parties, but, as to the Sovereign made a defendant, the effect has not been to compel, or attempt to compel, him to come in and submit to judgment in the ordinary course, but to give him an opportunity to come in and claim his right, or establish his interest in the subject-matter of the suit.³

With regard to Ambassadors, by Stat. 7 Anne, c. 12, all writs and processes sued forth and prosecuted, whereby the person of any Ambassador, authorized and received as such by her Majesty, may be arrested or imprisoned, or his goods distrained, seized, or attached, are to be deemed to be utterly null and void. This Act professes to be, and has frequently been adjudged to be, declaratory,⁴ and in confirmation of the Common Law; and, as Lord Tenterden said,⁵ "it must be construed according to the Common Law, of which the law of nations

¹ 5 Beav. 57.

² See 6 Beav. 58.

³ *Ibid.* 39. In *Gladstone v. Musurus Bey*, 1 H. & M. 495; 9 Jur. N. S. 71, the Sultan was made a defendant, but did not appear. [If the Court cannot give relief against the

government, the suit fails. *Gladstone v. Ottoman Bank*, 1 H. & M. 505; *Smith v. Wague lin*, 15 W. R. 558; L. R. 8 Eq. 198.]

⁴ 1 B. & C. 562.

⁵ *Ibid.*

must be deemed a part." The 5th section of the Act excepts the case of a bankrupt in the service of any Ambassador.⁶

Cases have frequently occurred in which an Ambassador has himself been a subject of the Sovereign to whom he was accredited; and, notwithstanding some difference of opinion, it seems to be considered, that such an Ambassador would not enjoy a perfect immunity from legal process, but would enjoy an immunity extending only to such things as are connected with his office and ministry, and not to transactions and matters wholly distinct and independent of his office and its duties.⁷

*143 * SECTION IV. — *Corporations and Joint-Stock Companies.*

It has been stated before,¹ that corporations aggregate must be sued by their corporate name, that is, by their name of foundation: though it has been said that, if a corporation be known by a particular name, it is sufficient to sue it by that name.² This, however, must be confined to the case of a corporation by prescription; for in other cases, where the commencement of it appears by the record, it can have no other name by use than that under which it has been incorporated, and the Court will not permit it to be sued by any other name.³

A corporation aggregate which has a head cannot be sued without it: because without its head it is incomplete.⁴ It is not, however, necessary to mention the name of the head;⁵ nor is it in general proper to make individual members of aggregate corporations parties by their proper Christian and surnames: though cases may occur where this will be permitted, for the purpose of compelling a discovery from them of some fact which may rest in their own knowledge. Thus, in the case put by Lord Eldon, in *Dummer v. The Corporation of Chippenham*,⁶ of an individual corporator whose estate was charged with a rent or payment to a charitable use, of which the corporation had the management, and who had obtained possession of the deed, and had destroyed or cancelled it, his Lordship was of opinion that, upon an information for the purpose of having the estate of the charity properly

⁶ See as to this statute, *Service v. Castaneda*, 2 Coll. 56; *Taylor v. Best*, 14 C. B. 487; 18 Jur. 402; see also *Gladstone v. Musurus Bey*, *ubi sup.*, in which V. C. Wood held on this statute, that a foreign ambassador cannot be impleaded before an English tribunal.

⁷ 6 Beav. 52. As to the rights and exemptions of Ambassadors, see 1 Kent, 38 *et seq.* 182.

¹ *Ante*, p. 21.

² *Attorney-General v. Corporation of Worcester*, 2 Phil. 3; 1 C. P. Coop. t. Cott. 18.

³ *Ibid.* See *ante*, 21, *note*. [But see *Alexander v. Berney*, 1 Stew. Eq. 90, where

an adjudication in bankruptcy against a corporation by its original name, after a legislative change of name, was held valid.]

⁴ 2 Bac. Ab. tit. Corp. (E.) Pl. 2. In *Daugars v. Rivaz*, 28 Beav. 233, 249; 6 Jur. N. S. 854, it was held, that the corporation of the French Protestant Church having become divided into separate churches, and there being no public officer at the head of the corporation, the bill was properly filed against the governing body of the particular church, and not against the corporation by its corporate name.

⁵ 3 Salk. 103; 1 Leon. 307.

⁶ 14 Ves. 245, 254.

administered by the corporation, it would be perfectly competent to call upon the mayor, if he was the individual implicated in that conduct, not only to answer with the rest under their common seal, but also to answer as to the circumstances relative to the deed supposed to be in his hands. So also, in the principal case, which was that of a bill by a schoolmaster against a corporation who were trustees of a charity, to be relieved against a resolution of the trustees by which he was deprived of his office of schoolmaster, on the ground that the resolution had been pronounced by five of the members of the corporation, from improper motives with reference to a parliamentary election, to which bill the five *members were made parties, for the purpose of obtain- *144 ing from them an answer upon oath as to their alleged improper conduct, a demurrer, which had been put in by these five members on the ground that no title was shown to the discovery against them, was overruled by Lord Eldon. And in the case of the *Attorney-General v. Wilson*,¹ a corporate body, suing both as plaintiff and relator, sustained a suit against five persons, formerly members of the corporation, in respect of unauthorized acts done by them in the name of the corporation.²

It has been thought that, as a corporation can sue within a foreign jurisdiction, there is no reason why it may not be sued without its jurisdiction, in the same manner, and under the same regulations, as domestic corporations;³ and accordingly, in some States, foreign corporations have been held to answer to action in their Courts.⁴

The practice of making the officers or servants of a corporation parties to a suit, for the purpose of eliciting from them a discovery, upon oath, of the matters charged in the bill, has been too frequently acted

¹ C. & P. 1, 21; Angell & Ames, Corp. § 676.

² There are cases in which a bill in Equity will lie against a corporation for diverting or misapplying its funds or credit, &c., by one of its members. *Cunliffe v. Manchester and Bolton Canal Co.*, 1 My. & R. 131, note. [See *ante*, 26, n. 1, and *infra*, 243, n. 4. The company is a necessary party to a bill by a policyholder against the officers of a mutual insurance company, who, having funds to pay the plaintiff's loss, neglected to pay it, and fraudulently applied the funds to other purposes. *Lyman v. Bonney*, 101 Mass. 562. And see, as to the necessity of making corporation a party, *Davenport v. Dows*, 18 Wall. 626.]

³ *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. 176; Angell & Ames, Corp. § 402.

⁴ *Day v. Essex County Bank*, 13 Vt. 97; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Missou. 422; [*Hadley v. Freedman's Sav. & Tr. Co.*, 2 Tenn. Ch. 122.]

Corporations created by any other State, having property in Massachusetts, shall be liable to be sued, and their property shall be

subject to attachment, in like manner as residents of other States having property in that State are liable to be sued and their property to be attached. *Genl. Sts. of Mass. c. 68, § 15; Silloway v. Columbian Ins. Co.*, 8 Gray, 199; see *Libby v. Hodgdon*, 9 N. H. 394; *Moulin v. Ins. Co.*, 4 Zabrisk. 222; *Thomas v. Merchants' Bank*, 9 Paige, 215; *Nash v. Rector, &c. of the Evangelical Lutheran Church*, 1 Miles, 78; *Peckham v. North Parish in Haverhill*, 16 Pick. 274; *Erickson v. Nesmith*, 4 Allen, 237.

But in *Williston v. Mich. Southern and Northern Ind. R. Co.*, 13 Allen, 400, it was held that no equitable relief can be granted in Massachusetts against a foreign corporation which has neither officers nor place of business in Massachusetts, for a failure to declare and pay dividends according to the stipulations of their certificates of stock. Service of the writ had been made in this case only by trustee process, attaching funds in the hands of the debtors of the defendants in Massachusetts. See *Stephenson v. Davis*, 56 Maine, 73.

upon and acknowledged to be now a matter of doubt.⁶ The first case which occurs upon the point is an anonymous one, in *Vernon*,⁷ *145 where a bill having been filed against a *corporation to discover writings, and the defendants answering under their common seal, and so, not being sworn, would answer nothing to their prejudice, it was ordered that the clerk of the company, and such principal members as the plaintiff should think fit, should answer on oath, and that the Master should settle the oath. In the case of *Glasscott v. Copper Miners' Company*,¹ the plaintiff was sued at Law by a body corporate, and filed his bill for discovery only: making the governor, deputy-chairman, one of the directors, and the secretary of the company co-defendants with the company. It was objected, upon demurrer to the bill, that an officer of a corporation could not be made a co-defendant to a bill which sought for discovery only, or, at any rate, that individual members could not be joined as defendants with the corporation at large; but the demurrer was overruled.²

It may be observed here, that, where the officer of the corporation from whom the discovery is sought is a mere witness, and the facts he is required to discover are merely such as might be proved by him on his examination, he ought not to be made a party. Thus, where an officer of the Bank of England was made a party, for the purpose of obtaining from him a discovery as to the times when the stock *146 in question in the cause had been transferred, and *he demurred

⁶ Ld. Red. 188, 189.

⁷ 1 Vern. 117; but the answer cannot be read against the Corporation: *Wych v. Meal*, 3 P. Wms. 310, 312; *Gibbons v. Waterloo Bridge Company*, 1 C. P. Coop. t. Cott. 385; *Wade v. East India Co.*, 29 Beav. 300; 7 Jur. N. S. 350.

¹ 11 Sim. 305; see *Attorney-General v. Mercers' Co.*, 9 W. R. 83; *Attorney-General v. East Dereham Corn Exchange*, 5 W. R. 486; *Ranger v. Great Western Railway Co.*, 4 De G. & J. 74; 5 Jur. N. S. 1191; *Harvey v. Beckwith*, 2 H. & M. 429; *Pepper v. Green*, *ib.* 478; see also *Moodaley v. Morton*, 1 Bro. C. C. 469. It should be observed here, that Lord Eldon, in *Dummer v. The Corporation of Chippenham*, 14 Ves. 254, mentioned it as his opinion, that the case of *Stewart v. The East India Company*, 2 Vern. 380, in which a demurrer to a bill against the company and one of its servants, is reported to have been allowed, is a misprint; and that, instead of stating that the demurrer was allowed without putting them to answer as to matter of fraud and contrivance, which is nonsense, it should have been, that the demurrer was disallowed, with liberty to insist by their answer that they should not be compelled to answer the charges of fraud, &c.; this case, however, appears to be correctly reported, see *M'Intosh v. Great Western Railway Company*, 2 De G. & S. 770.

² Officers and members of a corporation may be made parties to a bill so far as the bill seeks for discovery, though they have no in-

dividual interest in the suit, and no relief can be had against them. *Wright v. Dame*, 1 Met. 237; *Cartwright v. Hateley*, 1 Sumner's Ves. 293, note (1); *Le Texier v. Margrave and Margravine of Anspach*, 5 Ves. 322; *Fenton v. Hughes*, 7 Sumner's Ves. 287, Perkins's note (a); *Brumley v. Westchester Co. Manuf. Co.*, 1 John. Ch. 366; *Vermilyea v. Fulton Bank*, 1 Paige, 37; *Walker v. Hallett*, 1 Ala. (N. S.) 379; *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 54 Maine, 173, 184; see *Garr v. Bright*, 1 Barb. Ch. 157; *Masters v. Rossie Galena Lead Mining Co.*, 2 Sandf. Ch. 301; *McIntyre v. Trustees of Union College*, 6 Paige, 229; *Many v. Beekman Iron Co.*, 9 Paige, 188; *Governor & Co. of the Copper Mines*, 5 Lond. Jur. 264; *Bevans v. Dingman's Turnpike*, 10 Barr, 174; *McKim v. Odum*, 3 Bland, 421; *United States of America, v. Wagner*, L. R. 2 Ch. Ap. 587, 588; *Prieoleau v. United States of America*, L. R. 2 Eq. 667, 668. The reason for the relaxation of the general rule, that a mere witness cannot be made defendant in the case of a corporation, is that the answer of a corporation is not put in under oath, and that hence an answer is required from some person or persons capable of making a full discovery, as the agents or the officers of a corporation. *Howell v. Arkmore*, 1 Stock. (N. J.) 92; [*Lindsley v. James*, 3 Coldw. 485; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599. Under the Judicature Act, the officers of a corporation cannot be made defendants. *Wilson v. Church*, 9 Ch. Div. 552.]

to the bill, Sir John Leach V. C. allowed the demurrer, on the ground that the officer was in that case merely a witness.¹

But although it is not an unusual practice to make the clerk or other principal officer of a corporation a party to a suit against such corporation, for the purpose of eliciting from him a discovery of entries or orders in the books of the corporation, yet, where such is not the case, it is still the duty of the corporation, when informed by the bill or information of the nature and extent of the claims made upon it, if required to put in an answer, to cause diligent examination to be made before putting in the answer, of all deeds, papers, and muniments in their possession or power, and to give in their answer all the information derived from such examination; and it was said by Sir John Leach M. R. that if a corporation pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground will charge them with the costs of the suit.²

Where a suit is instituted against a corporation sole, he must appear and defend, and be proceeded against in the same manner as if he were a private individual. But where corporations aggregate are sued in their corporate capacity, they must appear by attorney, and answer under the common seal of the corporation;³ however, those of the corporation who are charged as private individuals, must answer upon oath.

If the majority of the members of a corporation are ready to put in their answer, and the head or other person who has the custody of the common seal refuses to affix it, application must be made to the Court of Queen's Bench for a *mandamus* to compel him, and in the mean time the Court of Chancery will stay the process against the corporation.⁴

* It may be here stated, that by the 7 Will. IV. and 1 Vic. c. 73, *147 her Majesty is enabled to grant letters-patent constituting companies, and providing that the company thereby constituted shall be sued by one of the public officers of the company appointed for that purpose.¹

By the Companies Act, 1862, every company constituted under that

¹ How v. Best, 5 Mad. 19. A mere witness ought not to be made a party to a bill, although the plaintiff may deem his answer more satisfactory than his examination. Story Eq. Pl. §§ 234, 519, and note; 2 Story Eq. Jur. § 1499; Wigram, Discovery (Am. ed.), p. 165, § 235; Hare, 65, 68, 73, 76; Newman v. Godfrey, 2 Bro. C. C. (Perkins's ed.), 332; Howell v. Ashmore, 1 Stock. (N. J.) 82; see Wright v. Dame, 1 Met. 237; Post v. Boardman, 10 Paige, 580; Norton v. Woods, 5 Paige, 251.

² Attorney-General v. The Burgesses of East Retford, 2 M. & K. 40.

³ 1 Grant Ch. Pr. 120; Brumley v. Westchester Manuf. Society, 1 John. Ch. 366; Balt. & Ohio R.R. Co. v. City of Wheeling,

13 Gratt. 40; Fulton Bank v. New York and Sharon Canal Co., 1 Paige, 311; Vermilyea v. Fulton Bank, 1 Paige, 37; Ransom v. Stonington Savings Bank, 2 Beasley (N. J.), 212; Cooper's Eq. Pl. 325; Story Eq. Pl. § 874; 3 Hoff. Ch. Pr. 239. They may make and adopt any seal *pro hac vice*. Ransom v. Stonington Savings Bank, *supra*; Mill-dam Foundry v. Hovey, 21 Pick. 417; [Hendee v. Pinkerton, 14 Allen, 381.] The answer of a corporation should be signed by the President. It is usual for the Secretary or Cashier to sign it also. 1 Barb. Ch. Pr. 156; [L. R. 6 C. B. 411.]

⁴ Rex. v. Wyndham, Cowp. 377; 2 Bac. Ab. tit. Corp. (E.) 2.

¹ See *ante*, p. 25.

Act is, upon certificate of incorporation, constituted a body corporate, by the name prescribed in the memorandum of association; and capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal.²

The process for compelling the appearance or answer of a corporation will be found in future chapters.³

The Bank of England was formerly a necessary party to a suit relating to any stock standing in its books, either for the purpose of compelling or authorizing it to suffer, or of restraining it by injunction from permitting, a transfer of such stock; but now, the Court has power to make an order to such effect, although the Bank is not made a party;⁴ and if the Bank is made a party in such a case, the plaintiff will be ordered to pay the costs occasioned thereby.⁵

Before the Court will make an order on the Bank in these cases, a certificate signed by their accountant that the fund in question is standing in the name of the party, or of the person of whom he is the representative, must be produced; and the Bank is required to deliver this certificate to the solicitor of the party applying.⁶

It may here be observed, that where money in the public funds, or the stock of any company, is the subject of dispute between two parties, the Bank or company, if they desire to apply to the Court of Chancery for protection, should do so by filing a bill of interpleader.⁷

It is also to be observed, that the Bank of England is not bound to take notice of any trust affecting public stock standing in their
 *148 * books: all that they have to do is to look to the legal estate; and therefore, if the person entitled to the legal estate applies for a transfer to himself, the Bank must permit the transfer, and are not bound to look further to see whether the stock is trust stock.¹ Upon this ground, where a bill was filed against the Bank, to compel them to make good the deficiency in a sum of stock which had been specifically bequeathed to a trustee, who was also the executor, and which had been transferred to the trustee and executor, and afterwards sold out by him, it was dismissed as against the Bank.²

² 25 & 26 Vic. c. 89, § 18; and see *ante*, p. 26. As to the personal liability to costs of the directors of a limited company, sued with the company, see *Betts v. De Vitre*, 5 N. R. 165, V. C. W.; 11 Jur. N. S. 9, and for form of order therein, see *ib.* 217.

³ See *post*, Chap. VIII. § 4, and Chap. X. § 2.

⁴ 39 & 40 Geo. III. c. 36. Where the Bank has an interest, or discovery from it is sought, it must be made a party, see § 2; and see *Temple v. Bank of England*, 6 Ves. 770, 772; *Edridge v. Edridge*, 3 Mad. 386; *Perkins v. Bradley*, 1 Hare. 219, 232; *Hammond v. Neume*, 1 Swaust. 35, 38; *Ross v. Shearer*, 5 Mad. 458; *Gould v. Kemp*, 2 M. & K. 304, 311; *Gladstone v. Musurus Bey*, 1 H. & M. 495; 9 Jur. N. S. 71.

⁵ *Edridge v. Edridge*, *ubi sup.*; *Perkins v. Bradley*, *ubi sup.*

⁶ 39 & 40 Geo. III. c. 36, §§ 1, 2.

⁷ *Birch v. Corbin*, 1 Cox, 144; [*Mills v. Townsend*, 109 Mass. 115; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.] With respect to the right of the Bank of England to apply to a Court of Equity to restrain any action brought against it by an executor or other person having a legal right to call for a transfer of funds, see *Bank of England v. Lunn*, 15 Ves. 569, 577, and the cases there cited; *Cochrane v. O'Brien*, 2 Jo. & Lat. 380; *Desborough v. Harris*, 5 De G., M. & G. 439; 1 Jur. N. S. 986.

¹ See *Fisher v. Essex Bank*, 5 Gray, 373, 377, 378. [*Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. 697; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507.]

² *Hartga v. Bank of England*, 3 Ves. 55, 58.

Upon the same principle, where the Bank filed a bill against the executors of a will to restrain their proceeding in an action brought by them against the Bank, in consequence of their refusal to permit a transfer to the executors of stock, part of the testator's residuary estate, which had been bequeathed to them upon certain trusts, the injunction was dissolved, on the ground that the Bank had a good defence at Law.³

It may be further observed, that, by the 1 & 2 Geo. I. c. 19, § 90, by which the management of the public stocks or annuities was first given to the Governor and Company of the Bank of England, the stock created by that Act was declared to be personal estate; and it was provided that any person possessed of such stock or annuities might devise the same by will in writing, attested by two or more credible witnesses. These clauses were repeated in all subsequent Acts creating stocks of this nature, and gave rise to considerable discussion as to whether the Bank were bound to take notice of a specific devise of stock, attested by two witnesses, and registered according to the provisions of the Acts, and whether they were justified in resisting a claim to such stock set up by the executor.⁴ This doubt is now removed: for by the 8 & 9 Vic. c. 97, it is enacted, that all shares of public stock standing in the name of any deceased person may be transferred by the executors, notwithstanding any specific bequest of the stock so to be transferred.

There are certain means provided by Statute,⁵ by which, upon summary application, orders may be obtained restraining, for a limited period, the transfer of stock or the payment of dividends. For the practice on those points, the reader is referred to the chapter on Orders in the Nature of Injunctions.⁶

* SECTION V. — *Persons out of the Jurisdiction of the Court.* *149

Where a suit affects the rights of persons out of the jurisdiction, the Court will in some cases, where there are other parties concerned, proceed against those other parties; and if the absent persons are merely passive objects of the judgment of the Court, or their rights are incidental to those of the parties before the Court, a complete determination may be obtained without them.¹ Thus, in *Attorney-General*

³ Bank of England v. Moffatt, 3 Bro. C. C. 260; 5 Ves. 668, and note; and see Bank of England v. Parsons, 5 Ves. 665.

⁴ Pearson v. Bank of England, 2 Bro. C. C. 529; 2 Cox, 175; Bank of England v. Parsons, *ubi sup.*; Austin v. Bank of England, 8 Ves. 522; Bank of England v. Lunn, 15 Ves. 569; Franklin v. Bank of England, 1 Russ. 575, 582; and see 9 B. & C. 156, Wms. Exors. p. 725.

⁵ 5 Vic. c. 5, §§ 4-6; Ord. XXVII.

⁶ See *post*, Chap. XXXVII.

¹ Ld. Red. 31, 32; and see Powell v. Wright, 7 Beav. 444, 450; Fell v. Brown, 2 Bro. C. C. (Perkins's ed.) 276, and notes; Lucas v. Bank of Darien, 2 Stewart, 280; Joy v. Wirtz, 1 Wash. C. C. 517; Erickson v. Nesmith, 46 N. H. 371. The general rule is stated in Lawrence v. Rokes, 53 Maine, 110; see Vose v. Philbrook, 3 Story, 347; Van Reimsdyke v. Kane, 1 Gall. 371; Bailey v. Inglee, 2 Paige, 278. [If the absent party is so concerned in the subject-matter that a decree between the immediate litigants cannot be

at the relation of the *University of Glasgow v. Baliol College*,² which was an information filed to impeach a decree made in 1699, on a former information³ by the Attorney-General against the trustees of a testator, his heirs-at-law and others, to establish a will and a charity created by it, alleging that the decree was contrary to the will, and that the University of Glasgow had not been made a party to the suit: Lord Hardwicke overruled the latter objection, as the University of Glasgow was a corporation out of the reach of the process of the Court, which circumstance warranted the proceedings, without making that body party to the suit.

*150 * And so, where a bill was filed for the recovery of a joint debt against one of two partners, the other being out of the kingdom, the question before the Court was: whether the defendant should pay the whole or only a moiety of the debt; and Lord Hardwicke was of opinion that he ought to pay the whole.¹ Upon the same principle, a

made without seriously affecting his rights, the Court will refrain from proceeding further. *Cassidy v. Shimmitt*, 122 Mass. 406; *McPike v. Wells*, 54 Miss. 136; *Hill v. Proctor*, 10 W. Va. 59; *Mudgett v. Gager*, 52 Me. 541.] "This ground of exception," says Mr. Justice Story, "is peculiarly applicable to suits in Equity in the Courts of the United States, which suits can be maintained in general only by and against citizens of different States. If, therefore, the rule as to parties were of universal operation, many suits in those Courts would be incapable of being sustained therein, because all the proper and necessary parties might not be citizens of different States; so that the jurisdiction of the Court would be ousted by any attempt to join them. On this account it is a general rule in the Courts of the United States to dispense, if consistently with the merits of the case it can possibly be done, with all parties, over whom the Court would not possess jurisdiction." *West v. Randall*, 2 Mason, 196; *Russell v. Clarke*, 7 Cranch, 69, 98; *Milligan v. Milledge*, 3 Cranch, 220; *Simms v. Guthrie*, 9 Cranch, 19, 29; *Elmendorf v. Taylor*, 10 Wheat. 152; *Mallow v. Hinde*, 12 Wheat. 193; *Harding v. Handy*, 11 Wheat. 103; *Ward v. Arredondo*, 1 Paine C. C. 413, 414. See the Act of Congress on this subject, passed Feb. 28, 1839, c. 36, § 1, [and now Rev. St. § 737 *et seq.*], by which an important alteration has been effected. [But if the person not before the Court be indispensable, the jurisdiction fails, notwithstanding the Act of Congress of 1839, 36, 1 (Rev. St. § 737). *Coiron v. Millaudon*, 19 How. 113; *Williams v. Bankhead*, 19 Wall. 563. See U. S. Rev. St. 737 *et seq.*; *Ober v. Gallagher*, 93 U. S. 199; *Parsons v. Howard*, 2 Woods, 1; *Kilgour v. New Orleans Gas Light Co.*, 2 Woods, 144; *Bronson v. Keokuk*, 2 Dill. 498.]

But a decree cannot be made against a defendant personally who has never been an inhabitant of the State, or served with process in it. *Moody v. Gay*, 15 Gray, 457;

Spurr v. Scoville, 3 Cush. 578. [See, now, *Pennoyer v. Neff*, 95 U. S. 714, where the power of the Courts of a State to render judgment against a non-resident are fully and ably discussed, and the principles which regulate the exercise of such jurisdiction determined. See also *Moore v. Gennett*, 2 Tenn. Ch. 375; *McEwen v. Zimmer*, Sup. Ct. Mich., 18 Law Reg. 92.]

A bill alleging that three of the four defendants were not inhabitants of the State, will, on demurrer, be dismissed as to them, when no service has been made on them. *Stephenson v. Davis*, 56 Maine, 73. The only service made in this case upon the parties demurring, was an attachment of their real and personal property. See *Spurr v. Scoville*, 3 Cush. 578. But the Court will not dismiss a bill on a mere suggestion that certain stockholders, who were defendants, were not residents of the State, and, therefore, the Court had not jurisdiction as to them. *Wiswell v. Starr*, 50 Maine, 381, 384. In *Postgate v. Barnes*, 9 Jur. N. S. 456, V. C. S., a demurrer to the bill of a married woman to enforce her equity to a settlement, on the ground that her husband was only made a defendant when he should come within the jurisdiction, was overruled; and see *Jackson v. Norton*, 4 Jur. N. S. 1067; 7 W. R. 4, M. R. [See *infra*, 190.]

² Dec. 11, 1744; Ld. Red. 32, n. (u).

³ Reported in 9 Mod. 407.

¹ *Darwent v. Walton*, 2 Atk. 510; *Erickson v. Nesmith*, 46 N. H. 371. This rule, that the Court can proceed to a decree against those parties, who are within the jurisdiction, must be taken with the qualification that it can be done without manifest injustice to the absent party. *Story Eq. Pl. §§ 78, 82*; *Milligan v. Milledge*, 3 Cranch, 220; *Towle v. Pierce*, 12 Met. 329; *Lawrence v. Rokes*, 53 Maine, 110, 116.

A bill seeking an adjustment of the accounts between the part-owners of a vessel, some of whom reside without the jurisdiction of the Court, cannot be sustained, unless such

bill may be brought against one factor without his companion, if such companion be beyond sea;² and where there were two executors, one of whom was beyond sea, and a bill was filed by a residuary legatee against the other, to have an account of his own receipts and payments: the Court, upon an objection being taken at the hearing, on the ground of the absence of the co-executor, allowed the cause to go on.³

In his treatise on pleading, Lord Redesdale says, "when a person who ought to be a party is out of the jurisdiction of the Court, that fact being stated in the bill, and admitted by the defendants, or proved at the hearing, is, in most cases, a sufficient reason for not bringing him before the Court; and the Court will proceed, without him, against the other parties, as far as circumstances will permit;"⁴ and on this principle, the Court has frequently made decrees without prejudice to the rights (if any) of absent parties, or reserving all questions in which they were interested, and determining only such as did not affect them.⁵

In bills of interpleader, also, a plaintiff may proceed with his suit and obtain an injunction against a party resident in this country, although the other parties claiming the property are out of the jurisdiction.⁶ In such cases, however, the plaintiff is bound to use prompt diligence to get the parties who are absent to come in and interplead with those who are present. If he does not succeed in doing so within a reasonable time, the consequence is, that the party within the jurisdiction must have that which is represented * to be the subject of com- *151 petition, and the plaintiff must be indemnified against any proceeding being afterwards taken on the part of those who are out of the jurisdiction.¹ For this purpose, "if the plaintiff can show that he has used all due diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court, upon that default, and their so abstaining from giving him an opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and enjoin that action for ever: not permitting those who refused the plaintiff that justice, to commit that injustice against him."² Upon

non-residents are summoned to answer, or it appears from the allegations in the bill that not only their interests will not be prejudiced by the decree, but also that they were not necessary to the just ascertainment of the merits of the case. *Mudgett v. Gager*, 52 Maine, 541; *Fuller v. Benjamin*, 23 Maine, 255. It is not enough for the bill to allege that "the plaintiff does not claim there is any thing due to him from said non-residents; or that he does not seek thereby to recover any thing from them." *Mudgett v. Gager*, *supra*.

² *Cowslad v. Cely*, Prec. Ch. 83.

³ *Ibid*.

⁴ *Ld. Red.* 164; see also *Smith v. Hibernian Mine Company*, 1 Sch. & Lef. 238, 240;

Rogers v. Linton, Bunb. 200; *Walley v. Walley*, 1 Vern. 487; *Duxbury v. Isherwood*, 12 W. R. 821, V. C. W.; *Erickson v. Nesmith*, 46 N. H. 371, 376.

⁵ *Willats v. Busby*, 5 Beav. 193, 200; *Powell v. Wright*, 7 Beav. 444, 450; *Morley v. Rennoldson*, 2 Hare, 570, 585; 7 Jur. 938; *Mores v. Mores*, 6 Hare, 125, 127, 135; 12 Jur. 620; see *Moody v. Gay*, 15 Gray, 457.

⁶ *Stevenson v. Anderson*, 2 Ves. & B. 407, 411.

¹ *Ibid*.

² *Per Lord Eldon*, 2 Ves. & B. 412; see also *Martinius v. Helmuth*, G. Coop. 245, 248; reported also in some copies of 2 Ves. & B. 412, n.; *East and West India Dock Company v. Littledale*, 7 Hare, 57.

the same ground it has been determined, that where a party to a bill of interpleader, who has been served, will not appear, and stands out all the process of contempt, the bill may be taken *pro confesso* against him, and he will be decreed to interplead with the other defendants.³

Where, however, the person who is out of the jurisdiction is one whose interests are principally affected by the bill, the Court cannot proceed in his absence, even though the parties having the legal estate are before the Court; ⁴ thus, where a judgment creditor, who had sued out an *elegit* upon his judgment, filed a bill for equitable execution against real estates, which were vested in trustees upon certain trusts, the Court would not proceed with the cause, because the equitable tenant for life, subject to the trusts, was abroad.⁵ Upon the same principle it has been held, that bail cannot maintain an injunction against a creditor, who has recovered a verdict, where the principal debtor is out of the jurisdiction.⁶ In a case where a contract for the sale of an estate in the West Indies had been entered into by a person who resided there, and had got into possession without paying the purchase-money, and a suit was instituted in this country by the vendor against the consignees appointed by the purchaser, Lord Lyndhurst refused to entertain a motion for a receiver of the proceeds of the consignments, on the ground that the purchaser, who was the principal defendant, was abroad, and had never been served with a *subpoena*.⁷

*152 * It has been held, that a receiver of a mortgaged estate may be appointed, notwithstanding the absence of the mortgagor. Thus, in the case of *Tanfield v. Irvine*,¹ an application for a receiver had been made to Sir John Leach V. C. by the grantee of an annuity, which was secured by an equitable charge upon an estate; and though the grantor had gone abroad, and had not appeared to the suit, his Honor refused the application, on the ground that the Court had not jurisdiction to deprive a man, who was not present, of the possession of his estate; but upon the motion being renewed before Lord Eldon, he made the order for a receiver, but guarding it, however, in such a way as not to prevent any person having a better title to the possession of the estate, from ousting him if they pleased. His Lordship observed, that he did not see why the rights of the equitable mortgagee were to be taken away, by the circumstance that the mortgagor had not entered

³ *Fairbrother v. Prattent*, Dan. Exc. 64; and the decree, *ib.* 69, n. (c). Where the rights of a defendant in Equity, who resides out of the State and has had notice of the suit, but does not appear and answer, will not be prejudiced by the decree, the bill may be taken *pro confesso* as to him. *Adams v. Stevens*, 49 Maine, 362.

⁴ Story Eq. Pl. § 81; *Fell v. Brown*, 2 Bro. C. C. (Perkins's ed.) 278, 279, notes; *Joy v. Wirtz*, 1 Wash. C. C. 517; *Russell v. Clarke*, 7 Cranch, 72; *Mallow v. Hinde*, 12

Wheat, 193; *Lawrence v. Rokes*, 53 Maine, 110, 113; *Spurr v. Scoville*, 3 Cush. 578.

⁵ *Browne v. Blount*, 2 R. & M. 83; and see *Kirwan v. Daniel*, 7 Hare, 347; *McCalmont v. Rankin*, 8 Hare, 1: 14 Jur. 475; *Anderson v. Stather*, 2 Coll. 209.

⁶ *Roveray v. Grayson*, 3 Swanst. 145, n. 7 *Stratton v. Davidson*, 1 R. & M. 484.

⁷ 2 Russ. 149, 151; see also *Coward v. Chadwick*, *ib.* 634, and 150, n.; *Dowling v. Hudson*, 14 Beav. 423, and cases collected in the note thereto.

an appearance, and could not be compelled to do so;² and that a second mortgagee might be delayed to all eternity, if the residence of the mortgagor out of the jurisdiction were to have the effect which the Vice-Chancellor had given it.

It is usual, in cases where any of the persons who, if resident in this country, would be necessary parties to a suit, are abroad, to make such persons defendants to the bill, stating the fact of their being abroad: which fact, unless they appear, must be proved at the hearing;³ and, notwithstanding the observation of Lord Redesdale cited above, it seems that the admission of the parties before the Court is not evidence on which the Court will act.⁴ When the proof of this fact at the hearing is not such as to satisfy the Court, the usual practice is to direct the cause to stand over for the purpose of supplying the proper evidence.⁵ In some cases, however, if there are preliminary inquiries or accounts to be taken, they have been directed to be proceeded with in the mean time;⁶ and in others, an inquiry as to the fact has been directed.⁷ In *Penfold v. Kelly*,⁸ Sir R. T. Kindersley V. C. refused an application * for leave to serve a defendant coming within the jurisdic- * 153 tion after decree, and against whom no specific relief was prayed, with a copy of the bill.

In *Capel v. Butler*,¹ where a party who was named as a defendant, but had never been served, appeared by counsel at the hearing, and consented to be bound by the decree, the defect arising from his not having been served was held to be cured.²

In some cases, where a defendant has been abroad during the proceedings in a cause, he has been allowed to come in after a decree has been pronounced, and to have the benefit of it, without the process of filing a supplemental bill. Thus, in *Banister v. Way*,³ after a decree, pronounced in a suit by a residuary legatee, establishing a will, and directing the necessary accounts, others of the residuary legatees, who were abroad, applied to have the benefit of the decree, submitting to be bound by it; and an order was made by Lord Thurlow (they submitting to the decree) that they should be at liberty to enter their appearance.

² See *Fell v. Brown*, 2 Bro. C. C. (Perkins's ed.) 278, 279, and notes.

³ *Moodie v. Bannister*, 1 Drew. 514; see *Erickson v. Nesmith*, 46 N. H. 371. The party should not be named as a defendant "when he shall come within the jurisdiction," but as being "out of the jurisdiction:" see *Jackson v. Norton*, 4 Jur. N. S. 1067; 7 W. R. 4, M. R.; *Story Eq. Pl.* § 80; *Munor v. De Tartel*, 1 Beav. 109; *Brookes v. Burt*, 1 Beav. 109; *Pingree v. Coffin*, 12 Gray, 288, 303, 304; *Postgate v. Barnes*, 9 Jur. N. S. 456; 11 W. R. 456, V. C. S.; see, however, *Merriman v. Goodman*, 1 W. N. 46, M. R.

⁴ *Wilkinson v. Beal*, 4 Mad. 408; *Hughes v. Eades*, 1 Hare, 486, 488; 6 Jur. 255; *Egginton v. Burton*, 1 Hare, 488, n.; *McAlmont v. Rankin*, 8 Hare, 1; 14 Jur. 475.

⁵ *Egginton v. Burton*, 1 Hare, 488, n.; *Smith v. Edwards*, 16 Jur. 1041, V. C. S. As to necessary evidence, where there is delay between the making and drawing up of the order, see *Anon.*, 9 L. T. N. S. 674, M. R.

⁶ *Butler v. Borton*, 5 Mad. 40; 42; *Hughes v. Eades*, 1 Hare, 486; 6 Jur. 255.

⁷ *Mores v. Mores*, 6 Hare, 136; 12 Jur. 620; *Eades v. Harris*, 1 Y. & C. C. 230, 234; but see *Dibbs v. Goren*, 1 Beav. 457.

⁸ 12 W. R. 286, and see *Ord. X.* 11, 18. ¹ 2 S. & S. 457, 462; and see *Sapte v. Ward*, 1 Coll. 24.

² For form of introductory part of decree, see *Seton*, 3, 4; and 1 Coll. 25.

³ 2 Dick. 686.

and should have the like benefit of the decree as if they had put in an answer, and had appeared at the hearing of the cause. A similar order was made by Lord Lyndhurst, after a cause had been heard upon further directions.⁴

An order for leave for a defendant to come in, after decree, may be obtained by petition of course, if the plaintiff will consent thereto. If he will not consent, notice of motion, or a summons, must be served on him.⁵ The petition, notice of motion, or summons, usually asks that the defendant, on submitting to be bound by the decree and proceedings already had, may be at liberty to enter an appearance to the bill, and may have the like benefit of the decree, and may be at liberty to attend the subsequent proceedings, as if he had appeared at the hearing. A copy of the order, when passed and entered, should be served on the solicitors of the other defendants, and on the plaintiff's solicitor when the order is made on petition. On production of the order to the Record and Writ Clerk, an appearance for the defendant⁶ may be entered in the usual way; and notice thereof must be given, on the same day, to the plaintiff's solicitor;⁶ and the cause thenceforth proceeds against such defendant in the ordinary manner.

In the case of infants, however, the Court must be satisfied, by inquiry or otherwise, that it is for their benefit to adopt the proceedings.⁷

*154 * Where a defendant is stated to be abroad, he is not considered a party to the suit, at least not till he has been served with the bill, for the determination of any point of practice arising between the plaintiff and the other defendants; therefore, an order to amend cannot be obtained, after the usual time, on the ground that a defendant abroad has not answered.¹

Under the present practice of the Court, however, such questions as we have been considering, with reference to defendants out of the jurisdiction, will be of comparatively rare occurrence; for the Court can now, in many cases, direct service on persons out of the jurisdiction;² and can also, when the suit is defective for want of parties, and the defendant has not taken the objection by plea or answer, make a decree, if it shall think fit, saving the rights of absent parties.³

And it may here be observed that, as a general rule, persons are not now named parties to a suit unless direct relief is sought against them; and therefore, if they happen to be out of the jurisdiction, it will in

⁴ *White v. Hall*, 1 R. & M. 332; and see *Prendergast v. Lushington*, 5 Hare, 177; *Potts v. Britton*, M. R. in Chamb. 22 Dec. 1864.

⁵ *Braithwaite's Pr.* 323. For form of order, see *Seton*, 1250; and for forms of petition, notice of motion, and summons, see Vol. III.

⁶ For forms of *præcipe* and notice, see Vc. III.

⁷ *Copley v. Smithson*, 5 De G. & S. 583, *Baillie v. Jackson*, 10 Sim. 167.

¹ *King of Spain v. Hullett*, 3 Sim. 338; [*Cassidy v. Shimmin*, 122 Mass. 406.]

² 2 & 3 Will. IV. c. 33; 4 & 5 Will. IV. c. 82. Ord. X. 7; see *post*, Chap. VIII. § 1.

³ Ord. XXIII. 11; *Mayberry v. Brookings*, 7 De G., M. & G. 673; 2 Jur. N. S. 76.

general, on the authority of *Browne v. Blount*,⁴ and the other cases before referred to, be necessary to serve them.

SECTION VI. — *Paupers.*

Although the 11 Hen. VII. c. 12, before referred to as that under which the practice of admitting parties to sue *in formâ pauperis* originated,⁵ does not extend to defendants, and consequently a defendant in an action at Law is never allowed to defend it as a pauper,⁶ yet a greater degree of liberality is practised in Courts of Equity; and a defendant who is in a state of poverty, and, as such, incapable of defending a suit, may, as well as a plaintiff, obtain an order to defend *in formâ pauperis*, upon making the same affidavit of poverty as that required to be made by a plaintiff.⁷ Indeed, originally, the right of admission *in formâ pauperis* appears to have been confined to defendants. By Lord Bacon's orders it is said, that "any man shall be admitted to defend *in formâ pauperis* * upon oath; but for plaintiffs, they *155 are ordinarily to be referred to the Court of Requests, or to the provincial counsels, if the case arise in the jurisdictions, or to some gentlemen in the country, except it be in some special cases of commiseration or potency of the adverse party."¹

It has been before stated, that no person suing in a representative character is allowed the privilege of proceeding *in formâ pauperis*. The same rule applies to defendants sued in a representative character, even in cases where they have received no assets of the estate of the testator whom they represent.²

The solicitor to the Suitors' Fund, or other officer appointed by the Lord Chancellor, is to visit Whitecross Street Prison³ quarterly, examine the prisoners confined for contempt, and report his opinion on their cases; and the Lord Chancellor may thereupon assign a solicitor to defend the prisoner *in formâ pauperis*. A like assignment may also be made, in the case of persons confined for contempt in other prisons, upon the jailer's report, and after investigation by the solicitor to the Suitors' Fund.⁴ The assignment is made without an application to the Court.⁵

⁴ 2 R. & M. 83, *ante*, p. 151.

⁵ *Ante*, p. 38.

⁶ Chitty's Arch. 1277.

⁷ McDonough v. O'Flaherty, 1 Beat. 54. In New Jersey the privilege of defending *in formâ pauperis* is granted in a proper case, although the Act of Assembly extends in terms only to plaintiffs. Pickle v. Pickle, Halst. N. J. Dig. 177. It seems to be doubtful, in New York, whether, in any case, a party can defend *in formâ pauperis*. The doubt grows out of the peculiar phraseology of the Statute in that State. Brown v. Story, 1 Paige, 583.

A party will not be deprived of the privilege of defending himself *in formâ pauperis*

on account of his misconduct. Murphy v. Oldis, 1 Hogan, 219.

¹ Beames's Ord. 44; Sand. Ord. 122. This order is abrogated by the Cons. Ord.; but see *ib.* Prel. Ord. r. 5; see also Lord Clarendon's Orders, Beames, 215-218; Sand. Ord. 312; now Cons. Ord. VII. 9-11.

² Oldfield v. Cobbett, 1 Phil. 613; *ante*, p. 38.

³ Substituted, by 25 & 26 Vic. c. 104, for the Queen's prison.

⁴ 23 & 24 Vic. c. 149, §§ 2, 5; and see §§ 3, 4, 6, and *post*, Chap. X. § 2.

⁵ Layton v. Mortimore, 2 De G., F. & J. 353.

The order admitting a party to sue or defend *in formâ pauperis*, has not the effect of releasing him from costs ordered to be paid prior to his admission, but the payment of such costs may be enforced in the usual manner; it may, however, be doubtful whether the admission may not have a retrospective effect upon costs incurred before the date of his admission, but concerning which no order for taxation and payment has been made.⁶ Where a defendant had been committed for not answering, and had subsequently obtained permission to defend *in formâ pauperis*, and thereupon had put in his answer, Sir J. L. Knight Bruce V. C. ordered him to be discharged, without payment of the costs of the contempt; considering the Court to have power to make such an order, either under its general authority independent of the 11 Geo. IV. & 1 Will. IV. c. 36, or under that statute combined with its general authority.⁷ It appears that where the plaintiff dismisses his bill against a pauper defendant, the practice is to allow the defendant *dies* costs.⁸

*156 *To entitle a party to defend as a pauper, he must make an affidavit similar to that required from a plaintiff applying to sue in that character; and it seems that if he is in possession of the property in dispute, he cannot be admitted, or, if admitted, he may, upon the fact being afterwards shown to the Court, be dispaupered.¹ In this and in most other respects, the rules laid down with regard to persons suing *in formâ pauperis*,² are applicable to persons defending in that character: the only difference being in the form of application for admission; for the petition, in the case of a defendant, is much shorter than in the case of a plaintiff, and is not required to contain any statement of the case, or to be accompanied by any certificate of counsel.³

SECTION VII. — *Persons outlawed, attainted, or convicted.*

It is said that all persons disabled by law from instituting or maintaining a suit may, notwithstanding, be made defendants in a Court of Law, and cannot plead their own disabilities;⁴ and it is presumed that this rule would also be adopted in Courts of Equity, where the suit

⁶ Davenport v. Davenport, 1 Phil. 124; see, however, Prince Albert v. Strange, 2 De G. & S. 652, 718; 13 Jur. 507, where a defendant, having been admitted to defend in the course of the cause, was ordered, at the hearing, to pay the plaintiff's costs up to the time of such admission.

⁷ Bennett v. Chudleigh, 2 Y. & C. C. 164; see, however, Snowball v. Dixon, 2 De G. & S. 9; and Dew v. Clark, 16 Jur. 1, L. C.; 3 M'N. & G. 357.

⁸ Rubery v. Morris, 1 M'N. & G. 413; 16 Sim. 312, 433; 12 Jur. 689. Unless otherwise directed, costs ordered to be paid to a party suing or defending *in formâ pauperis*, are to be taxed, as *dies* costs, Ord. XL. 5.

¹ Spencer v. Bryant, 11 Ves. 49; see also Wyatt's P. R. 321.

² Ante, pp. 41, 42.

³ See Ord. VII. 9, 10, 11; XL. 5. Regulation to Ord. IV. 2. The defendant need not enter an appearance before applying for the order, Braithwaite's Pr. 563. An application in behalf of an infant defendant for leave to defend *in formâ pauperis*, will not be entertained before the appointment of a guardian *ad litem*. Matter of Byrne, 1 Edw. Ch. 41. For forms of petition and affidavit, see Vol. III.

⁴ Treatise on Star Chamber, part 3, § 6 (2 Collect. Jurid. 140). It is said in the above Treatise, that persons attainted of treason or

seeks to establish a pecuniary demand against the party; where, however, the proceeding is *in rem*, and a person under any of the disabilities alluded to is interested in the subject of the suit, then it would seem, that as the interest of the party is entirely vested in the Crown, the Attorney-General would be the proper defendant.⁵ Whether in such case, the party himself should be joined, is a point which does not appear to have been determined; but it is submitted that the rule, that no person can be made a party to a suit against whom no relief can be prayed, will apply to this case, as well as to that of bankrupts.

* SECTION VIII. — *Bankrupts.*

*157

It is a general rule of Courts of Equity, that no person can be made a party to a suit against whom no relief can be prayed;¹ and it follows, as a consequence of this rule, that no person whose interest in the subject-matter of the suit has been vested by act of law in another, ought to be made a defendant. Consequently, it has been held, that bankrupts and insolvent debtors, whose interests, whether legal or equitable, in the property, must have devolved upon their assignees, cannot be made parties to suits relative to any property which is affected by the bankruptcy or insolvency.²

Upon this principle, a demurrer put in by a bankrupt, who was joined as a co-defendant with his assignees, in a bill to enforce the specific performance of an agreement entered into by him previously to his bankruptcy, was allowed.³

It is said by Lord Redesdale that, although a bankrupt made a party to a bill touching his estate may demur to the relief, all his interest being transferred to his assignees, yet it has been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of the discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignee; otherwise, the bankruptcy might

felony are excepted out of this rule; but it has been decided, in many cases, that a defendant cannot plead his own attainder to an action brought against him for debt or trespass. *Banyster v. Trussell*, Cro. Eliz. 516; *Coke's Entries*, 246; see also *Ward and Prestall's cases*, in 1 Leon. 329; and *Vin. Ab. Attainder* (B.) 3.

⁵ See *Balch v. Wastall*, 1 P. Wms. 445; *Hayward v. Fry*, *ib.* 446; — *v. Bromley*, 2 P. Wms. 269, 270; *Rex v. Fowler*, Bumb. 38; *Cuddon v. Hubert*, 7 Sim. 485; and see *Attorney-General v. Rickards*, 8 Beav. 380; *Goldsmith v. Russell*, 5 De G., M. & G. 547; *Bromley v. Smith*, 26 Beav. 644; *Hancock v. The Attorney-General*, 10 Jur. N. S. 557; 12 W. R. 569, V. C. K.

¹ Story Eq. Pl. § 231, and cases cited in notes; *Todd v. Stewart*, 6 J. J. Marsh. 432.

² *Whitworth v. Davis*, 1 Ves. & B. 545, 547; *DeGolls v. Ward*, 3 P. Wms. 311, n.; *Collins v. Shirley*, 1 R. & M. 638; Judgment of Lord Cottenham in *Rochfort v. Battérsby*, 2 H. L. Ca. 408; and see *Davis v. Snell*, 28 Beav. 321; Story Eq. Pl. § 233 and note; *De Wolf v. Johnson*, 10 Wheat. 384. Counsel for an insolvent appearing separately from his assignees not heard. *Edmunds v. Waugh*, 1 W. N. 7, V. C. K.; [L. R. 1 Eq. 419.]

³ *Whitworth v. Davis*, 1 Ves. & B. 545; see also *Griffin v. Archer*, 2 Anst. 478; *Lloyd v. Lander*, 5 Mad. 282, 288; *Collet v. Wollaston*, 3 Bro. C. C. 228.

entirely defeat the ends of justice.⁴ This opinion has given rise to much discussion, and is made the subject of an elaborate judgment by Sir Thomas Plumer V. C. in the case of *Whitworth v. Davis*,⁵ in the course of which he observes that "the case of *Fenton v. Hughes*,⁶ lays down a broad principle, viz., that a person who has no interest, and is a mere witness against whom there could be no relief, ought not to be a party; a bankrupt stands in that situation: a competent witness, having no interest, against whom, therefore, no relief can be had at the hearing; he falls precisely within that general rule."⁷ He, however, allowed the demurrer in the case before him, without determining the general question.

*158 * When the bankruptcy of a defendant does not appear on the face of the bill, or has occurred subsequently to the filing of the bill, but before the expiration of the time for putting in his answer, the defendant may take the objection by way of plea.¹ He may also plead the bankruptcy of a co-defendant, even where it took place after the filing of the bill.²

A bankrupt can be made a party to a bill for the mere purpose of discovery and injunction;³ but there is no doubt that if he is made a party for the purpose of obtaining relief against him, he may demur to the bill, and that in such case his demurrer will protect him from the discovery as well as the relief; where, however, fraud or collusion is charged between the bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur, although relief be prayed against him. Thus, where a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by permission of the plaintiff, possessed part of the goods taken in execution for the purpose of sale, instead of paying the produce to the plaintiff had paid it to his assignees: a demurrer by the alleged bankrupt, because he had no interest, and might be examined as a witness, was overruled.⁴ Upon the same principle, where a man had been fraudulently induced by the drawer to accept bills of exchange without consideration, and the drawer afterwards indorsed them to others: upon a bill filed against the holder and drawer of the bills of exchange,

⁴ Ld. Red. 161; *Fopping v. Van Pelt*, 1 Hoff. Ch. Pr. 545.

⁵ 1 Ves. & B. 545.

⁶ 7 Ves. 287; see also *Le Texier v. Margrave* of Anspach, 15 Ves. 159, 166.

⁷ 1 Ves. & B. 549, 550; see *Gilbert v. Lewis*, 1 De G., J. & S. 38; 2 J. & H. 452; 9 Jur. N. S. 187; *Story Eq. Pl.* § 223, n.

¹ *Turner v. Robinson*, 1 S. & S. 3; *Lane v. Smith*, 14 Beav. 49; *Jones v. Binns*, 10 Jur. N. S. 119; 12 W. R. 329, M. R.; 33 Beav. 362; [*Pepper v. Henzell*, 2 H. & M.

486;] and see *Campbell v. Joyce*, L. R. 2 Eq. 377, V. C. W.

² *Sergrove v. Mayhew*, 3 M'N. & G. 97.

³ Plea of defendant's bankruptcy overruled; he being the manager, secretary, and a member of the committee of an association; and discovery was required from him in order to obtain contribution from the members. *Pepper v. Henzell*, 2 H. & M. 486; 11 Jur. N. S. 840.

⁴ *King v. Martin*, 2 Ves. J. 641, cited Ld. Red. 162; but see *Gilbert v. Lewis*, 1 De G., J. & S. 38; 2 J. & H. 452; 9 Jur. N. S. 187.

for a delivery up of the bills, and an injunction, the drawer pleaded his bankruptcy, which took place after the bill filed, in bar to the bill; but Sir Lancelot Shadwell V. C. overruled the plea.⁵

Where a defendant becomes bankrupt after the commencement of the suit, the bankruptcy is no abatement, and the plaintiff has his choice, either to dismiss the bill and go in under the bankruptcy, or to go on with the suit, making the assignees parties.⁶ It seems that in *Knoc v. Brown*,⁷ Lord Thurlow permitted the plaintiff to dismiss his own bill without costs, because it was by the *act of the defendant *159 himself that the object of the suit was gone. In a subsequent case, however, of *Rutherford v. Miller*,¹ the Court of Exchequer refused to make such an order without costs; and in *Monteith v. Taylor*,² where a motion was made on behalf of the defendant, who had become bankrupt, to dismiss the plaintiff's bill with costs, for want of prosecution, Lord Eldon, although he at first entertained a doubt whether he could make such an order with costs, afterwards expressed an opinion against the plaintiff upon that point, upon which the plaintiff submitted to give the usual undertaking to speed the cause; and in the case of *Blackmore v. Smith*,³ Lord Cottenham, after referring to the order made in the last-mentioned case, in the Registrar's book, held, that if the bill were dismissed it must be with costs.

It appears from the two cases last referred to, that a defendant may, notwithstanding he has become bankrupt, move to dismiss the plaintiff's bill for want of prosecution; and it is the practice, on such a motion, to dismiss the bill with costs.⁴

After what has been said, it is scarcely necessary to observe that where a party who is a defendant to a suit becomes bankrupt, it will be necessary for the plaintiff, if he proceeds with the suit, to bring the assignees before the Court by amendment or a supplemental order;⁵ and it has been decided, that where the assignee of a bankrupt has been already before the Court as a defendant, and such assignee die or is removed, and a new assignee is appointed in his stead, the suit abates, and an order to carry on the proceedings against such new

⁵ Mackworth v. Marshall, 3 Sim. 368.

⁶ Monteith v. Taylor, 9 Ves. 615.

⁷ 2 Bro. C. C. 186.

¹ 2 Anst. 458.

² 9 Ves. 615.

³ 1 M'N. & G. 80.

⁴ Blackmore v. Smith, *ubi sup.*; see also Robson v. Earl of Devon, 3 Sm. & G. 227; Levi v. Heritage, 26 Beav. 560, which were cases of insolvent debtors; overruling Blanchard v. Drew, 10 Sim. 240; see, however, Kembell v. Walduck, 1 Sm. & G. App. 27; 18 Jur. 69.

⁵ 15 & 16 Vic. c. 86, §§ 52, 53; Lash v. Miller, 4 De G., M. & G. 841; 1 Jur. N. S. 457; Storm v. Davenport, 1 Sandf. Ch. 135. It is to be borne in mind, that there is a difference in reference to this point between cases of voluntary alienation, and cases of involuntary alienation, as by insolvency or

bankruptcy of the defendant. This distinction is fully discussed in Sedgwick v. Cleveland, 7 Paige, 290-292; see also note to Story Eq. Pl. § 342. After the assignees have been made parties, the bankrupt appears to be treated as out of the suit; see Robertson v. Southgate, 5 Hare, 223; Stahlschmidt v. Lett, *ib.* 595; and see Seton, 1166. For forms of supplemental order, see Seton, 1165, Nos. 5, 6; and for forms of motion paper and petition, see Vol. III.; and see *ante*, p. 64.

[But see, now, Doe v. Childress, 21 Wall. 642; Payne v. Beech, 2 Tenn. Ch. 711; Eyster v. Graff, 91 U. S. 521; Esterbrook Steel Pen Man. Co. v. Ahern, 3 Stew. Eq. 341; and the cases cited by the Reporter in an exhaustive note. And see Barger v. Buckland, 28 Gratt. 850; Parks v. Doty, 13 Bush, 727.]

assignee must be obtained in like manner as against the original assignee.⁶

Where a bill has been filed against a defendant who afterwards became bankrupt, and a supplemental bill was in consequence filed against his assignees, the evidence taken in the original cause previously to the bankruptcy was allowed to be read at the hearing *160 *against the assignees; but where it appeared that some of the witnesses in the cause had been examined after the commission issued, and before the supplemental cause was at issue, an objection to reading their depositions was allowed; but the objection was overruled in so far as it extended to the witnesses who had been previously examined.¹

It has been held that, on the death of the assignee of an insolvent's estate, where no new assignee has been appointed, a party having a demand against the insolvent, but not having proved under the insolvency, may sue the executors of the deceased assignee.²

It may here be observed that, after some difference of opinion upon the subject, it has been determined, that in foreclosure suits, where assignees are made parties as defendants, in respect of the equity of redemption, they are not entitled to their costs from the plaintiff, even though they may have received no assets of the bankrupt wherewith to pay them.³

SECTION IX. — *Infants.*

Infants as well as adults may, as we have seen,⁴ be made defendants to suits in Equity; and, in such cases, it is not necessary that any other person should be joined with them in the bill; nor is it usual for the plaintiff to describe them as infants in his bill, unless any question in the suit turns upon the fact of their infancy.

Although it is not necessary that, in bringing a bill against infants, the plaintiff, as in the case of married women, should join any other person with them, yet they are not permitted, on account of their supposed want of capacity, to defend themselves; and therefore, where a defendant to a suit, or the respondent to a petition,⁵ is an infant, the Court will appoint a proper person, who ought not to be a mere volunteer,⁶ to put in his defence for him, and generally to act on his behalf

⁶ *Gordon v. Jesson*, 16 Beav. 440. The 157th section of the Bankrupt Act, 12 & 13 Vic. c. 106, referred to *ante*, p. 65, applies only, it would seem, to plaintiffs; see *Gordon v. Jesson*, *ubi sup.*; and see *Bainbrigge v. Blair*, *Younge*, 386; *Mendham v. Robinson*, 1 M. & K. 217; *Man v. Ricketts*, 7 Beav. 484; 1 Phil. 617; (decided on similar clause in former Bankrupt Act), and cases there cited.

¹ *Hichens v. Congreve*, 4 Sim. 420.

² *Fulcher v. Howell*, 11 Sim. 100; and see *ante*, p. 62.

³ *Appleby v. Duke*, 1 Phil. 272; *Clarke v. Wilmot*, *ib.* 276; *Ford v. White*, 16 Beav. 120, and cases there cited; and see *Ford v. Chesterfield*, 16 Beav. 516; and see also *post*, Chap. XVI., *Disclaimers*.

⁴ *Ante*, p. 130.

⁵ *Re Barrington*, 27 Beav. 272; *Re Ward*, 2 Giff. 122; 6 Jur. N. S. 441; *Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 46.

⁶ *Foster v. Cautley*, 10 Hare, App. 24; 17 Jur. 370. It is usual to appoint the nearest relative of an infant defendant as his guardian *ad litem*. *Bank of United States v.*

in the conduct and management of the case.⁷ The person so appointed is called "the guardian of the infant;" and is generally styled "the guardian *ad litem*," * to distinguish him from the guardian *161 of the person or of the estate.¹

Formerly it was usual, upon the appointment of a guardian *ad litem*, for the infant to appear personally in Court.² This is no longer necessary;³ but the order may be obtained upon motion of course, or upon petition of course, presented at the Rolls in the name of the infant; the application being supported by an affidavit of the infant's solicitor, that the proposed guardian has no interest in the matters in question in the suit, adverse to that of the infant; and it must also be proved by the same affidavit, or by that of some other person, if the solicitor is not sufficiently acquainted with the proposed guardian, that he is a fit and proper person to be appointed.⁴ A co-defendant may

Ritche, 8 Peters, 128. [Grant v. Van Schoonhoven, 9 Paige, 255. And see where no one applies, Anonymous, 2 Ch. Cas. 163; 2 Fonbl. 236; Conclin v. Hall, 2 Barb. Ch. 136; Carter v. Montgomery, 2 Tenn. Ch. 457.]

⁷ A decree against an adult defendant, as if an infant, was held not to bind him. Snow v. Hole, 15 Sm. 161; Green v. Badley, 7 Beav. 271.

¹ In a suit against an infant, process should be served upon him, and a guardian *ad litem* appointed by the Court. Carrington v. Brents, 1 McLean, 17; Walker v. Hallett, 1 Ala. 379; Graham v. Sublett, 6 J. J. Marsh. 45. [A guardian *ad litem* need not be appointed, if the infant has a probate or general guardian, unless the interests of the infant and such guardian are in conflict. Mansur v. Pratt, 101 Mass. 60. So in Tennessee the general guardian represents the infant. Britain v. Cowan, 5 Humph. 315; Cowen v. Anderson, 7 Coldw. 291.]

In New York, the appearance of an infant is entered by his guardian *ad litem*, who is appointed by the Court on petition for that purpose. Knickerbocker v. De Freest, 2 Paige, 304; Grant v. Van Schoonhoven, 9 Paige, 255. See, in Ala., Cato v. Easley, 2 Stewart, 214; Darrington v. Borland, 3 Porter, 10.

Infants above the age of fourteen years should be consulted in the appointment of a guardian *ad litem*, if that course would not be attended with too much trouble or expense. Walker v. Hallett, 1 Ala. 379. Courts may appoint guardians *ad litem* to non-resident infants. Walker v. Hallett, 1 Ala. 379; Graham v. Sublett, 6 J. J. Marsh. 45; Smith v. Palmer, 3 Beav. 10; [Kilcrease v. Blythe, 5 Humph. 378.] And they may provide reasonable compensation for such guardians. Walker v. Hallett, 1 Ala. 379; Graham v. Sublett, 6 J. J. Marsh. 45; see Gott v. Cook, 7 Paige, 523. It is error to enter a decree against infant defendants without assigning them a guardian *ad litem*. Roberts v. Stanton, 2 Munf. 129; Irons v. Crist, 3 A. K. Marsh. 143; St. Clair v. Smith, 3 Ham. 363; Crockett v. Drew, 5 Gray, 399; Swan v.

Horton, 14 Gray, 179; Ewing v. Highbee, 7 Ham. 198; see Darby v. Richardson, 3 J. J. Marsh. 544; Beverley v. Miller, 6 Munf. 99; Cravens v. Dyer, 1 Litt. 153; Shields v. Bryant, 3 Bibb, 525. The guardian must have accepted the appointment, and that fact should appear of record. Daniel v. Hannagan, 5 J. J. Marsh. 49.

Where infant defendants had not been served with process, but upon inspection of the record it appeared, that, upon their motion, a guardian *ad litem* had been appointed, who proceeded in the cause, the Court held, that a decree against the infants was not void, and therefore could not be impeached in a collateral suit. Day v. Kerr, 7 Missou. 426. [So, where there is an actual appearance by guardian *ad litem*, recognized by the Court, although there is no order of record. Hopper v. Fisher, 2 Head, 153; Greenlaw v. Kernehan, 4 Sneed, 371; Kindell v. Titus, 9 Heisk. 738; Jackson v. Jackson, 2 Tenn. Leg. Rep. 275.] It is not necessary to serve a copy of a bill in Equity on a guardian *ad litem*, after his appointment. Jones v. Drake, 2 Hayw. 237.

The Court will not appoint a person guardian *ad litem* for an infant defendant, on the nomination of the plaintiff. Knickerbocker v. De Freest, 2 Paige, 304.

² Crabbe v. Moubery, 5 De G. & S. 347; Benison v. Wortley, *ib.* 648; [Tappen v. Norman, 11 Ves. 563.]

³ See Drant v. Vause, 2 Y. & C. C. 524; 7 Jur. 637, L. C.; Egremont v. Egremont, 2 De G., M. & G. 730; 17 Jur. 55; Foster v. Cautley, 10 Hare App. 24; 17 Jur. 370; Storr v. Pannell, 1 W. R. 209, V. C. S.; [Walker v. Hallett, 1 Ala. 379; Banta v. Calhoun, 1 A. K. Mar. 167; Carter v. Montgomery, 2 Tenn. Ch. 450.]

⁴ Braithwaite's Pr. 46, 47. For form of order, see Seton, 1250; and for forms of motion paper, petition, and affidavit, see Vol. III. Where the infant is a respondent to a petition, the application must be supported by an affidavit that the petition has been served on the infant. *Re Willan*, 9 W. R. 689, n.

be appointed, if he has no adverse interest;⁵ but the plaintiff, a married woman, or a person out of the jurisdiction,⁶ cannot be appointed.

*162 *An appearance for the infant should be entered at the Record and Writ Clerks' Office, before the application is made; but no other step in the suit, on behalf of the infant, will be regular, till a guardian *ad litem* has been appointed.¹

If no application for the appointment of a guardian is made on behalf of the infant, the plaintiff may, if default is made by the infant in appearing or answering,² apply to the Court that a solicitor may be appointed his guardian. The application is made by motion, of which notice³ must be served upon or left at the dwelling-house of the person with whom, or under whose care, the infant was at the time of serving the bill,⁴ and if such person is not the father, or guardian, notice must also be served upon the father or guardian. Where the infant's father was dead, service of the notice at the house of the infant's mother and step-father was held sufficient;⁵ and where the plaintiff was unable to discover where the parents lived, service was deemed sufficient on the head of a college, of which the infant was an under-graduate.⁶ If, however, an appearance has been entered for the infant, service upon the solicitor is sufficient.⁷ Upon the motion, the Court must be satisfied that the bill has been duly served, and that the notice of the application was served after the expiration of the time allowed for appearing or answering, and at least six clear days before the day in such notice named for hearing the application;⁸ but the Court, on hearing the application, may dispense with service on the father or guardian.⁹ The solicitor to the Suitors' Fee Fund is the person usually appointed.¹⁰

If the infant is out of the jurisdiction, the same course must be followed;¹¹ but where he had no substantial interest, and had been served with the bill, the Court dispensed with service of notice of the application.¹²

⁵ See *Bonfield v. Grant*, 11 W. R. 275, M. R.; *Newman v. Selfe*, *ib.* 764, M. R.; *Anon.*, 9 Hare, App. 27.

⁶ *Anon.*, 18 Jur., 770, V. C. W.

¹ *Lushington v. Sewell*, 6 Mad. 28. An appearance by the plaintiff for an infant defendant is irregular, and of no validity, Ord. X. 5; *Leese v. Knight*, 8 Jur. N. S. 1006; 10 W. R. 711, V. C. K.

² If no answer is required from the infant (as is usually the practice), and no voluntary answer is put in, the defendant is considered, after the expiration of the time for answering voluntarily, to be in default. *Bentley v. Robinson*, 9 Hare, App. 76.

³ For form of notice of motion, see Vol. III.

⁴ *Taylor v. Ansley*, 9 Jur. 1055, V. C. K. B.; *Christie v. Cameron*, 2 Jur. N. S. 635, V. C. W.; and see Ord. VII. 3.

⁵ *Hitch v. Wells*, 8 Beav. 576.

⁶ *Christie v. Cameron*, *ubi sup.*

⁷ *Cookson v. Lee*, 15 Sm. 302; *Bentley v. Robinson*, 9 Hare, App. 76.

⁸ For form of affidavit in support of motion, see Vol. III.

⁹ Ord. VII. 3; see *Leese v. Knight*, 8 Jur. N. S. 1006; 10 W. R. 711, V. C. K. For form of order, see *Seton*, 1251.

¹⁰ *Thomas v. Thomas*, 7 Beav. 47; *Sheppard v. Harris*, 10 Jur. 24, V. C. K. B. Where he is appointed, the Court provides for his costs, Ord. XL. 4; usually directing the plaintiff to pay them, and add them to his own. *Harris v. Hamlyn*, 3 De G. & S. 470; 14 Jur. 55; *Fraser v. Thompson*, 1 Giff. 337; 4 De G. & J. 659; but where there is property of the infant's with which the Court can deal, it will, it seems, direct the costs to be paid out of it. *Robinson v. Aston*, 9 Jur. 224, V. C. K. B.

¹¹ *O'Brien v. Maitland*, 10 W. R. 275, L. C.

¹² *Lambert v. Turner*, 10 W. R. 335, V. C. K.; *Turner v. Sowden*, 10 Jur. N. S. 1122; 13 W. R. 66, V. C. K.; 2 Dr. & Sm. 265, *nom.* *Turner v. Snowden*.

* If the guardian dies pending the suit, a new guardian must *163 be appointed in his place; this is done in the same manner as the original guardian was appointed, and upon similar evidence.¹ All orders appointing guardians must be left at the Record and Writ Clerks' Office for entry.²

Where the infant is a married woman, it is nevertheless necessary that she should defend by her guardian: though it appears to be the practice to appoint her husband to be her guardian where he is a defendant with her, and they intend to defend jointly.³

The duty of the guardian is to put in the proper defence for the infant; and it seems that he is responsible for the propriety and conduct of such defence;⁴ and if he puts in an answer which is scandalous or impertinent, he is liable for the costs of it. Sometimes the guardian is ordered or decreed to perform a duty on behalf of the infant: his refusal or neglect to do which will subject him to the censure of the Court.⁵

If the guardian of an infant defendant, or the next friend of an infant plaintiff, does not do his duty, or other sufficient ground be made out, the Court will remove him.⁶ It was said by Sir John Leach V. C.,⁷ that infants are as much bound by the conduct of their solicitor, as adults; thus, an issue *devisavit vel non* may, it seems, be waived on the part of the infant.⁸ And so, although the Court usually will not, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit,⁹ yet when once a decree has been

¹ *Ante*, pp. 160, 161.

² Braithwaite's Pr. 47.

³ *Colman v. Northcote*, 2 Hare, 147; 7 Jur. 528, and cases there referred to. [A decree in Chancery is erroneous which is rendered against a woman who is shown by the bill to be both a minor and a *feme covert*, where no appearance by or for her has been entered, and no guardian *ad litem* appointed. *O'Hara v. MacConnell*, 93 U. S. 150.]

⁴ *Knickerbocker v. De Freest*, 2 Paige, 304. [A guardian *ad litem* may consent to any matter relating to the conduct of the cause, such as consenting to take the evidence by affidavit. *Knatchbull v. Fowle*, 1 Ch. Div. 604.] It is the special duty of the guardian *ad litem* to submit to the Court, for its consideration and decision, every question involving the rights of the infant affected by the suit. *Ibid.*; *Dow v. Jewell*, 21 N. H. 486, 487, and to make a vigorous defence of the interests of the infant. *Sconce v. Whitney*, 12 Ill. 150; *Enos v. Capps*, 12 Ill. 255. If the guardian *ad litem* neglects his duty to the infant, whereby such infant sustains an injury, the guardian will not only be punished for his neglect, but he will also be liable to the infant for all the damages he may have sustained thereby. *Knickerbocker v. De Freest*, *supra*.

Where a person consents to act as guardian *ad litem*, he must put in a pleading; and is not to stop the plaintiff by neglecting it, merely because he thinks his wards are improper or unnecessary parties. *Farmers'*

Loan and Trust Co. v. Reed, 3 Edw. Ch. 414. The infant's answer is generally confined to a mere submission of his rights and interests in the matters in question, to the care and protection of the Court. The answer in such cases generally is, that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself upon the protection of the Court. *Dow v. Jewell*, 21 N. H. 487, per *Gilchrist C. J.*

⁵ *Hinde*, 241. Except in case of gross misconduct, a guardian *ad litem* will not be ordered to pay the costs of a suit which he has defended unsuccessfully. *Morgan v. Morgan*, 11 Jur. N. S. 233, V. C. K.

⁶ *Russell v. Sharpe*, 1 J. & W. 482. The application for this purpose may be made by summons; for forms, see Vol. III.; and see *ante*, p. 71.

⁷ *Tillotson v. Hargrave*, 3 Mad. 494; see *Morison v. Morison*, 4 M. & C. 216, 226.

⁸ *Levy v. Levy*, 3 Mad. 245.

⁹ *Dow v. Jewell*, 21 N. H. 486, 487; *Mills v. Dennis*, 3 John. Ch. 368; *Monday v. Monday*, 1 V. & B. 223. Neither a default nor a decree *pro confesso* can be taken against an infant. *Enos v. Capps*, 12 Ill. 255; [*Wells v. Smith*, 44 Miss. 296; *McIlvoy v. Alsop*, 45 Miss. 365.] A decree cannot be entered against an infant without proof to sustain the case. *Hamilton v. Gilman*, 12 Ill. 260.

*164 pronounced without that * previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit. In the same manner, an order for maintenance, though usually made after an inquiry, if made without would be equally binding.¹ By a recent order,² it is provided that any consent by the guardian to any mode of taking evidence or other procedure, shall, if given with the sanction of the Court or Judge in Chambers, have the same effect as if the infant were not under disability, and had given such consent.

An infant defendant is as much bound by a decree in Equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or error.

To impeach a decree on the ground of fraud or collusion, the infant may proceed, either by a bill of review, or supplemental bill in the nature of a bill of review; or he may so proceed by original bill. He may also impeach a decree, on the ground of error, by original bill; and he is not obliged, for that purpose, to wait till he has attained twenty-one.³

Among the errors that have been allowed as sufficient grounds on which to impeach a decree against an infant, is the circumstance that, in a suit for the administration of assets against an infant heir, a sale of the real estate has been decreed before a sufficient account has been taken of the personal estate.⁴ And so, if an account were to be directed against an infant in respect of his receipts and payments during his minority, such a direction would be erroneous.⁵ Another ground of error for which a decree against an infant may be impeached is, that it does not give the infant a day after his coming of age to show cause against it, in cases where he is entitled to such indulgence.⁶

It was an established rule at Common Law, that in all actions for debt against infant heirs by specialty creditors of their ancestors, either party was entitled to pray that the parol might demur; that is, that the proceedings might be stayed until the heir had attained his full *165 age.⁷ This rule was the foundation of a * similar practice in Equity in like cases; ¹ so that, when any suit was instituted, either

¹ Wall v. Bushby, 1 Bro. C. C. 484, 488; per Gilchrist C. J. in Dow v. Jewell, 21 N. H. 487; and see Brook v. Mostyn, 10 Jur. N. S. 554, M. R.; *ib.* 1114; 13 W. R. 115, L. J.J.; 33 Beav. 457; 2 De G. & S. 373, 417; as to compromises with the Court's sanction, where infants are interested. [See Musgrove v. Lusk, 2 Teyn. Ch. 576.]

² Ord. 5 Feb., 1861, r. 24. For form of summons to obtain the Judge's sanction, see Vol. III.

³ Richmond v. Tayleur, 1 P. Wms. 737; Brook v. Mostyn, *ubi sup.* [S. C. *sub nom.* Mostyn v. Brooke, L. R. 4 H. L. 304; Liv-

ingston v. Noe, 1 Lea, 64; McGavock v. Bell, 3 Coldw. 517; Loyd v. Malone, 23 Ill. 43.]

⁴ Bennett v. Hamill, 2 Sch. & Lef. 565. [Davidson v. Bowden, 5 Sneed, 129.]

⁵ Hindmarsh v. Southgate, 3 Russ. 324, 327; see Stott v. Meanock, 10 W. R. 605, *bis*, L. J.J.

⁶ Bennett v. Hamill, *ubi sup.*; 2 Kent, 245, 246.

⁷ 3 Bla. Com. 300; Plasket v. Beeby, 4 East, 485; Com. Dig. Enfant, (D) 3; *ib.* Pleas, 2 (E) 3.

¹ Chaplin v. Chaplin, 3 P. Wms. 368, Lechnere v. Brasier, 2 J. & W. 287, 290; Scarth v. Cotton, Ca. t. Talb. 198.

by a specialty creditor or by a simple contract creditor, the equity of which depended upon the legal liability of the heir to pay out of descended assets the specialty debts of his ancestor, no relief could be obtained against the heir during his minority, but the decree contained a direction for liberty to apply when the heir should have attained his full age; accompanied, in the case of a suit by a simple contract creditor, with a declaration of the right to have the assets marshalled. Courts of Equity did not, however, confine this species of protection to cases precisely similar to those in which the parol could demur at Law; but, by a kind of analogy, they adopted a second rule, by which, in cases of foreclosure and partition, and in all cases in which the real estates of an infant were to be sold or conveyed under a decree of the Court, and consequently the execution of the conveyance was necessarily deferred, the infant had an opportunity, after attaining twenty-one, to show cause against the decree.² For this purpose, a provision was inserted in the decree, giving the infant a day to show cause against it within a certain time after he came of age.³ The words of the decree in such cases were as follow: "And this decree is to be binding on the defendant, the infant, unless he, on being served, after he shall have attained his age of twenty-one years, with *subpœna* to show cause against this decree, shall, within six months from the service of such *subpœna*, show unto this Court good cause to the contrary."⁴ The insertion of this clause in a decree for a conveyance by an infant of his estate, was so strictly insisted upon in all cases, that the omission of it has been considered as an error in the decree.⁵

By the 11 Geo. IV. & 1 Will. IV. c. 47, the rule as to the parol demurring was abolished, and the cases in which the clause giving the infant a day to show cause ought to be introduced, were materially lessened in number;⁶ for by the 10th section of that statute, it is enacted, that from and after the passing of the *Act, where *166 any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against

² See *Price v. Carver*, 3 M. & C. 162, 163.

³ See *Harris v. Youman*, 1 Hoff. Ch. 178; *Wilkinson v. Oliver*, 4 Hen. & M. 450; *Shields v. Bryant*, 3 Bibb, 525; *Dow v. Jewell*, 21 N. H. 470; *Anderson v. Irvine*, 11 B. Mon. 341; *Cole v. Miller*, 32 Miss. 89; [*Guest v. Sims*, 1 Tenn. 79. The rule applies where the infant is directed to convey, not where title can be, and is divested by the decree. *Sheffield v. Duchess of Buckingham*, 1 West, 684; *Mills v. Dennis*, 3 John. Ch. 146; *Winston v. Campbell*, 4 H. & M. 477; *Rogers v. Clark*, 4 Sneed, 668; *Winchester v. Winchester*, 1 Head, 460. See *infra*, 166, n. 5; 168, n. 4; 1276, n. 3; 997, n. 1.] Where a decree against an infant defendant permits him to show cause within a certain time after he comes of age, why the decree should not be enforced, he cannot assail the decree in any manner he may choose, without regard to the course of prac-

tice pursued by adult defendants, but he must apply to the Court for leave and direction. *Field v. Williamson*, 4 Sandf. Ch. 613. [And the cause must be one which existed at the time the decree was pronounced. *Walker v. Page*, 21 Gratt. 636.]

⁴ *Seton*, 685, No. 2; see *Dow v. Jewell*, 21 N. H. 491.

⁵ *Richmond v. Tayleur*, 1 P. Wms. 737. An absolute decree against an infant, without giving him day after he comes of age to show cause against it, will be reversed. *Beeler v. Bullitt*, 4 Bibb, 11; *Passmore v. Moore*, 1 J. J. Marsh. 591; *Jones v. Adair*, 4 J. J. Marsh. 220; *Arnold v. Voorhies*, 4 J. J. Marsh. 507; *Searey v. Morgan*, 4 Bibb, 96; *Wright v. Miller*, 4 Barb. (S. C.) 600; *Coffin v. Heath*, 6 Met. 76.

⁶ See 2 Macpherson (Lond. ed. 1842), 360, 361, 411.

entirely defeat the ends of justice.⁴ This opinion has given rise to much discussion, and is made the subject of an elaborate judgment by Sir Thomas Plumer V. C. in the case of *Whitworth v. Davis*,⁵ in the course of which he observes that "the case of *Fenton v. Hughes*,⁶ lays down a broad principle, viz., that a person who has no interest, and is a mere witness against whom there could be no relief, ought not to be a party; a bankrupt stands in that situation: a competent witness, having no interest, against whom, therefore, no relief can be had at the hearing; he falls precisely within that general rule."⁷ He, however, allowed the demurrer in the case before him, without determining the general question.

*158 * When the bankruptcy of a defendant does not appear on the face of the bill, or has occurred subsequently to the filing of the bill, but before the expiration of the time for putting in his answer, the defendant may take the objection by way of plea.¹ He may also plead the bankruptcy of a co-defendant, even where it took place after the filing of the bill.²

A bankrupt can be made a party to a bill for the mere purpose of discovery and injunction;³ but there is no doubt that if he is made a party for the purpose of obtaining relief against him, he may demur to the bill, and that in such case his demurrer will protect him from the discovery as well as the relief; where, however, fraud or collusion is charged between the bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur, although relief be prayed against him. Thus, where a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by permission of the plaintiff, possessed part of the goods taken in execution for the purpose of sale, instead of paying the produce to the plaintiff had paid it to his assignees: a demurrer by the alleged bankrupt, because he had no interest, and might be examined as a witness, was overruled.⁴ Upon the same principle, where a man had been fraudulently induced by the drawer to accept bills of exchange without consideration, and the drawer afterwards indorsed them to others: upon a bill filed against the holder and drawer of the bills of exchange,

⁴ Ld. Red. 161; *Fopping v. Van Pelt*, 1 Huz. Ch. Pr. 545.

⁵ 1 Ves. & B. 545.

⁶ 7 Ves. 287; see also *Le Texier v. Margrayne* of Annapoli, 15 Ves. 159, 166.

⁷ 1 Ves. & B. 549, 550; see *Gilbert v. Lewis*, 1 De G., J. & S. 38; 2 J. & H. 452; 2 Jur. N. S. 187; *Story Eq. Pl.* § 223, n.

¹ *Tanner v. Robinson*, 1 S. & S. 3; *Lane v. Sturt*, 14 Beav. 49; *Jones v. Binns*, 10 Jur. N. S. 119; 12 W. R. 329, M. R. 33 Beav. 362; [*Pepper v. Henzell*, 2 H. & M.

486;] and see *Campbell v. Joyce*, L. R. 2 Eq. 377, V. C. W.

² *Sergrove v. Mayhew*, 3 M'N. & G. 97.

³ Plea of defendant's bankruptcy overruled; he being the manager, secretary, and a member of the committee of an association; and discovery was required from him in order to obtain contribution from the members. *Pepper v. Henzell*, 2 H. & M. 486; 11 Jur. N. S. 840.

⁴ *King v. Martin*, 2 Ves. J. 641, cited Ld. Red. 162; but see *Gilbert v. Lewis*, 1 De G., J. & S. 38; 2 J. & H. 452; 9 Jur. N. S. 187.

for a delivery up of the bills, and an injunction, the drawer pleaded his bankruptcy, which took place after the bill filed, in bar to the bill; but Sir Lancelot Shadwell V. C. overruled the plea.⁵

Where a defendant becomes bankrupt after the commencement of the suit, the bankruptcy is no abatement, and the plaintiff has his choice, either to dismiss the bill and go in under the bankruptcy, or to go on with the suit, making the assignees parties.⁶ It seems that in *Knox v. Brown*,⁷ Lord Thurlow permitted the plaintiff to dismiss his own bill without costs, because it was by the *act of the defendant *159 himself that the object of the suit was gone. In a subsequent case, however, of *Rutherford v. Miller*,¹ the Court of Exchequer refused to make such an order without costs; and in *Monteith v. Taylor*,² where a motion was made on behalf of the defendant, who had become bankrupt, to dismiss the plaintiff's bill with costs, for want of prosecution, Lord Eldon, although he at first entertained a doubt whether he could make such an order with costs, afterwards expressed an opinion against the plaintiff upon that point, upon which the plaintiff submitted to give the usual undertaking to speed the cause; and in the case of *Blackmore v. Smith*,³ Lord Cottenham, after referring to the order made in the last-mentioned case, in the Registrar's book, held, that if the bill were dismissed it must be with costs.

It appears from the two cases last referred to, that a defendant may, notwithstanding he has become bankrupt, move to dismiss the plaintiff's bill for want of prosecution; and it is the practice, on such a motion, to dismiss the bill with costs.⁴

After what has been said, it is scarcely necessary to observe that where a party who is a defendant to a suit becomes bankrupt, it will be necessary for the plaintiff, if he proceeds with the suit, to bring the assignees before the Court by amendment or a supplemental order;⁵ and it has been decided, that where the assignee of a bankrupt has been already before the Court as a defendant, and such assignee die or is removed, and a new assignee is appointed in his stead, the suit abates, and an order to carry on the proceedings against such new

⁵ Mackworth v. Marshall, 3 Sim. 368.

⁶ Monteith v. Taylor, 9 Ves. 615.

⁷ 2 Bro. C. C. 186.

¹ 2 Anst. 458.

² 9 Ves. 615.

³ 1 M.N. & G. 80.

⁴ Blackmore v. Smith, *ubi sup.*; see also Robson v. Earl of Devon, 3 Sm. & G. 227; Levi v. Heritage, 26 Beav. 560, which were cases of insolvent debtors; overruling Blanchard v. Drew, 10 Sim. 240; see, however, Kemball v. Walduck, 1 Sm. & G. App. 27; 18 Jur. 69.

⁵ 15 & 16 Vic. c. 86, §§ 52, 53; Lash v. Miller, 4 De G., M. & G. 841; 1 Jur. N. S. 457; Storm v. Davenport, 1 Sandf. Ch. 135. It is to be borne in mind, that there is a difference in reference to this point between cases of voluntary alienation, and cases of involuntary alienation, as by insolvency or

bankruptcy of the defendant. This distinction is fully discussed in Sedgwick v. Cleveland, 7 Paige, 290-292; see also note to Story Eq. Pl. § 342. After the assignees have been made parties, the bankrupt appears to be treated as out of the suit; see Robertson v. Southgate, 5 Hare, 223; Stahlschmidt v. Lett, *ib.* 595; and see Seton, 1166. For forms of supplemental order, see Seton, 1165, Nos. 5, 6; and for forms of motion paper and petition, see Vol. III.; and see *ante*, p. 64.

[But see, now, Doe v. Childress, 21 Wall. 642; Payne v. Beech, 2 Tenn. Ch. 711; Eyster v. Graff, 91 U. S. 521; Esterbrook Steel Pen Man. Co. v. Ahern, 3 Stew. Eq. 341; and the cases cited by the Reporter in an exhaustive note. And see Barger v. Buckland, 28 Gratt. 850; Parks v. Doty, 13 Bush, 727.]

was prayed. It is to be observed, also, that in those cases, as well as in *Pace v. Marsden*, the decree was made for a sale, without a previous reference to inquire whether it would be for the benefit of the infant. In *Pace v. Marsden*, however, it seems that a sale was prayed by the bill. In *Price v. Carver*,³ Lord Cottenham seems to have suggested, that a decree for sale was the proper course, as against an infant defendant; and in the event of such a decree, it would appear that no day to show cause is given.⁴ Now, however, in all foreclosure suits, the Court is empowered, if it thinks fit, to direct a sale, instead of a foreclosure;⁵ and where it is for the benefit of the infant, it is the practice to do so.⁶ Where the value of the mortgaged property was clearly less than the amount due to the mortgagee, the Court, at the hearing, made an absolute decree for foreclosure against an infant defendant, upon the plaintiff's paying the infant's costs.⁷

Mere irregularities and errors in the proceedings of the Court will not invalidate a sale, or prevent a good title from being made under a decree;⁸ it seems, however, that if there is a material error in substance, as well as in words and form, a purchaser may object to the title, and the Court will discharge him from his contract. Thus, in the case of *Culvert v. Godfrey*,⁹ where a sale of an infant's estate was ordered,

merely because it was beneficial to the infant, and without there
 *169 being any person who had a right to call *upon the Court to sell the estate for the satisfaction of a claim or debt, Lord Langdale M. R., considering that such an order was not within the jurisdiction of the Court, allowed an objection to the title, made in consequence of the irregularity of the decree.

Where an answer is put in on behalf of an infant, it is put in upon the oath of the person appointed his guardian;¹ but the infant is not

³ 3 M. & C. 157, 161.

⁴ *Scholefield v. Heafield*, 7 Sim. 669; 8 Sim. 479; *Davis v. Dowding*, 2 Keen, 245. [*Ante*, 165, note 3.]

⁵ 15 & 16 Vic. c. 86, § 48; and see *Hurst v. Hurst*, 16 Beav. 372; *Powell v. Robins*, 7 Sumner's Ves. 211, note (1), and cases cited; *Harris v. Harris*, 6 Gill & J. 111; *Garland v. Living*, 1 Rand. 396; *Coger v. Coger*, 2 Dana, 270, in reference to the circumstances under which Courts will decree a sale of the lands descended to infants. In *Mills v. Dennis*, 3 John. Ch. 367, which was a bill for foreclosure of a mortgage, Mr. Chancellor Kent observed, "The practice with us has been to sell, and not to foreclose, as well where infants, as where adults are concerned. I think this course must generally be most beneficial to the infants as well as to the creditors; and there can be no doubt of the authority of the Court to pursue it." In case of a decree for the sale of the mortgaged premises, the decree, it is understood, will bind the infant. *Mills v. Dennis*, 3 John. Ch. 367, 369.

⁶ *Mears v. Best*, 10 Hare, App. 51; *Siffkin v. Davis*, Kay, App. 21.

⁷ *Croxon v. Lever*, 10 Jur. N. S. 87; 12 W. R. 237, M. R., following *Billson v. Scott*, Seton, 686, V. C. W.

⁸ *Culvert v. Godfrey*, 6 Beav. 97, 107; *Baker v. Sowter*, 10 Beav. 343, 348. [*Ante*, 161, note 1.]

⁹ 6 Beav. 97, 109. [See *Brown, ex parte*, 8 Humph. 200; *Gray v. Barnard*, 1 Tenn. Ch. 238; *Huger v. Huger*, 3 Des. 18.] Now, however, the Court has statutory power to sell infants' settled estates; see *post*, Chap. XLV. § 6.

¹ *Ld. Red.* 314. The order appointing the guardian must be produced to the person before whom the answer is sworn, *Ord. VII* 4. Where a guardian *ad litem* has been appointed, an order may be obtained, on a petition of course, by the plaintiff, to file an infant's answer without oath, or without oath or signature of his guardian. For form of petition, see Vol. III.

bound by such answer, and it cannot be read against him:² the true reason of which is, because in reality it is not the answer of the infant, but of the guardian, who is the person sworn, and not the infant; and the infant may know nothing of the contents of the answer put in for him, or may be of such tender years as not to be able to judge of it.³ This being the case, it would be useless, and occasion unnecessary expense, to call upon an infant to put in a full answer to the plaintiff's bill;⁴ and it is, therefore, held, that exceptions will not lie to the answer of an infant, for insufficiency.⁵

It is not now the practice to require any answer from an infant. Formerly, when an answer from every defendant was necessary, an infant's answer was generally confined to a mere submission of his rights and interests in the matters in question in the cause to the care and protection of the Court;⁶ the infant might, however, state in his answer any thing which he meant to prove by way of defence;⁷ and he may now file a voluntary answer for this purpose.⁸ whenever it is for his benefit so to do, as in many cases it may be;⁹ but whatever admissions there may be in the answer, or whatever points may be tendered thereby in issue, it appears *that the plaintiff is not in any *170 degree exonerated from his duty in proving, as against the infant, the whole case upon which he relies.¹

Where an answer has been put in by a guardian on behalf of an infant defendant, and the infant comes of age, and is dissatisfied with the defence put in by his guardian, he may apply to the Court for leave to amend his answer, or to put in a new one;² and it seems that

² *Leggett v. Sellon*, 3 Paige, 84; *James v. James*, 4 Paige, 115; *Stephenson v. Stephenson*, 6 Paige, 353; *Rogers v. Cruger*, 7 John. 581; *Bulkley v. Van Wyck*, 5 Paige, 536; *Stewart v. Duvall*, 7 Gill & J. 180; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 500; *Crain v. Parker*, 1 Carter (Ind.), 74. It is the duty of the Court to see that the rights of an infant are not prejudiced or abandoned by the answer of his guardian. *Barret v. Oliver*, 7 Gill & J. 191. An infant is not bound by a guardian's waiver of service of process. *Robbins v. Robbins*, 2 Carter, 74; *Lenox v. Nettlebe*, 1 Hemp. 251.

The answer of an infant by his guardian *ad litem*, is not evidence in his favor, although it is responsive to the bill, and sworn to by the guardian *ad litem*. *Bulkley v. Van Wyck*, 5 Paige, 536; *Stephenson v. Stephenson*, 6 Paige, 353. A plaintiff cannot in any form of pleading compel an infant to become a witness against himself. *Bulkley v. Van Wyck*, *ubi supra*. [*Infra*, 753, n. 6.]

³ *Wrottesley v. Bendish*, 3 P. Wms. 236; see *Hough v. Doyle*, 8 Blackf. 300; *Hough v. Canby*, 8 Blackf. 301.

⁴ *Strudwick v. Pargiter*, Bunb. 338.

⁵ *Copeland v. Wheeler*, 4 Bro. C. C. 256; *Lucas v. Lucas*, 13 Ves. 274; 1 D. Red. 315; *Leggett v. Sellon*, 3 Paige, 84; *Bulkley v. Van Wyck*, 5 Paige, 536.

⁶ *Mills v. Dennis*, 3 John. Ch. 367, 368; *Dow v. Jewell*, 21 N. H. 470, 486, 487.

⁷ Per Richards C. B. in *Attorney-General v. Lambirth*, 5 Pri. 398.

⁸ For formal parts of an infant's answer, see Vol. III.

⁹ *Lane v. Hardwicke*, 9 Beav. 148. Ord. XIII. 1, empowering the plaintiff to file a traversing note in default of answer, does not, it seems, apply to an infant defendant. *Emery v. Newson*, 10 Sim. 564.

¹ *Holden v. Hearn*, 1 Beav. 445, 455; 3 Jur. 428; *Mills v. Dennis*, 3 John. Ch. 367, 368; 2 Kent, 245; *Winston v. Campbell*, 4 Hen. & M. 477; *Massie v. Donaldson*, 8 Ohio, 377.

² *Stephenson v. Stephenson*, 6 Paige, 353; *James v. James*, 4 Paige, 115. An infant defendant does not lose his right to object to the jurisdiction of the Court at the hearing, upon the ground that the remedy is at Law, although his guardian *ad litem* has omitted to raise such objection in his answer. *Bowers v. Smith*, 10 Paige, 193.

Where the infant under leave does amend his answer, or puts in a new one, on coming of age, the plaintiff may amend his bill, and may waive an answer under oath by the infant so coming of age. *Stephenson v. Stephenson*, 6 Paige, 353.

this privilege applies as well after a decree has been made as before.³

An infant, however, wishing to make a new defence, must apply to the Court as early as possible after attaining twenty-one; for if he is guilty of any laches, his application will be refused.⁴

The same reasons which prevent an infant from being bound by his answer, operate to prevent his being bound by admissions in any other stage of proceeding, unless indeed such admissions are for his benefit. Thus, it was held that, where an infant is concerned, no case could be stated by the Court of Chancery for the opinion of a Court of Law: because an infant would not be bound by the admissions in such case.⁵ Upon the same principle it has been held, that an infant is not bound by a recital in a deed executed during infancy.⁶

The consequence of this rule is, that where there are infant defendants, and it is necessary, in order to entitle the plaintiff to the relief he prays, that certain facts should be before the Court, such facts, although they might be the subject of admission on the part of adults, must

*171 be proved against the infants.⁷ For the same reason, where a will relating to real estate is to be established in Chancery, and the heir-at-law is an infant, it is always necessary to establish the due execution of the will by the examination of witnesses.

From the report of the cases of *Cartwright v. Cartwright*, and *Sleeman v. Sleeman*, in Mr. Dickens's Reports,¹ it seems to have been held, that where the heir-at-law in an original suit, being adult, had by his answer admitted the due execution of the will, but died before the cause was brought to a hearing, leaving an infant heir, who was brought before the Court by revivor, the will must be proved *per testes* against the infant heir. But in *Livesey v. Livesey*,² Sir John Leach M. R. held, that the circumstance of the first heir having admitted the will, rendered it unnecessary to prove it against the infant; and in a subsequent case,³ Sir Lancelot Shadwell V. C. expressed himself to be of the same opinion as the Master of the Rolls, and said that he had referred to the entries of the cases of *Sleeman v. Sleeman*, and *Cartwright v. Cartwright*,

³ *Kelsall v. Kelsall*, 2 M. & K. 409, 416; *Snow v. Holt*, 15 Sam. 161; 10 Jur. 347; *Codrington v. Johnston*, cited 1 Smith Pr. 275; *Selton*, 685.

⁴ *Barnet v. Leigh*, 1 Dick. 89. In the case of *Barnet v. Lee*, 2 Ark. 487, and 529, referred to in the margin of 1 Dick. 89 as S. C., the application was made during the infancy, see p. 9, 174, and see *Cecil v. Lord Salisbury*, 2 Vern. 224; *Mason v. Debow*, 2 Hayw. 176; *Morris v. Morris*, 11 Jur. 260, V. C. K. B.; *Moxyponny v. Dering*, 4 De G. & J. 179, 5 Jur. N. S. 691.

⁵ *Hawkins v. Lusscombe*, 2 Swanst. 392; but it was done in *Walsh v. Frevanham*, 16 Sim. 178; 12 Jur. 547.

⁶ *Murray v. Lord Harwood*, 18 Ves. 274.

⁷ *Wilkinson v. Bad*, 4 Mad. 408; see also *Quattrick v. Raden*, 5 Mad. 81, where the Court refused to allow evidence, taken before

the infants were made parties, to be read against them; but see *Baillie v. Jackson*, 10 Sim. 167, as to accounts; and see *Jebb v. Tugwell*, 20 Beav. 461. In *Ellis v. Dennis*, 3 John. Ch. 367, which was a suit for foreclosure, it was held, that there could be no valid decree against an infant, by default, nor on his answer by guardian; but the plaintiff must prove his demand in Court, or before a Master, and the infant will have a day in Court, after he comes of age, to show error in the decree. See *Massie v. Donaldson*, 8 Ohio, 377; *Walton v. Coulson*, 1 McLean, 125; *Chalfant v. Monroe*, 3 Dana, 35; *Dow v. Jewell*, 21 N. H. 486, 487.

¹ 2 Dick. 545, 787.

² Cited 4 Sim. 132.

³ *Lock v. Foote*, 4 Sim. 132. [See *Lewis v. Outlaw*, 1 Tenn. 140.]

in the Registrars' book; and that with respect to the former, no such thing as is mentioned by the reporter appears to have taken place, but the original heir having admitted the will, the Court established it; and with respect to the latter, all that was stated was, that on hearing the will and proofs read (not saying what proofs), the Court declared that the will ought to be established.⁴

Where an infant has a day given him by the decree, to show cause against it, the process served upon him at his coming of age is a writ of *subpœna*, which is a judicial writ.⁵

The *subpœna* will be sealed upon its mere presentation, and without production of the decree or order referred to in it; and need not be served personally.⁶ It is served by delivering a copy thereof, and of the indorsement, to the late infant personally, or to his servant, or some member of his family,⁷ at his dwelling-house, or usual place of abode, and at the same time producing the original *subpœna*.⁸ If service cannot be thus effected, an application may be made to the Court, by *ex parte* motion,⁹ supported by affidavit, to direct some other mode of service.¹⁰ If the order be made, a copy of it must be served with the *subpœna*, in the manner prescribed by the order.

*The service of the *subpœna* will be of no validity, if not made *172 within twelve weeks after the *teste* of the writ.¹

If, after service of the *subpœna* to show cause, the party does not appear within the time limited, the decree will be made absolute, without entering an appearance for him,² upon an *ex parte* motion, supported by an affidavit of service of the *subpœna*, evidence that the infant is of age, and the Registrar's certificate of no cause shown.³

It is said above,⁴ that in cases of foreclosure, the only cause which can be shown by an infant after attaining twenty-one, against making the decree absolute, is error in the decree, and that he will not be permitted to unravel the account, nor even to redeem the mortgage on paying what is due. This strictness, however, must not be understood as applying to cases in which fraud or collusion has been made use of in obtaining the decree.⁵ Neither, it is apprehended, will the above rule apply to cases where the title claimed by the infant is paramount the mortgage. Thus, in a case where an estate had been conveyed to the great-uncle and grandfather of the infant, as joint-tenants in fee, and upon the death of the great-uncle, the grandfather, being the sur-

⁴ See also *Robinson v. Cooper*, 4 Sim. 131. Such a statement by an ancestor plaintiff, in a bill, is an admission binding on his infant heir. *Hollings v. Kirkby*, 15 Sim. 183.

⁵ 2 Kent, 245, and note; *Dow v. Jewell*, 21 N. H. 491. For form of writ, see Ord. Sched. E. 6; and Vol. III.; for forms of *prœcipe* and indorsement, see Vol. III.

⁶ *Braithwaite's Pr.* 266, 267.

⁷ Such member should be an inmate of the house. *Edgson v. Edgson*, 3 De G. & S. 629.

⁸ See Ord. X. 1; XXVIII. 6.

⁹ For form of motion paper, see Vol. III.

¹⁰ See Ord. X. 2; *Elcock v. Glazg*, 2 Dick. 764.

¹ Ord. XXVIII. 9.

² *Gillb. For. Rem.* 160; *Wharam v. Broughton*, 1 Ves. S. 185.

³ See *Seton*, 685; *Hinde*, 436, 440. For forms of orders absolute, see *Seton*, 685, 689; and for forms of motion paper and affidavit, see Vol. III.

⁴ *Ante*, p. 167.

⁵ *Loyd v. Mansel*, 2 P. Wms. 73.

vivor, had mortgaged the estate, and died, leaving the infant his heir-at-law: upon a bill filed by the mortgagee against the infant to foreclose, the infant stated in his answer that the estate had been purchased and paid for by his great-uncle, who devised the same to his grandfather for life, with remainder to his heirs in tail, and so claimed the estate as heir in tail by a title paramount the mortgage; but the Court decreed an account, and that the defendant should redeem or be foreclosed, unless he showed cause within six months after he came of age, on the ground that the grandfather being by the deed joint-tenant in fee with his brother, whom he survived, must have appeared to the mortgagee to have a good title. The infant, however, when he came of age, upon being served with a *subpœna* to show cause, moved for leave to amend his defence, by putting in a new answer, and swore that he believed he could prove that the mortgagee had notice of the trust for his great-uncle at the time he lent the money, which was a point not insisted upon in his former answer; and the Court made the order.⁶ The reason of this distinction between the case of a claim by the infant paramount the mortgage, and that of a claim subject to the mortgage, is obvious; for in the latter case, it will be presumed that the Court

would not have made the decree had it not been satisfied
 *173 *that the mortgage was properly executed, and, therefore, it would not be reasonable to allow a party, claiming subject to that deed, to disturb the title which the mortgagee had acquired under it; but in the former case, the mortgage may have been properly executed, and the account taken under it may have been perfectly correct, and yet the mortgagor may not have had a title to make the mortgage: in which case, it would not be just to preclude the infant from an opportunity of establishing a case which, from the circumstance of its not having been insisted upon in the infant's answer, was not properly submitted to the decision of the Court at the time the decree was pronounced.

In ordinary cases, where an infant has a day given him to show cause against making a decree absolute, he may either impeach the decree on the ground of fraud or collusion between the plaintiff and his guardian, or he may show error in the decree. He may also show that he had grounds of defence which were not before the Court, or were not insisted upon at the hearing, or that new matter has subsequently been discovered, upon which the decree may be shown to be wrong.

If the late infant seeks to controvert the decree on the ground of fraud or collusion, he is not bound to proceed by way of rehearing or by bill of review, but he may impeach the former decree by an original bill, in which it will be enough for him to say, that the decree was obtained by fraud or collusion; he may in like manner impeach the decree by original bill, even though his ground of complaint against it

⁶ Anon., Mos. 66.

is confined to error.¹ In such cases, it is not necessary for the infant to wait till he comes of age before he seeks redress, but application for that purpose may be made at any time.²

If the late infant seeks to impeach the decree, by showing that he had grounds of defence which were either not before the Court, or not insisted upon at the original hearing, he might, under the old practice, apply to the Court, either by motion or petition, for leave to put in a new answer; and it seems that such application might be made *ex parte*, and was a matter of course;³ but under *the present *174 practice (unless an answer has been put in, or it is thought desirable to put one in, on behalf of the infant), it is conceived the form of the motion or petition will be for leave to make a new defence.

Although it was a matter of course, that an infant defendant to a suit, who had had a day given him to show cause against the decree after attaining twenty-one, might have leave to put in a new answer, yet, if he was plaintiff in a cross-bill, and that suit or any part of it had been dismissed, he was not allowed to amend his cross-bill, or to file a new one for the same matter.¹ He might, however, file a bill of discovery in aid of the case intended to be made by his answer; and it seems that if he did so, the time of six months allowed by the course of the Court for a defendant to show cause why a decree should not be made absolute after he comes of age, was not so sacred but that in particular cases, and where the matter was of consequence, the Court might enlarge it; and, therefore, in the case of *Trefusis v. Cotton*,² where a defendant, on attaining twenty-one, and being served with a *subpœna* to show cause against a decree, filed a bill against the plaintiffs in the original suit for discovery, and applied to the Court to have the time for showing cause enlarged till the defendants to the bill of discovery had put in their answer, Lord King made an order, enlarging the time for three months after the six months were expired; and on that time being out, and the defendants not having put in a full answer, the time was twice enlarged upon motion *quousque*.³ It seems, however, from a subsequent notice of the same case,⁴ that an infant, after he attains twenty-one cannot controvert the original decree by a new bill praying relief,

¹ [See *ante*, 164, n. 3.] In the case of gross fraud or collusion used in obtaining a decree, the Court will entertain an original bill for the purpose of impeaching it, even though the party complaining was not an infant at the time of the decree pronounced; see *Loyd v. Mansel*, 2 P. Wms. 73; *Sheldon v. Fortescue*, 3 P. Wms. 111. In general, however, where no fraud is alleged, the proceedings to set aside a decree, if it has been signed and enrolled, must be by bill of review, or, if not signed and enrolled, by supplemental bill in the nature of a bill of review. *Wortley v. Birkhead*, 3 Atk. 803, 811; *Galley v. Baker*, Ca. t. Talb. 201.

² *Richmond v. Tayleur*, 1 P. Wms. 737; *Carew v. Johnston*, 2 Sch. & Lef. 292.

³ *Fountain v. Caine*, 1 P. Wms. 504; *Napier v. Lady Effingham*, 2 P. Wms. 401; *Affid.* 4 Bro. P. C. ed. Toml. 340; *Bennet v. Lee*, 2 Atk. 529, 531; *Kelsall v. Kelsall*, 2 M. & K. 409, in which the cases are reviewed.

⁴ *Sir J. Napier v. Lady Effingham*, Howard, cited Mos. 67, 68.

² Mos. 203.

³ For forms of petition to enlarge the time for showing cause, see 2 Newl. 214; *Hinde*, 572.

⁴ Mos. 308.

unless for fraud or collusion, or for error;⁵ and that if he does so, the original decree may be pleaded in bar to such new bill.

Although, where a day is given to an infant to show cause against a decree, he need not, as we have seen,⁶ stay till that time, before he seeks to impeach it on the ground of fraud, collusion, or error,⁷ yet, if he proceeds on the ground that he is dissatisfied with the defence which has been made, and wishes to make a new defence, he must, in general, wait till he has attained twenty-one before he applies: because, if he should apply before, and there should be a decree against him upon the

second hearing, he may with as much reason make similar appli-

*175 cations, and so occasion * infinite vexation. This was the opinion originally expressed by Lord Hardwicke, in the case of *Bennet v. Lee*;¹ though he afterwards held, in the same case, that as the facts upon which the infant wished to rest his new defence were of long standing, and the witnesses were consequently very old, and might die before he came of age, the infant might put in a better answer.² And so in *Savage v. Carrol*,³ leave was given to the infant defendant, upon the same grounds, to put in an amended answer before attaining twenty-one; but it was subsequently held in the same case,⁴ that where an infant, before attaining twenty-one, obtains leave to put in a new answer, he will thenceforth be considered as plaintiff, and as such will be bound by the decree.⁵

Where an infant defendant on coming of age, having obtained leave to put in a new answer, did so accordingly, he might show that fact for cause why the decree should not be made absolute, and the plaintiff was obliged to proceed upon the answer according to the rules of the Court in other cases.⁶

The consequence of an infant putting in a new answer was, that, if it was replied to, he might examine witnesses anew to prove his defence: which might be different from what it was before.⁷

SECTION X. — *Idiots, Lunatics, and Persons of Weak Mind.*

An idiot or lunatic may, as we have seen,⁸ be made a defendant to a suit, but then, where he has been found of unsound mind by inquisition, he must defend by the committee of his estate, who, as well as the idiot or lunatic whose estate is under his care, is a necessary party to a suit

⁵ *Richmond v. Tayleur*, 1 P. Wms. 737; see *Loyd v. Malone* 23 Ill. 43; *Regla v. Martin*, 19 Cal. 463. [*Ante*, 164, n. 3.]

⁶ *Ante*, p. 173.

⁷ *Richmond v. Tayleur*, 1 P. Wms. 737.

¹ 2 Atk. 487.

² *Ib.* 532.

³ 1 Ball & B. 548.

⁴ 2 Ball & B. 244.

⁵ In proceedings by an infant, on coming

of age, to set aside a decree, which has been rendered against him while under age, he should give notice to the other parties to the decree. *Ruby v. Strother*, 11 Mis. 417.

⁶ *Cotton v. Trefusis*, Mos. 313.

⁷ *Napier v. Lord Effingham*, 2 P. Wms. 401, 403; and see *Codrington v. Johnstone*, Seton, 685; *Kelsall v. Kelsall*, 2 M. & K. 409, 416.

⁸ *Ante*, p. 130.

respecting that estate.⁹ No order is required in the suit to entitle the committee to defend; but the committee must obtain the sanction of the Lord Chancellor or Lords Justices in the lunacy, before defending, in the same manner as before instituting a suit.¹⁰

* Usually the lunatic and his committee make a joint defence *176 to the suit; but if it happens that an idiot or lunatic has no committee, or the committee is plaintiff, or has an adverse interest, an order should be obtained, on motion or petition of course, supported by affidavit,¹ appointing a guardian to defend the suit;² and it is the same where he is respondent to a petition.³

Where, after decree, the committee died, and a new one was appointed, an order was made, on motion, that in all subsequent proceedings the name of the new committee should be substituted for that of the former;⁴ where no decree had been made, such an order was refused;⁵ now, however, in both these cases, an order to carry on and prosecute the suit may be obtained, on motion or petition of course.⁶ Lunatics not so found by inquisition,⁷ and persons of weak intellect, or who are by age or infirmity reduced to a second infancy,⁸ must defend by guardian: who will be appointed on an application by motion, or petition of course, in the name of the person of unsound mind;⁹ and it is the same in the case of a petition where no suit has been instituted.¹⁰ The application must be supported by affidavits proving the mental incapacity of the defendant,¹¹ the fitness of the proposed guardian, and that he has no adverse interest.¹² A co-defendant may be appointed, if he has no adverse interest;¹³ but not the plaintiff, nor a married woman, nor a person resident out of the jurisdiction.¹⁴

If the guardian dies, it appears that a similar evidence of mental in-

⁹ Ld. Red. 30, 104; Story Eq. Pl. § 70; Harrison v. Rowan, 4 Wash. C. C. 202. In Brasher v. Van Cortlandt, 2 John. Ch. 242, 245, it was held not necessary, in New York, to make the lunatic himself a party defendant to a bill for payment of his debts, but his committee only, where he had a committee. So in Teal v. Woodworth, 3 Paige, 470. See Berry v. Rogers, 2 B. Mon. 308. But in a suit where there are conflicting interests between a lunatic and his committee, which must be settled in the cause, both should be made parties. Teal v. Woodworth, 3 Paige, 470.

¹⁰ Ante, p. 85.

¹ For forms of motion paper, petition, and affidavit, see Vol. III.

² Ld. Red. 104; Snell v. Hyat, 1 Dick. 287; Lady Hartland v. Atcherley, 7 Beav. 53; Worth v. M'Kenzie, 3 M. N. & G. 363; Snook v. Watts, Seton, 1251; New v. New, 6 Paige, 237; Hewitt's case, 3 Bland, 184; Post v. Mackall, 3 Bland, 486. For form of order, see Seton, 1251. [See Emery v. Parrot, 107 Mass. 95, where a guardian *ad litem*, was appointed for a non-resident defendant of unsound mind, and afterwards a guardian for the same person was appointed in the State of his residence.]

³ See *Re Greaves*, 2 W. R. 365; 2 Eq. Rep. 616, L. C. & L. J.J.

⁴ Lyon v. Mercer, 1 S. & S. 356; Bryan v. Twigg, 3 Eq. Rep. 62; 3 W. R. 42, V. C. K.

⁵ Rudd v. Speare, 3 De G. & S. 374.

⁶ 15 & 16 Vic. c. 86, § 52; Seton, 1166, 1170; and see *post*, Chap. XXXIII., *Revivor and Supplement*.

⁷ Ld. Red. 104; and see Bonfield v. Grant, 11 W. R. 275, M. R.

⁸ Ld. Red. 103; and see Newman v. Selfe, 11 W. R. 764, M. R.; but see Steel v. Cobb, *ib.* 298, M. R.

⁹ For forms of motion paper and petition, see Vol. III.

¹⁰ *Re Greaves*, 2 W. R. 355; 2 Eq. Rep. 516, L. C. & L. J.J.

¹¹ Simmons v. Bates, 20 L. T. 272.

¹² Piddocke v. Smith, 9 Hare, 395; 11 Jur. 1120; and see Foster v. Cautley, 10 Hare, App. 24; 17 Jur. 370. For form of affidavits, see Vol. III.

¹³ Bonfield v. Grant, 11 W. R. 275, M. R.; Newman v. Selfe, *ib.* 764, M. R.

¹⁴ Lady Hartland v. Atcherley, 7 Beav. 53.

capacity is necessary, in support of the application for the appointment of a new guardian, to that required on the original application.¹⁵ The death of the guardian, and fitness of the person proposed in his place, must also be proved. The application should be made by motion,¹⁶ or by summons.¹⁷

*177 * Where an application for the appointment of a guardian is intended to be made by, or on behalf of, a defendant of unsound mind, or weak intellect, an appearance should, in the first place, be entered for him at the Record and Writ Clerks' office; but no subsequent step can be taken on his behalf, till the order for a guardian has been obtained.¹ If such order be not obtained on his behalf, the plaintiff must apply for the order; and in this case, an appearance for the defendant is not necessary: the entry of an appearance on his behalf by the plaintiff being irregular.²

Where a guardian is appointed at the instance of the plaintiff, it is usual to appoint the solicitor to the Suitors' Fee Fund.³

Where the plaintiff applies, he must do so by motion, notice of which must be served upon or left at the dwelling-house of the person with whom, or under whose care, the defendant was living at the time of serving the bill,⁴ or, where an appearance has been entered for him, upon the solicitor who entered it.⁵ And upon the motion, the Court must be satisfied that the bill has been duly served,⁶ and that the notice of the application was served after the expiration of the time allowed for appearing or answering, and at least six clear days before the day in such notice named for hearing the application.⁷

The order is made under the jurisdiction in Chancery, and not in Lunacy;⁸ and if the fact of the infirmity is disputed, or the order has been irregularly obtained by the defendant, the plaintiff may move, on

¹⁵ See *Needham v. Smith*, 6 Beav. 130.

¹⁶ *Ibid.*

¹⁷ According to the present practice, the order may also be obtained on petition of course at the Rolls. For forms of motion paper, petition, summons, and affidavit, see Vol. III.

¹ See *Lushington v. Sewell*, 6 Mad. 28.

² Ord. X. 5; *Leese v. Knight*, 8 Jur. N. S. 1006; 10 W. R. 711, V. C. K.

³ Ord. VII. 3; *McKeverakin v. Cort*, 7 Beav. 347; *Biddulph v. Lord Camoys*, 9 Beav. 548; 10 Jur. 485. If there is any friend of the defendant who is a fit person, he will be appointed, in preference to the solicitor to the Suitors' Fee Fund; *Ibid.*; *Moore v. Platel*, 7 Beav. 583; and see *Charlton v. West*, 3 De G., F. & J. 156; 7 Jur. N. S. 614; *Bonfield v. Grant*, 11 W. R. 275, M. R.

⁴ Ord. VII. 3.

⁵ *Cookson v. Lee*, 15 Sim. 302; *Bentley v. Robinson*, 9 Hare, App. 76. These were cases of infants, but doubtless apply to the case of persons of unsound mind.

⁶ The defendant should, it seems, be served personally. *Morgan v. Jones*, W. R. 381, V. C. W.; *Anon.*, 2 Jur. N. S. 324,

V. C. W. [But the Court has allowed substituted service on the medical officer of an asylum in which the defendant has been placed, although the unsoundness had not been found by inquisition, upon an affidavit that the medical officer refused to allow the defendant, on account of his condition, to be served personally. *Raine v. Wilson*, L. R. 16 Eq. 576. *A fortiori*, if the unsoundness of mind be found by inquisition in the same Court in which the suit is pending. *Speak v. Metcalf*, 2 Tenn. Ch. 214. *Infra*, 444, n. 6.]

⁷ Ord. VII. 3. For forms of notice of motion and affidavit, see Vol. III.; and for form of order, see *Seton*, 1251. The Court will provide for the costs of the solicitor to the Suitors' Fee Fund where he is appointed guardian; usually by directing the plaintiff to pay them, and add them to his own; see Ord. XL. 4; and *Harris v. Hamlyn*, 3 De G. & S. 470; 14 Jur. 55; *Fraser v. Thompson*, 4 De G. & J. 659; 1 Giff. 337; 5 Jur. N. S. 669; and see *Robinson v. Aston*, 9 Jur. 224, V. C. K. B.

⁸ *Pidcocke v. Boulton*, 2 De G., M. & G. 898.

notice to the defendant, to discharge the order; and, if necessary, the Court will direct an inquiry whether the defendant is competent or not.⁹

The defendant, on his recovery, must apply by motion, on notice to the plaintiff and to the guardian,¹⁰ that the order assigning the guardian may be discharged.¹¹ Where he had delayed applying, he had to pay his guardian's costs, although the motion was *granted, *178 but had liberty to add them to his own costs in the suit.¹

The answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the Court to defend the suit.² It was held in the case of *Leving v. Caverly*,³ that the answer of a superannuated defendant, put in by his guardian, may be read against him; but this proposition appears to have been doubted: and it is conceived that should the point now arise, it would be decided otherwise.⁴

Where the infirmity is the result of bad health, the practice is to allow time to file the answer, and not to put it in by guardian.⁵

The committee or guardian of a person of unsound mind, whether so found by inquisition or not, before he consents to any departure from the ordinary course of taking evidence or other procedure in the suit, should first obtain the sanction of the Court, or of the Judge in Chambers; and the committee should also obtain that of the Lord Chancellor or Lords Justices sitting in Lunacy.⁶

All orders appointing guardians should be left at the Record and Writ Clerks' Office for entry.⁷

SECTION XI. — *Married Women.*

It is a rule both of Law and of Equity, that where a suit is instituted against a married woman, her husband must also be a party,⁸ unless he

⁹ *Lee v. Ryder*, 6 Mad. 294; *Seton*, 1251. [Matter of Collins, 3 C. E. Green, 254; Matter of Weis, 1 C. E. Green, 319; *In re Cumming*, 1 De G., M. & G. 537, 550. So, if after inquisition found, it be suggested that he has been restored in mind. *Yourie v. Nelson*, 1 Tenn. Ch. 275.]

¹⁰ For form of notice of motion, see Vol. III.

¹¹ See *Frampton v. Webb*, 11 W. R. 1018, V. C. W.

¹ *Ibid.*

² *Id.* Red. 315. The answer of an idiot or lunatic is similar to that of an infant, and should be sworn to by his committee, in the same manner as the answer of an infant is verified by his guardian *ad litem*. 1 Barb. Ch. Pr. 154; see *Rothwell v. Benshall*, 1 Bland, 373; *Coupous v. Kauffman*, 3 Edw. Ch. 311. For the formal parts of such answer, see Vol. III. As to the answers of imbecile prisoners confined for contempt, see 11 G. IV. & 1 W. IV. c. 36, § 15, r. 9, and *post*, Chap. X. § 2.

³ *Prec. Ch.* 229.

⁴ *Micklethwaite v. Atkinson*, 1 Coll. 173; *Percival v. Caney*, 4 De G. & S. 610, somewhat fuller reported on this point, 14 Jur. 1062; S. C. *nom.* *Stanton v. Percival*, 3 W. R. 391; 24 L. J. Ch. 369, H. L. A female defendant, above sixty years of age, who had been deaf and dumb from her infancy, was admitted to appear and defend by guardian. *Markle v. Markle*, 4 John. Ch. 168; see *Manlever v. Warren*, 2 Jones, 47.

⁵ *Willyams v. Hodge*, 1 M'N. & G. 516; and see *Patrick v. Andrews*, 22 L. J. Ch. 240, M. R.; *Steel v. Cobb*, 11 W. R. 298, M. R.; *Newman v. Selfe*, *ib.* 764, M. R.

⁶ *Ord.* 5 Feb. 1861, r. 24. For form of summons, see Vol. III.

⁷ *Braithwaite's Pr.* 47.

⁸ *Holmes v. Penney*, 3 K. & J. 90; 3 Jur. N. S. 80; see 2 *Story Eq. Jur.* § 1368; *Story Eq. Pl.* § 71; *Williams v. Coward*, 1 Grant (Penn.), 21; *Hamlin v. Bridge*, 24 Maine, 145; *McDermott v. French*, 2 McCarter (N.

is an exile, or has abjured the realm,⁹ or there has been a judicial separation, or the wife has obtained a protection order under the Divorce Acts:¹ in which cases, the wife is considered in all respects as a *feme sole*,² and may be made a defendant, without her husband being joined;³ which, it seems, she also may if her husband is an alien enemy.⁴ It appears also, that in certain cases a husband may, in Equity, make his wife a defendant,⁵ thus, where she has before marriage entered into articles concerning her own estate, she is considered to have made herself a separate person from her husband, and, in such a case, upon a motion by the husband to commit her for not answering interrogatories, she was ordered to answer.⁶ A husband, however, cannot make his wife a defendant, in order to have from her a discovery of his own estate.⁷

But although a wife cannot, except in the cases which have been pointed out, be made a defendant to a suit without her husband being joined as a co-defendant, yet there are cases in which, although the husband and wife are both named as defendants, the suit may be proceeded with against the wife separately. Thus, if the suit relates to the wife's separate property, and the husband be beyond seas, and not amenable to the process of the Court, the wife may be served with, and compelled to answer, the bill.⁸ In *Dubois v. Hole*,⁹ a bill was filed against a man and his wife for a demand out of the separate estate of the wife, and, the husband being abroad, the wife was served with a *subpœna*, and, upon non-appearance, was arrested upon an attachment; and she having stood out all the usual process of contempt, the bill was taken *pro confesso* against her.¹⁰ It is to be observed, that, in order to entitle the plaintiff to compel the wife to

J.), 78; Calvert, Parties; 269; and notwithstanding he is a bankrupt; Beales v. Spencer, 2 Y. & C. C. C. 651; 8 Jur. 236.

⁹ Ld. Red. 30, 105; or is transported under a criminal sentence. Story Eq. Pl. § 71; Calvert on Parties, 414; Broom's Com. 584, and cases cited, *ib. n. (b)*. [And so, when the husband is a resident of another State. *Ante*, 88, n. 3.]

¹ 20 & 21 Vic. c. 85, §§ 21, 25, 26, 45; 21 & 22 Vic. c. 108, §§ 6-8; 27 & 28 Vic. c. 44; Rudge v. Weedon, 4 De G. & J. 216; 5 Jur. N. S. 380, 723; *Re Rainsdon's Trusts*, 4 Drew. 446; 5 Jur. N. S. 55; Cooke v. Fuller, 26 Beav. 99; and other cases cited, *ante*, p. 90. [*Re Kingsley*, 26 Beav. 84; Pratt v. Jenner, L. R. 1 Ch. App. 493.] If the marriage has been dissolved, she is sued in her maiden name, Evans v. Carrington, 1 J. & H. 598; 6 Jur. N. S. 268; 7 Jur. N. S. 197; 2 De G., F. & J. 481, and where the wife has obtained a protection order, she is usually described in the title as "a married woman, sued as a *feme sole*." Tidman v. Trego, M. R. 1863, T. 44.

² Countess of Portland v. Prodgors, 2 Vern. 104.

⁸ 1 Inst. 132 b., 133 a.; Robinson v. Reynolds, 1 Aiken, 74; Bean v. Morgan, 1 Hill Ch. 8; *ante*, 90, note.

⁴ Deerley v. Duchess of Mazarine, Salk. 116; 2 Kent (11th ed.), 155; Story Eq. Pl. § 71.

⁵ Brooks v. Brooks, Prec. Ch. 24; *ante*, 110; but by making her a defendant, he admits that the property in question is her separate estate; and, therefore, a demurrer was allowed to a bill, by which he claimed to be entitled to the property himself. Earl v. Ferris, 19 Beav. 67; 1 Jur. N. S. 5.

⁶ Brooks v. Brooks, *ubi sup.*

⁷ *Ibid.*

⁸ Story Eq. Pl. § 71. An order for leave to serve the bill and interrogatories seems, in such case, necessary: Hinde, 85; Naylor v. Byland, Seton, 1246. The order may be obtained on *ex parte* motion, supported by affidavit. For form of order, see Seton, 1246, No. 9; and for forms of motion paper and affidavit, see Vol. III.

⁹ 2 Vern. 613.

¹⁰ 2 Vern. 614, *in notis*; see also Bell v. Hyde, Prec. Ch. 28, and the cases there cited.

answer separately, the husband must be actually out of the jurisdiction; and the mere circumstance that he was a prisoner, was held not to be a sufficient ground for obtaining an order for a separate answer.¹¹

* The Court will compel a woman to appear and answer separately from her husband, where the demand is against her in respect of her separate estate, and the husband is only named for conformity, and cannot be affected by the decree; where there is no separate property belonging to the wife, she cannot be proceeded against without her husband, unless she has obtained an order to answer separately: in which case, she will be liable to the usual process of contempt, if she does not put in her answer in conformity with the order which she herself has obtained.¹ *180

It is to be observed here, that a *feme covert* executrix or administratrix is not considered as having a separate property in the assets of her testator or intestate; and upon this ground, Lord Eldon, in *Pannell v. Taylor*,² held, that a writ of *ne exeat regno*, against a married woman sustaining that character, could not be maintained. In that case, his Lordship had originally granted the writ, upon the authority of *Moore v. Meynell*,³ and *Jernegan v. Glasse*;⁴ but upon further argument, he was of opinion that it could not be maintained: observing, that if he had been apprised of the circumstances of the case of *Moore v. Meynell* (upon the authority of which Lord Hardwicke appears to have acted in *Jernegan v. Glasse*), he should not have granted the writ.

Where a married woman is living separate from her husband, and is not under his influence or control,⁵ or where she obstinately refuses to join in a defence with him,⁶ the Court will, upon the application of the husband, give him leave to put in a separate answer. The application is made by motion, of which notice⁷ must be given to the plaintiff,⁸ and must be supported by an affidavit of the husband,⁹ verifying the circumstances; and process of contempt will then be stayed against him for want of his wife's answer, and the plaintiff must proceed separately against the wife.¹⁰

If the separate answer of the husband is received and filed at the

¹¹ Anon., 2 Ves. J. 332. If the wife be absent, the husband may obtain time to issue a commission to obtain the wife's oath to the answer; and if she refuse to answer, the bill may be taken *pro confesso* against her. *Leavitt v. Cruger*, 1 Paige, 422. See Halst. Dig. 170-174. The plaintiff may stipulate to receive the joint answer, sworn to by the husband alone. *Leavitt v. Cruger*, 1 Paige, 422; *New York Chem. Co. v. Flowers*, 6 Paige, 654.

¹ *Powell v. Prentice*, Ridg. 258. Husband and wife may defend a suit *in forma pauperis*, and the order for leave to do so is of course. *Pitt v. Pitt*, 17 Jur. 571, V. C. S.; 1 Sm. & G. App. 14.

² T. & R. 96, 103.

³ 1 Dick. 30.

⁴ *Id.* 107; 3 Atk. 409; Amb. 52; and T.

& R. 97, n. (b.); but see *Moore v. Hudson*, 6 Mad. 218; 2 C. P. Coop. t. Cott. 245. As to the writ of *ne exeat*, see *post*, Chap. XXXVIII.

⁵ *Chambers v. Bull*, 1 Anst. 269; *Barry v. Cane*, 3 Mad. 472; *Garey v. Whittingham*, 1 S. & S. 163; *Gee v. Cottle*, 3 M. & C. 180; *Nichols v. Ward*, 2 M'N. & G. 140.

⁶ *Ld. Red.* 105; *Pain v. —*, 1 Ca. in Ch. 296; *Murriet v. Lyon*, Bunb. 175; *Pavie v. Acourt*, 1 Dick. 13.

⁷ For form of notice, see Vol. III.

⁸ Whether notice should be given to the wife also, *quære*; see 1 S. & S. 163; 2 M'N. & G. 143.

⁹ See *Barry v. Cane*, 3 Mad. 472, n.; for form of affidavit, see Vol. III.

¹⁰ See *Bray v. Akers*, 15 Sim. 610; *Story Eq. Pl.* § 71; *Leavitt v. Cruger*, 1 Paige, 421.

Record and Writ Clerks' Office, before an order for him to
 *181 * answer separately has been obtained, it is an irregular proceeding;¹ and the plaintiff may move, on notice to the husband, that the answer may be taken off the file for irregularity;² or he may sue out an attachment against the husband for want of the joint answer;³ or he may waive the irregularity, and move, on notice to the wife, and an affidavit of the facts, that she may answer separately.⁴ The husband, if in custody for not filing the joint answer, cannot clear his contempt by putting in the separate answer of himself;⁵ he should move, on notice to the plaintiff,⁶ supported by his own affidavit⁷ of the facts, for leave to answer and defend separately from her, and that, upon putting in his separate answer, he may be discharged from custody.⁸

Where a married woman claims an adverse interest,⁹ or is living separate from her husband,¹⁰ or he is mentally incompetent to answer,¹¹ or she disapproves of the defence he intends to make,¹² she may, on motion or petition of course,¹³ obtain an order to defend separately;¹⁴ and if a husband insists that his wife shall put in an answer contrary to what she believes to be the fact, and by menaces prevails upon her to do it, this is an abuse of the process of the Court, and he may be punished for the contempt.¹⁵

If the husband has put in his answer separately from his wife, under an order so to do;¹⁶ or without an order, and the plaintiff desires to waive the irregularity;¹⁷ or an order has been made, exempting the husband from process for want of her answer;¹⁸ or if she refuses to join with him in answering;¹⁹ or if he is abroad;²⁰ or if the suit
 *182 relates to her separate estate, and she is abroad,²¹ or * they live apart;¹ or if the husband, from mental incapacity, is unable to

¹ *Gee v. Cottle*, 3 M. & C. 180; *Nichols v. Ward*, 2 M.N. & G. 140; and see *Garey v. Whittingham*, 1 S. & S. 163; *Lenaghan v. Smith*, 2 Phil. 539.

² *Gee v. Cottle*, and *Nichols v. Ward*, *ubi sup.*; *Collard v. Smith*, 2 Beasley (N. J.), 43, 45. For form of notice, see Vol. III.

³ *Gee v. Cottle* *ubi sup.*; *Garey v. Whittingham*, 1 S. & S. 163; *Nichols v. Ward*, 2 M.N. & G. 140.

⁴ *Nichols v. Ward*, 2 M.N. & G. 143, n. For form and notice of affidavit, see Vol. III.

⁵ *Gee v. Cottle*, 3 M. & C. 180.

⁶ *Quere*, if the wife should be served, see 1 S. & S. 163; 2 M.N. & G. 143.

⁷ *Barry v. Cane*, 3 Mad. 472, n.

⁸ See *Nichols v. Ward*, 2 M.N. & G. 143; *Seton*, 1255, No. 5. For forms of notice of motion and affidavit in support, see Vol. III.

⁹ *Ld. Red.* 104; *Anon.*, 2 Eq. Ca. Ab. 66, pl. 2.

¹⁰ *Ld. Red.* 104; *Rudge v. Weedon*, 7 W. R. 368, V. C. K., n.

¹¹ *Estcourt v. Ewington*, 9 Sim. 252, and cases there referred to; 2 Jur. 414.

¹² *Ld. Red.* 104; *Ex parte Halsam*, 2 Atk. 50.

¹³ For form of order on motion, see *Seton*, 1254, No. 3; and for forms of motion paper and petition, see Vol. III.

¹⁴ The order is, according to the present practice, usually obtained on petition of course, at the Rolls; and it appears from information obtained from the Secretary of the M. R., that the practice is to make the order on the application of the wife, whenever she is made a defendant in respect of her separate estate, without inquiring whether in fact the interests of the husband and wife are adverse. If their interests are adverse, the order will be made, though the suit does not relate to her separate estate.

¹⁵ *Ex parte Halsam*, 2 Atk. 50.

¹⁶ *Bray v. Akers*, 15 Sim. 610; *Seton*, 1255, No. 4.

¹⁷ See *Nichols v. Ward*, 2 M.N. & G. 140.

¹⁸ *Ib.* 143, n.

¹⁹ *Woodward v. Conebear*, 8 Jur. 642, V. C. W.

²⁰ *Dubois v. Hole*, 2 Vern. 613; *Bunyan v. Mortimer*, 6 Mad. 278; *Lethley v. Taylor*, 9 Sim. 252.

²¹ *Nichols v. Ward*, 2 M.N. & G. 143, n.

¹ *Wickens v. Marchioness of Townsend*, cited, 1 Smith's Pr. 410, n.; *Seton*, 1256.

join with her in answering; ² or if, after the joint answer is put in, the husband goes abroad, and the bill is amended, and an answer is required thereto; ³ or if the fact of marriage is in dispute between the husband and wife: ⁴ the plaintiff, where no order for her to answer separately has been obtained by her or her husband, may, on motion, supported by an affidavit of the facts, obtain an order ⁵ that she may answer separately from her husband. ⁶ Notice of the motion ⁷ should be given to the wife; ⁸ and if she is abroad, an order for leave to serve her there with the notice is necessary, ⁹ and may be obtained on an *ex parte* motion. ¹⁰

Where a woman was made a defendant to a bill filed for the purpose of establishing a will against her, and a man who pretended that he was her husband, but which the woman denied: on her making application to answer separately, Lord Hardwicke ordered, that she should be at liberty to put in a separate answer, but without prejudice to any question as to the validity of the marriage. ¹¹

In general, the separate answer of a *feme covert* ought to have an order to warrant it, and if put in without an order, it may be taken off the file; ¹² but if a husband brings a bill against his wife, he admits her to be a *feme sole*, ¹³ and she must put in her answer as such, and no order is necessary to warrant her so doing; ¹⁴ and if she does not put in her answer, the husband may obtain an order to compel her to do so. ¹⁵

But although, strictly speaking, the answer of a *feme covert*, if separate, ought to be warranted by an order, yet if her answer be put in without such an order, and the same be a fair and honest answer, and deliberately put in with the consent of the husband, and * the plaintiff accepts it and replies to it, the Court will not, on *183 the motion of the wife, or of her executors, set it aside. ¹

The separate answer of a married woman is put in by her in the same manner as if she were a *feme sole*, without joining any guardian or other

² *Estcourt v. Ewington*, 9 Sim. 252; 2 Jur. 414.

³ *Carleton v. M'Enzie*, 10 Ves. 442.

⁴ *Longworth v. Bellamy*, Seton, 1245.

⁵ For forms of order, see Seton, 1255, Nos.

4, 6.
⁶ See *Hope v. Carnegie*, L. R. 7 Eq. 254; S. C. *ib.* 263.

⁷ For forms of notice of motion and affidavit in support, see Vol. III.

⁸ *Nichols v. Ward*, 2 M'N. & G. 143, n. 1; Seton, 1255, 1256; but see *Bray v. Akers*, 15 Sim. 610; *Hope v. Carnegie*, L. R. 7 Eq. 263.

⁹ See *Nichols v. Ward*, 2 M'N. & G. 143, n.

¹⁰ For form of motion paper, see Vol. III.

¹¹ *Wybourn v. Blount*, 1 Dick. 155.

¹² *Wyatt's P. R.* 53; and see *Higginson v. Wilson*, 11 Jur. 1071, V. C. K. B. An answer of a wife, put in separately without a previous order, was suppressed for irregu-

larity. *Perine v. Swaine*, 1 John. Ch. 24; *Leavitt v. Cruger*, 1 Paige, 421; *Collard v. Smith*, 2 Beasley (N. J.), 43; *Robbins v. Abrahams*, 1 Halst. Ch. 16. But the irregularity will be waived by the plaintiff filing a replication. *Fulton Bank v. Beach*, 2 Paige, 307; S. C. 6 Wend. 36; *Collard v. Smith*, 2 Beasley (N. J.), 45. If the wife apprehend that her husband will not make a proper defence for her, she may, as of course, obtain leave to answer separately. *Lingan v. Henderson*, 1 Bland, 270; see *Anon.*, 2 Sumner's Ves. 332, note (a); *Ferguson v. Smith*, 2 John. Ch. 139.

¹³ See *Earl v. Ferris*, 19 Beav. 67; 1 Jur. N. S. 5; *ante*, p. 109, note 9.

¹⁴ *Ex parte Strangeways*, 3 Atk. 478; Ld. Red. 105; [*Copeland v. Granger*, 3 Tenn. Ch. 487.]

¹⁵ *Ainslie v. Medicott*, 13 Ves. 266.

¹ *Duke of Chandos v. Talbot*, 2 P. Wms. 371.

person with her;² and when put in under an order, she has the full time for answering from the date of the order.³ When an order to answer separately has been obtained, it should be produced to the Commissioner before whom the answer is sworn, and be referred to in the jurat;⁴ and the order must be produced at the Office of the Record and Writ Clerks, at the time of filing the answer.⁵ If, however, the married woman is an infant, she cannot answer, either separately or jointly, until a guardian has been appointed for her;⁶ such appointment will be made by order, on motion or petition of course, supported by affidavit of the fitness of the proposed guardian.⁷

A married woman, obtaining an order to answer separately from her husband, renders herself liable to process of contempt, in case she does not put in her answer pursuant to the order;⁸ but an order for leave to sue out such process is necessary, and may be obtained by the plaintiff on an *ex parte* motion.⁹

Where husband and wife are defendants to a bill, the wife will not be compelled to answer to any thing which may expose her to a forfeiture;¹⁰ neither is she compellable to discover whether she has a separate estate, unless the bill is so framed as to warrant the Court in making a decree against such estate. Thus, where a bill was filed against a man and his wife, for the purpose of enforcing the specific performance of an agreement, alleged to have been entered into by an agent on their behalf for the purchase of an estate from the plaintiff, and in support of the plaintiff's case, it was alleged that the wife had separate moneys and property of her own, and had joined with her husband in authorizing the agent to enter into the agreement, but the bill prayed merely that the husband and wife might be decreed specifically to perform the agreement, and did not seek any specific relief against her separate estate: the wife, having obtained an order to that effect, put in a

*184 *separate demurrer as to so much of the bill as required from her a discovery whether she had not separate money and property of her own, and answered the rest. Upon argument, Sir Thomas Plumer V. C. allowed the demurrer, on the ground that as the decree, in cases where a *feme covert* was held liable, had been uniformly against the separate estate, and not against the *feme covert* herself, and as the bill did not seek any decree against any trustees, or particular fund, but

² For formal parts of such answer, see Vol. III.

³ Jackson v. Haworth, 1 S. & S. 161.

⁴ For form of jurat, see Vol. III.

⁵ Braithwaite's Pr. 45, 397.

⁶ Colman v. Northcote, 2 Hare, 147; 7 Jur. 528; Braithwaite's Pr. 47.

⁷ For forms of motion paper and petition, and affidavit in support, see Vol. III.

⁸ Powell v. Prentice, Ridg. P. C. 258; Lenaghan v. Smith, 2 Phil. 537; Bunyan v. Mortimer, 6 Mad. 278; Home v. Patrick, 30 Beav. 405; 8 Jur. N. S. 351; Bull v. Withey,

9 Jur. N. S. 595, V. C. S.; Graham v. Fitch, 2 De G. & S. 246; 12 Jur. 833.

⁹ Taylor v. Taylor, 12 Beav. 271; Thicknesse v. Acton, 15 Jur. 1052, V. C. T.; Home v. Patrick, Bull v. Withey, *ubi sup.* As to notice in other cases, see Graham v. Fitch, *ubi sup.*; Bushell v. Bushell, 1 S. & S. 164; McKenna v. Everett, Seton, 1256, No. 7. For form of motion paper, see Vol. III.

¹⁰ Wrottesley v. Bendish, 3 P. Wms. 235, 238.

only against the wife, it could not be supported, and the interrogatory, if answered, would consequently be of no use.¹

A wife cannot be compelled to make a discovery which may expose her husband to a charge of felony; and if called upon to do so, she may demur.²

In like manner, a married woman cannot be made a party to a suit, for the mere purpose of obtaining discovery from her, to be made use of against her husband; ³ therefore, in *Le Texier v. The Margrave of Anspach*,⁴ where a bill was filed against the Margrave to recover a balance due to the plaintiff upon certain contracts, to which bill the Margravine was made a party, as the agent of her husband, for the purpose of eliciting from her a discovery of certain vouchers, which were alleged to be in her possession: a demurrer by the Margravine separately was allowed by Lord Rosslyn, and afterwards upon rehearing by Lord Eldon, after the Margrave's death. Upon the same principle, where a bill was filed against a man and his wife for discovery in aid of an action at Law, brought against him to recover a debt due from the wife *dum sola*, a separate demurrer put in by the wife was allowed.⁵

In *Rutter v. Baldwin*,⁶ the Court agreed clearly, that a wife can never be admitted to answer, or otherwise as evidence, to charge her husband; and that where a man marries a widow executrix, her evidence will not be allowed to charge her second husband; ⁷ but in that case, the wife having held herself out as a *feme sole*, and treated with the plaintiff and other parties to the cause, who were ignorant of her marriage, in that character, and it having been proved in the cause that on some occasions the husband had given in to the concealment of the marriage, the Court allowed the answer of the wife to be read as evidence against the husband, and decreed accordingly.

It was supposed that the admission of a will, in the separate answer of a married woman, who was the heiress-at-law of the * testator, was sufficient evidence to enable the Court to declare *185 the will established; ¹ but it has now been decided, that such evidence is not sufficient for that purpose, or to bind her inheritance.² As a general rule, however, the separate answer of a married woman may be read against her.³

Where a husband and wife are made defendants to a suit relating to personal property belonging to the wife, and they put in a joint answer, such answer may be read against them, for the purpose of fixing them

¹ *Francis v. Wigzell*, 1 Mad. 258.

² *Cartwright v. Green*, 8 Ves. 405, 410; see *Story Eq. Pl.* § 519.

³ 2 *Story Eq. Jur.* § 1496.

⁴ 5 Ves. 322, 329; and 15 Ves. 159, 164.

⁵ *Barron v. Grillard*, 3 V. & B. 165; see *Metler v. Metler*, 3 C. E. Green (N. J.), 270.

⁶ 1 Eq. Ca. Ab. 227, pl. 15.

⁷ See *Cole v. Gray*, 2 Vern. 79.

¹ *Codrington v. Earl of Shelburn*, 2 Dick. 475.

² *Brown v. Hayward*, 1 Hare, 432; 6 Jur. 847; see *Comley v. Hendricks*, 8 Blackf. 189.

³ *Ld. Red.* 104, 105. The peculiar relations of husband and wife will not protect her from making a discovery relating solely to her own conduct, and affecting only her own interests. *Metler v. Metler*, 3 C. E. Green (N. J.), 270.

with the admissions contained in it; but where the subject-matter relates to the inheritance of the wife, it cannot;⁴ and the facts relied upon must be proved against them by other evidence. Thus, in *Merest v. Hodgson*,⁵ the L. C. B. Alexander refused to permit the joint answer of the husband and wife to be read, but ordered the cause to stand over, to give the plaintiffs an opportunity of proving the facts admitted. And it has been held, that the joint answer of the husband and wife may be read against the wife with reference to her separate estate, as well as her separate answer, on the ground that in such a case she cannot be compelled to answer separately.⁶

From the report of the case of *Eyton v. Eyton*,⁷ it appears on first view, as if the separate answer of a husband had been admitted by the Master of the Rolls to be read as evidence against the wife in a matter relating to her inheritance; but upon closer attention it will be found, that, in all probability, the reason of the decree in that case was, that his Honor conceived that the counterpart of the settlement, which appears to have been produced, was considered to be sufficient evidence of the settlement: at least, this appears to have been the ground upon which the case was decided on the appeal before the Lord Keeper Wright.

In *Ward v. Meath*,⁸ a bill was exhibited against the husband and wife, concerning the wife's inheritance; the husband stood out all process of contempt, and upon its being moved that the bill might be taken *pro confesso*, it was opposed, because the wife, having in the interim obtained an order to that effect, put in an answer, in which she set forth a title in herself; and the Court decreed, that the bill should be taken *pro confesso* against the husband only, and that he should account *186 for all the profits of the *land which he had received since the coverture, and the profits which should be received during coverture.

It may be observed, in this place, that there is no case in which the Court has made a personal decree against a *feme covert* alone.¹ She may pledge her separate property, and make it answerable for her en-

⁴ *Evans v. Cogan*, 2 P. Wms. 449. [*Kerchner v. Kempton*, 47 Md. 563.]

⁵ 9 Pri. 563; see also *Elston v. Wood*, 2 M. & K. 678.

⁶ *Callow v. Howle*, 1 De G. & S. 531; 11 Jur. 984; *Clive v. Carew*, 1 J. & H. 199, 207; 5 Jur. N. S. 487.

⁷ Prec. Ch. 116.

⁸ 2 Cha. Ca. 173; 1 Eq. Ca. Ab. 65, pl. 4.

¹ *Hulme v. Tenant*, 1 Bro. C. C. 16, 21; *Francis v. Wiggzell*, 1 Mad. 258, 263; *Aylett v. Ashton*, 1 M. & C. 105, 111; see also *Jordan v. Jones*, 2 Phil. 170, 172, where the Court refused to compel a married woman to execute a conveyance of an estate not settled to her separate use; but in cases of this description, the married woman can usually be established to be a trustee, and then an order under the Trustee Acts may be obtained.

[The general rule, that Equity will not

give a personal decree against a *feme covert*, prevails in the United States. *Phipps v. Sedgwick*, 95 U. S. 3; *Maberry v. Neely*, 5 Humph. 337; *Chatterton v. Young*, 2 Tenn. Ch. 768, 771. Nor will a personal judgment at law sustain a proceeding in Equity to subject the separate estate of a married woman, unless the demand was of a character for which the separate estate would be liable without judgment, where there is any restriction on the power of the *feme* to charge the property. *Swayne v. Lyon*, 17 P. F. Smith, 436; *Chatterton v. Young*, 2 Tenn. Ch. 768. But in California it has been held that on the foreclosure of a mortgage made by a married woman on her separate estate, a personal judgment may be rendered against her for any unsatisfied balance of debt. *Marlow v. Barlow*, 7 Rep. 583. And this would seem to be the logical result of enabling a married woman

gagements; ² but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree is prayed for against her, the bill cannot be sustained. Upon this ground, in the case of *Francis v. Wigzell*,³ before referred to, where a bill was filed against a husband and wife for the specific performance of an agreement for the purchase of an estate, charging that the wife had separate property sufficient to answer the purchase-money, but without praying any specific relief against such separate estate, a demurrer put in by the wife, to so much of the bill as sought discovery from her whether she had a separate estate or not, was allowed.

It appears, however, that where a married woman, having a general power of appointment, by will, over real or personal estate, makes, by her will, her separate property liable to the payment of her debts, a Court of Equity will lay hold of the estate so devised, and apply it in the payment of written engagements entered into by her, and in the discharge of her general debts. In the case of *Owens v. Dickenson*,⁴ where a married woman had made her will in pursuance of a power, and thereby charged her real estate with the payment of debts, Lord Cottenham entered into the principles upon which Equity enforces the contracts of married women against their separate estate, and rejected the theory that such contracts are in the nature of executions of a

to act as a *feme sole* touching her separate property. *Natl. Bk. v. Garlinghame*, 36 How. Pr. 369. The authorities are conflicting upon the point of the validity of a personal judgment against a *feme covert* at Law. *Freem. on Judgts.* §§ 149, 150. In North Carolina and Tennessee the validity of such judgments, as against collateral attack, has been upheld. *Green v. Branton*, 1 Dev. Eq. 508; *Crawford v. Crawford*, 1 Tenn. Leg. Rep. 37. While Mr. Justice Field, in an able opinion, has decided that a judgment against a married woman upon a contract not binding upon her is void. *Norton v. Meader*, 4 Sawy. 603. So, in *Swayne v. Lyon*, *ubi supra*, it was held that every judgment against a married woman which does not show her liability on its face is void. See also *Hix v. Gosling*, 1 Lea, 572.]

² See *Sperling v. Rochfort*, 8 Sumner's Ves. 175, 182, Perkins's note (*a*), and cases cited; *Fetteplace v. Gorges*, 3 Bro. C. C. (Perkins's ed.) 8, 10, and note, and cases cited. [Taylor v. Meads, 4 De G., J. & S. 597.]

[A wife may, within the power under which she holds separate estate, bestow the property upon her husband, as well as upon a stranger: *Meth. Epis. Church v. Jaques*, 3 John. Ch. 86; *Bradish v. Gibbs*, 3 John. Ch. 523; *Stephen v. Beall*, 22 Wall. 329; or charge it for his debts: *Demarest v. Wyncoop*, 3 John. Ch. 523; *Field v. Sowle*, 4 Russ. 112; *Marshman v. Conklin*, 6 C. E. Green, 549; *Hodges v. Williams*, Sup. Cr. Tenn. cited 2 Tenn. Ch. 679; and become the debtor of her husband for money borrowed to improve her separate estate: *Gardner v. Gardner*, 22 Wend. 526; *S. C.* 7 Paige, 112.

And a wife who permits her husband for years to receive and appropriate the income of her separate estate cannot compel him to account to her thereof except from the time permission is revoked. *Lyon v. Greenbay Ry. Co.*, 42 Wis. 548; *Lishey v. Lishey*, 2 Tenn. Ch. 5. The wife may charge her separate estate for debt within the power under the instrument of title, but the general rule is that the written contract must on its face show the intent to charge. *Yale v. Dederer*, 68 N. Y. 329; *Maguire v. Maguire*, 3 Mo. App. 458; *Gozman v. Cruger*, 69 N. Y. 87; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Shacklett v. Polk*, 4 Heisk. 104. And if the instrument under which she claims limits the power of disposition either directly or by pointing out the mode, the charge must be within the power. *Ross v. Ewer*, 3 Atk. 156; *Morgan v. Elam*, 4 Yer. 375; *Leaycraft v. Hedden*, 3 Green Ch. 512; *Williamson v. Beckham*, 3 Leigh, 20. The Court has no power, even with the consent of the *feme*, to pass her separate estate beyond the power reserved. *Richards v. Chambers*, 10 Ves. 580; *Sturgis v. Corp*, 13 Ves. 190; *Robinson v. Dart*, Dud. Eq. 128. And even where the intent to bind the separate estate is declared, the better opinion is that the property will not be bound unless the contract enured to the benefit of the *feme* or the separate estate. *Perkins v. Elliott*, 8 C. E. Green, 526; *Kelso v. Tabor*, 52 Barb. 125; *McCormick v. Hilbrook*, 22 Iowa, 487; *Coates v. McKee*, 26 Ind. 233; *Lightfoot v. Bass*, 2 Tenn. Ch. 677.]

³ 1 Mad. 258.

⁴ C. & P. 48, 54; 4 Jur. 1151.

power of appointment: he observed, "The view taken by Lord Thurlow, in *Hulme v. Tenant*, is more correct. According to that view, the separate property of a married woman being a creature of Equity, it

follows, that, if she has power to deal with it, she has the other *187 power incident to property in general, namely, the * power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at Law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied;" acting upon this principle, Lord Cottenham referred it to the Master, to inquire what debts there were to be paid under the provisions of the will. In order to bind her separate property, however, there must be a contract, fraud, or breach of trust; but the contract, it would seem, need not be in writing.¹

Where the Court thought a married woman defendant ought to pay certain costs, and it did not appear that she had separate estate, the Court gave the plaintiff liberty to apply for payment of these costs, in case of any moneys becoming payable to her separate use.²

If the equity of redemption of a mortgaged estate comes to a married woman, and a bill is brought against her and her husband to foreclose it, upon which a decree of foreclosure is pronounced, the wife is liable to be absolutely foreclosed, though during the coverture, and will not have a day given her to redeem after her husband's death;³ and where a widow filed a bill to set aside a decree of foreclosure pronounced against her and her husband during coverture, and to be let in to redeem, and the mortgagee pleaded the proceedings and decree in the former cause, the plea was allowed.⁴

Where an estate has been sold under a decree of the Court, a *feme covert* is as much bound by the decree as a *feme sole*, although it may be to her prejudice; as it would most ruinously depreciate the value of property sold under a decree in Equity, if, where there is neither fraud nor collusion in the purchaser, his title could be defeated. It is to be observed, however, that a decree obtained by fraud is invalid.⁵

¹ *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Hobday v. Peters* (No. 2), 28 Beav. 354; 6 Jur. N. S. 794; *Wright v. Chard*, 4 Drew. 673; 5 Jur. N. S. 1334; 1 De G., F. & J. 567; 6 Jur. N. S. 476; *Clive v. Carew*, 1 J. & H. 199; 5 Jur. N. S. 487; *Johnson v. Gallagher*, 7 Jur. N. S. 275; 9 W. R. 506, L. J.; 3 De G., F. & J. 404; *Bolden v. Nicholas*, 3 Jur. N. S. 884, V. C. W.; *Shattock v. Shattock*, L. R. 2 Eq. 182, M. R.; *Rogers v. Ward*, 8 Allen, 387; *Picard v. Hine*, L. R. 5 Ch. Ap. 274; *Gardner v. Gardner*, 22 Wend. 526; [*Sharpe v. Foy*, L. R. 4 Ch. Ap. 35; *Chubb v. Stretch*, L. R. 9 Eq. 555. Where the contract is for the protection of her separate realty, as by the making of a levee. *Henry v. Blackburn* (Sup. Ct. Ark.), 1 Memph. L. J. 194.]

² *Pemberton v. M'Gill*, 1 Jur. N. S. 1045, V. C. W.

³ *Mallack v. Galton*, 3 P. Wms. 352; but the decree ought not to be made absolute at once, even by consent, on an affidavit verifying the amount due. *Harrison v. Kennedy*, 10 Hare, App. 51. [But see *Kerchner v. Kempton*, 47 Md. 568, where it was held that such a decree although consented to by the husband, was not binding on the wife, the husband having no authority to employ counsel to represent her in such a litigation without her assent.]

⁴ *Mallack v. Galton*, 3 P. Wms. 352.

⁵ *Burke v. Crosbie*, 1 Ball & B. 489; *Kennedy v. Daly*, 1 Sch. & Lef. 355.

It may here be mentioned, that a married woman defendant, in case she desires to appeal against a decree or order made in the suit, must appeal by her next friend.⁶

* Where a suit has been instituted against a man and his wife, *188 and the husband dies pending the proceedings, the suit will not be abated.¹ When a female defendant marries, no abatement takes place; but the husband's name should be introduced in all subsequent proceedings.²

But although, where a bill has been exhibited against a man and his wife, and the husband dies pending the suit, there is no abatement, and the wife will be bound by the former answer and proceedings in the cause, yet where, by the death of the husband, a new interest arises to the wife, it seems that she will not be bound by the former answer. Thus, where a bill was filed by the assignees of a husband to compel the specific performance of a contract for the sale of a part of his estate, to which the wife was made a co-defendant in respect of certain terms of years which were vested in her as administratrix of a person to whom the terms had been assigned to protect the inheritance, and she had joined with her husband in putting in an answer, by which she claimed to be dowable out of the property: upon the death of her husband, an objection was taken to the suit being proceeded with till a supplemental bill had been filed against her, in order to give her an opportunity of making another defence in respect of the right of dower which had become vested in her, and Sir Thomas Plumer M. R. said, that her former answer could not be pressed against her, because, in the former case, she was made a party as administratrix; but the right to dower which she then had was not claimed by her as representative, but in her own character; and it was an interest that had devolved upon her since her answer was put in; his Honor, therefore, held the suit to be defective.³ A supplemental bill was thereupon filed against the widow, in order to enable her to claim, in her separate character, what she had before claimed in her character of wife. Upon hearing the cause, however, Lord Eldon, although he recognized the principle laid down by Sir Thomas Plumer, said, that he should have been inclined, in that case, to have come to a different decision, as he thought that it would have been difficult for the widow, in her answer to the supplemental bill, to state her case differently from the way in which it had been stated in her former answer.⁴ It is conceived that under the present practice, however, it would not be held necessary for the plaintiff to take any step in the cause, in order to enable a widow to raise a new defence.

⁶ *Elliot v. Ince*, 7 De G., M. & G. 475; 3 Jur. N. S. 597; [*Picard v. Hine*, L. R. 5 Ch. Ap. 274;] or obtain an order to appeal *in forma pauperis* without. *Crouch v. Waller*, 4 De G. & J. 43; 5 Jur. N. S. 326; *ante*, pp. 39, 40, 111.

¹ *Ld. Red. 59; Shelberry v. Briggs*, 2 Vern.

249; 1 Eq. Ca. Ab. 1, pl. 4; *Durbaine v. Knight*, 1 Vern. 318; 1 Eq. Ca. Ab. 126, pl. 7.

² *Ld. Red. 58; Wharam v. Broughton*, 1 Ves. S. 182; and see *Saple v. Ward*, 1 Coll. 25. For the title of their joint answer in such case, see Vol. III.

³ *Mole v. Smith*, 1 J. & W. 665, 668.

⁴ *Mole v. Smith*, Jac. 490, 495.

It follows, from what has been before stated, that where a man
 *189 * and his wife are defendants to a suit, if the wife dies there will
 be an abatement of the suit. Thus, where a man having married
 an administratrix, the plaintiff obtained a decree against him and his
 wife, after which the wife died: it was held, that the suit was abated,
 and that the new administrator ought to be made a party, before any
 further proceedings could be had in the cause.¹

For the means by which the plaintiff compels the appearance and
 answer of the husband and wife, in those cases in which they answer
 jointly, and for the process in those cases in which, according to the
 principles above laid down, a separate answer, by either the one or
 the other, ought to be filed, the reader is referred to the Chapters on
 Process.²

¹ Jackson v. Rawlins, 2 Vern. 195; *ib.* ed. Raithby, n. (2). [A married woman is not a necessary party to a bill seeking to charge her husband's interest in her real estate. Waugh v. Wrenn, 9 Jur. N. S. 365. But her

trustee, the trust being active, is a necessary party to a bill seeking to divest her of her own interest. O'Hara v. MacConnell, 93 U. S. 150.]

² See *post*, Chap. VIII. § 4; Chap X. § 2.

OF PARTIES TO A SUIT.

SECTION I. — *Of necessary Parties, in respect of the Concurrence of their Interests with that of Plaintiff.*

It is the constant aim of a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation.¹ For this purpose, all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, to be made parties to the suit,² or ought by service upon them of a copy of the bill,³ or notice of the decree⁴ to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.⁵

¹ Ld. Red. 163; Story Eq. Pl. §§ 72, 76; Caldwell v. Taggart, 4 Peters, 190; Joy v. Wirtz, 1 Wash. C. C. 517; Mandeville v. Riggs, 2 Peters, 482; Cutler v. Tuttle, 4 C. E. Green, 549, 556; Richardson v. Hastings, 7 Beav. 323, 326; Hare v. London and North Western Railway Co., 1 J. & H. 252. It seems, however, that, under the modern English practice, the Court is less unwilling to relax the rule in special cases. Ford v. Tennant, 29 Beav. 452; 7 Jur. N. S. 615, L. J.

² Ld. Red. 164; [L. R. 8 St. 349.]

³ Ord. X. 11, 14, 15.

⁴ 15 & 16 Vic. c. 86, § 42, r. 8.

⁵ Orders, August, 1841, 23d and 26th. Generally, all persons interested in the subject of a suit should be made parties, plaintiffs, or defendants. Stephenson v. Austin, 3 Met. 474, 480; Williams v. Russell, 19 Pick. 162, 165; West v. Randall, 2 Mason, 181; Pipe v. Bateman, 1 Clarke (Iowa), 369; New Braintree v. Southworth, 4 Gray, 304; Crocker v. Higgins, 7 Conn. 342; Footman v. Pray, R. M. Charl. 291; Watkins v. Washington, 2 Bland, 509; Hoxie v. Carr, 1 Sumner, 172; Whiting v. Bank of United States, 13 Peters, 6-14; Hopkirk v. Page, 2 Brock. 20; M'Connell v. M'Connell, 11 Vt. 290; Evans v. Chism, 18 Maine, 220; Hussey v. Dole, 24 Maine, 20; Beals v. Cobb, 51 Maine, 348; Pierce v. Faunce, 47 Maine, 507; Oliver v. Palmer, 11 Gill & J. 426; Willis v. Henderson, 4 Seam. 20; Wells v. Strange, 5 Geo. 22; Turner v. Berry, 3 Gilman, 541; Hicks v. Campbell, 4 C. E. Green, 183; Pence v.

Pence, 2 Beasley (N. J.), 257. The general rule requiring all persons interested to be made parties to the suit, is confined to parties to the interest involved in the issue, and who must necessarily be affected by the decree. Michigan State Bank v. Gardner, 3 Gray, 308, per Thomas J. It is a rule, which is more or less within the discretion of the Court, and may be dispensed with, when it becomes extremely difficult or inconvenient. Wendell v. Van Rensselaer, 1 John. Ch. 349; Hallett v. Hallett, 2 Paige, 15; Cullen v. Duke of Queensberry, 1 Bro. C. C. 101, and Mr. Belt's notes; Mann v. Butler, 2 Barb. Ch. 362; Birdsong v. Birdsong, 2 Head, 289; Tobin v. Walkinshaw, 1 McAll. C. C. 26; United States v. Parrott, 1 McAll. C. C. 271; West v. Randall, 2 Mason, 181; Brasher v. Van Cortlandt, 2 John. Ch. 242; Boisgerard v. Wall, 1 Sm. & M. Ch. 404; Whitney v. Mavo, 15 Ill. 251; Soc. for Prop. of Gospel v. Hartland, 2 Paine C. C. 536. Where the persons interested are so numerous as to make it impossible, or very inconvenient, to bring them all before the Court, a part of them may file a bill in behalf of themselves, and all others standing in the same situation. Robinson v. Smith, 3 Paige, 222; per Foster J. in Williston v. Michigan Southern and Northern R. R. Co., 13 Allen, 406.

[It has already been stated that the Court will proceed against the parties before it, although the suit relates to the rights of persons out of the jurisdiction. *Ante*, 149, and notes. This ground of exception to the general rule was peculiarly applicable to

*191 *The strict application of this rule, in many cases, creates difficulties; which have induced the Court to relax it; and, as we shall see, it has long been the established practice of the Court, to allow a plaintiff to sue on behalf of himself and of all the others of a numerous class of which he is one, and to make one of a numerous class (as the members of a joint-stock company), the only defendant, as representing the others, on the allegation that they are too numerous to be all made parties;¹ and, in addition, the Court is now enabled, whenever it thinks fit, to adjudicate upon questions arising between parties, without making other persons who are interested in the property in question, or in other property comprised in the same instrument, parties to the suit.² When the Court acts on this power, the absent parties are not bound by the decree;³ whereas, in the cases first alluded to, the absent parties are generally bound.⁴

The application of the general rule, above referred to, will be considered *first*, with reference to those whose rights are concurrent with

suits in Equity in the Courts of the United States. It was accordingly held, that where a decree in relation to the subject-matter of litigation can be made without concluding the rights of a person out of the jurisdiction, that person is not an essential party. *Story v. Livingston*, 13 Pet. 359. To the end of directing the exercise of this exceptional jurisdiction, certain rules, and particularly rules 22 and 47, given *infra*, 2380, 2386, were prescribed. Congress also undertook to legislate on the subject by the Act of Feb. 28, 1839, c. 36, and, now, by the Revised Statutes of 1878, § 737 *et seq.* If, however, the person not before the Court be indispensable, the jurisdiction fails, notwithstanding the rules and the statutes. *Williams v. Bankhead*, 19 Wall. 563; *Coiron v. Millaudon*, 19 How. 113; *Parsons v. Howard*, 2 Woods, 1; *Kilgour v. New Orleans Gas Light Co.*, 2 Woods, 144. See also *Ober v. Gallagher*, 93 U. S. 199; *Bronson v. Keokuk*, 2 Dill. 498; *Brigham v. Luddington*, 12 Blatchf. 237. And see where a plea of non-joinder of parties was held bad under § 737. *Gray v. Natl. Steamship Co.*, 7 Rep. 581, U. S. C. C. N. Y.

This is also the rule of the State Courts. If the absent party is so concerned in the subject-matter that a decree between the immediate litigants cannot be made without seriously affecting his rights, the Court will proceed no further. *Cassidy v. Shimmin*, 122 Mass. 406; *McPike v. Wells*, 54 Miss. 136; *Hill v. Proctor*, 10 W. Va. 59; *Mudgett v. Gager*, 52 Me. 541. See *ante*, 149, n. 1.]

All persons having the same interest should stand on the same side of the suit; but if any such refuse to appear as plaintiffs, they may be made defendants, their refusal being stated in the bill. *Contee v. Dawson*, 2 Bland, 264; *Pogson v. Owen*, 3 Desaus. 31; *Cook v. Hadley, Cooke*, 465; *Morse v. Hovey*, 9 Paige, 197; *Bartlett v. Parks*, 1 Cush. 86; *Whitney v. Mayo*, 15 Ill. 251; *Smith v. Sackett*, 5 Gilman, 534; *Lovell v. Farring-*

ton, 50 Maine, 239. Parties should not be joined as plaintiffs in a suit without their knowledge or consent; if they are, the bill as to them should be dismissed. *Gravestine's App.* 49 Penn. St. 510.

Parties having conflicting interests in the subject of litigation should not be joined as plaintiffs in the suit. *Grant v. Van Schoonhoven*, 9 Paige, 255; *Turnham v. Turnham*, 3 B. Mon. 581; *Michigan Bank v. Gardner*, 3 Gray, 308, 309, per Thomas J.; *Crook v. Brown*, 11 Md. 158; *Johnson v. Vail*, 1 McCarter (N. J.), 423, 425, 426. [And, therefore, a principal in an alleged breach of trust cannot be joined as a co-plaintiff with the persons alleged to have been thereby injured, in an action against the parties charged with participating in the fraud. *Paxton v. Wood*, 77 N. C. 11. Where parties have an interest to a certain extent in common, and seek the same relief, they may join in the same bill. *Wall v. Fairley*, 73 N. C. 464. So, defendants may be joined who have an interest, though not to the same extent, in the demand. *Woodward v. Hall*, 2 Tenn. Ch. 164. A person may file a bill in a double capacity, as executor and as an individual. *Ransom v. Geer*, 3 Stew. Eq. 249.]

¹ [The rule which excuses the omission of parties by name for sufficient cause applies to non-resident parties defendant, made such by publication. *McCaleb v. Crichfield*, 5 Heisk. 288.]

² 15 & 16 Vic. c. 86, § 51. The Court acted on this power in the case of *Parnell v. Hingston*, 3 Sm. & G. 337, which is believed to be the only reported case in which it has done so. See also *Swallow v. Binns*, 9 Hare, App. 47; 17 Jur. 295; *Lanham v. Pirie*, 2 Jur. N. S. 1201, V. C. S.; *Prentice v. Prentice*, 10 Hare, App. 22; *Re Brown*, 29 Beav. 401. [And see now Supreme Court of Judicature Act of 1873, L. R. 8 St. 352.]

³ *Doody v. Higgins*, 9 Hare, App. 32.

⁴ *Barker v. Walters*, 8 Beav. 92.

the rights of the party instituting the suit; and *secondly*, with reference to those who are interested in resisting the plaintiff's claim.

With respect to the first class, it is to be observed, that (subject to the provisions of the late Act above pointed out) it is required in all cases where a party comes to a Court of Equity to seek for *that *192 relief which the principles there acted upon entitle him to receive, that he should bring before the Court all such parties as are necessary to enable it to do complete justice; and that he should so far bind the rights of all persons interested in the subject, as to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, by preventing his being sued or molested again respecting the same matter either at Law or in Equity. For this purpose, formerly, it was necessary that he should bring regularly before the Court, either as co-plaintiffs with himself, or as defendants, all persons, so circumstanced, that unless their rights were bound by the decree of the Court, they might have caused future molestation or inconvenience to the party against whom the relief was sought.

But now, a plaintiff is enabled, in many cases, to avoid the expense of making such persons active parties to the cause, by serving them with copies of the bill under the general order,¹ or with notice of the decree under the recent Act.² The practice arising under these provisions will be stated hereafter; for, as it does not affect the principle, requiring all persons concurrently interested with the plaintiff, to be bound by the decree, but only substitutes, in some cases, an easier mode of accomplishing that end; it will be convenient, in the first instance, to consider what is the nature of those concurrent rights and interests, which render it necessary that the persons possessing them, should be made either active or passive parties to the suit.

In general, where a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it should be a party to the suit;³ for, if he were not, his legal right would not be bound by decree,⁴ and he might, notwithstanding the success of the plaintiff, have it in his power to annoy the defendant by instituting proceedings to assert his right in an action at Law, to which the decree in Equity being *res inter alios acta* would be no answer, and the defendant would be obliged to resort to another proceeding in a Court of Equity, to restrain the plaintiff at Law from proceedings to enforce a demand which has been already satisfied under the decree in Equity. This complication of litigation it is against the principles of Equity to permit, and it therefore requires that in every suit all the persons who have legal rights in the subjects in dispute, as well as the persons

¹ Ord. X. 11, 14.

² 15 & 16 Vic. c. 86, § 42, r. 8.

³ See *Johnson v. Rankin*, 2 Bibb, 184; *Neilson v. Churchill*, 5 Dana, 341. [It is not allowable to file a bill in Chancery by the

legal owner "to the use of" the beneficial owner, but the latter should sue. *Kitchins v. Harrall*, 54 Miss. 474.]

⁴ *Ld. Red.* 145.

having the equitable right, should be made parties to the proceedings.⁵

*193 *Upon this ground it is, that in all suits by persons claiming under a trust, the trustee or other person in whom the legal estate is vested, is required to be a party to the proceeding.¹ Thus where an estate had been limited by a marriage settlement to a trustee and his heirs, upon trust during the lives of the plaintiff and his wife, to apply the profits to their use, with remainder to the children of the marriage, with remainder over; and a bill was brought by the persons interested under that settlement to set aside a former settlement, as obtained by fraud, it was held that the plaintiff could have no decree because the trustee was not a party;² and where it appeared that a mortgage had been made to a trustee for the plaintiff, it was determined that the trustee was a necessary party to a suit to foreclose the equity of redemption.³

The rule is the same whether the trust be expressed or only implied, as where the executor of a mortgagee files a bill to foreclose a mortgage of freehold or copyhold estate, he should make the heir-at-law of the mortgagee a party;⁴ because although according to the principles upon which the Courts of Equity proceed, money secured by mortgage is considered as part of the personal estate of the mortgagee, and belongs on his death to his personal representative; yet, as the legal estate is in the heir, he would not, unless he was before the Court when it was pronounced, be bound by the decree. There is another reason why it is necessary to bring the heir before the Court in a bill to foreclose a mortgage, because if the mortgagor should think proper to redeem the estate under the decree, he will be a necessary party to the reconveyance.⁵ And so important is it considered in such a case that the heir should be a party, that where the mortgagee died without any heir that could be discovered, the Court restrained his executor from proceeding at Law to compel payment of the mortgage money, and ordered the money into Court till the heir could be found.⁶

The heir, however, is only a necessary party where nothing has been

⁵ In a suit under a statute, which provided that any inhabitant of a town might maintain a suit in Equity, by bill or petition, to restrain the town from a mis-application of money in violation of a statute under which it was received, the plaintiffs averred that they were inhabitants of the town, and men of property, liable to be taxed therein, and that the application of the money contemplated by the town would be a direct injury to them, it was held that the plaintiffs had such an interest in the money and in its application, as would entitle them to maintain such bill, if any qualification of interest were necessary. But it seems that no such qualification of interest is requisite for this purpose. *Simmons v. Hanover*, 23 Pick. 188.

¹ *Malin v. Malin*, 2 John. Ch. 238; *Fish v. Howland*, 1 Paige, 20; *Cassiday v. Me-*

Daniel, 8 B. Mon. 519; *Carter v. Jones*, 5 Ired. Eq. 196.

² 9 Mod. 80.

³ *Wood v. Williams*, 4 Mad. 185; *Hichens v. Kelly*, 2 Sm. & G. 264; see *Boyden v. Partridge*, 2 Gray, 190. [A deed of land, with power of sale, whether to the creditor or a third person, is, in Equity, a mortgage, if the equity of redemption be reserved. *Shillaber v. Robinson*, 97 U. S. 68.]

⁴ *Scott v. Nicholl*, 3 Russ. 476.

⁵ *Wood v. Williams*, 4 Mad. 186.

⁶ *Schoole v. Sall*, 1 Sch. & L. 177. The result of this case was, that after the cause had remained some years in Court, it was thought worth while to get an Act of Parliament to re-vest the estate, on an allegation that the heir could not be found. See also *Stoke v. Robson*, 19 Ves. 385; 3 V. & B. 54;

done by the mortgagee to affect the descent of the legal estate * upon him. If the descent of the legal estate has been diverted, *194 it is necessary to have before the Court the person in whom it is actually vested;¹ and therefore, where a mortgagee has devised his mortgage in such manner as to pass not only the money secured, but the legal estate in the property mortgaged, the devisee alone may foreclose without making the heir-at-law of the original mortgagee a party.²

Upon the same principle, where a mortgagee in his lifetime actually assigns his whole interest in the mortgage, even though the assignment be made without the privity of the mortgagor, the assignee alone may foreclose without bringing the original mortgagee before the Court;³ and where there have been several *mesne* assignments of the mortgage, the last assignee, provided the legal estate is vested in him, will be sufficient without its being necessary to bring the intermediate ones before the Court.⁴ It is to be observed, however, that in order to justify the omission of the intermediate assignees in the case of an assignment of a mortgage, the conveyance must have been absolute, and not by way of mortgage;⁵ for if there be several derivative mortgagees, they must all be made parties to a bill of foreclosure by one of them. Thus, where A. made a mortgage for a term of years for securing 350*l.* and interest to B., who had assigned the term to C., redeemable by himself on paying 300*l.* and interest; and B. died, and C. brought a bill against A. to foreclose him without making the representatives of B. the original mortgagee parties, it was held by the Court that there was plainly a want of proper parties.⁶

The principle that requires a trustee or other owner of the legal estate to be brought before the Court in suits relating to trust property, applies equally to all cases where the legal right to sue for the thing

Smith v. Richnell, *ib. notis*; Schelmardine v. Harrop, 6 Mad. 39. The difficulty experienced in the case referred to is now met by the provisions of the Trustee Act, 1850, § 19, which enables the Court, in such a case, to vest the estate; see *post*; and see *Re Boden's Trust*, 1 De G., M. & G. 57; 9 Hare, 820; *Re Lea's Trust*, 6 W. R. 482, V. C. W.; but see *Re Hewitt*, 27 L. J. Ch. 302, L. C. and L. J.J.

¹ See *Eagle Fire Ins. Co. v. Cammet*, 2 Edw. Ch. 127.

² *Williams v. Day*, 2 Ch. Ca. 32; *Renvoise v. Cooper*, 6 Mad. 371.

³ *Chambers v. Goldwin*, 9 Ves. 269; *Story Eq. Pl.* § 189; *Bishop of Winchester v. Beavor*, 3 Sumner's Ves. 314, and note (a); *Whitney v. McKinney*, 7 John. Ch. 144.

⁴ *Chambers v. Goldwin*, 9 Ves. 269.

⁵ *Story Eq. Pl.* § 191; *Kittle v. Van Dyck*, 1 Sand. (N. Y.) 76, cited. [*Infra*, 260, n. 5.]

⁶ *Hobart v. Abbot*, 2 P. Wms. 643; *Kittle v. Van Dyck*, 1 Sand. (N. Y.) 76. The general, although not universal, rule, is that all incumbrancers, as well as the mortgagor,

should be made parties, being, if not indispensable, at least proper, parties to a bill of foreclosure, whether they are prior or subsequent incumbrancers. *Findley v. Bank of United States*, 11 Wheat. 304; *Haines v. Beach*, 3 John. Ch. 459; *Ensworth v. Lambert*, 4 John. Ch. 605; *McGown v. Yorks*, 6 John. Ch. 450; *Bishop of Winchester v. Beavor*, 3 Sumner's Ves. 314, note (a); *Taite v. Pallas*, 1 Hogan, 261; *Bodkin v. Fitzpatrick*, 1 Hogan, 308; *Canby v. Ridgeway*, Halst. N. J. Dig. 168; *Lyon v. Sandford*, 5 Conn. 544; *Renwick v. Macomb*, 1 Hopk. 277; *Fell v. Brown*, 2 Bro. C. C. (Perkins's ed.) 278, 279, notes; *Maderias v. Cutlett*, 7 Monroe, 476; *Wing v. Davis*, 7 Greenl. 31; *Poston v. Eubank*, 3 J. J. Marsh. 44; *Stucker v. Stucker*, 3 J. J. Marsh. 301; *Cooper v. Martin*, 1 Dana, 25; *Noyes v. Sawyer*, 3 Vt. 160; *Judson v. Emanuel*, 1 Ala. N. S. 598; *Miller v. Kershaw*, 1 Bailey Eq. 479; *Bristol v. Morgan*, 3 Edw. Ch. 142; *Nodine v. Greenfield*, 7 Paige, 544; see *Platt v. Squire*, 12 Met. 494. [See *infra*, 214, n. 5, 7, 8; 277, 279.]

demand is outstanding in a different party from the one claiming the beneficial interest. Thus, where a bill is filed for the specific performance of a covenant under hand and seal of one, for the benefit of another, the covenantee must be a party to a bill by the person for whose benefit the covenant was intended, against the covenantor.¹ And so in *Cope v. Parry*,² which was a bill filed for the specific performance of a covenant for the surrender of a copyhold estate to A., in trust for others, Lord Chief Baron Richards said, that as the effect of a surrender, if the Court decreed it, would be to give the legal estate to A., he ought to be a party, otherwise another suit might become necessary against him.

It is to be observed, that the preceding cases arose upon covenants formally entered into under hand and seal; the same rule will not, however, apply to less formal instruments, such as ordinary agreements not under seal, where one party contracts as agent for the benefit of another. In such cases it is not necessary to bring the agent before the Court, because, even at Law, it is the undoubted right of the principal to interpose and supersede the right of his agent by claiming to have the contract performed to himself, although made in the name of his agent.³ This principle was acted upon by the Court of Queen's Bench, in the case of the *Duke of Norfolk v. Worthy*,⁴ and in *Bethune v. Farebrother*,⁵ where the plaintiff not wishing to appear as purchaser, procured J. S. to bargain for him, who signed the contract (not as agent) and paid the deposit by his own check; yet, inasmuch as it was the plaintiff's money, he was allowed to maintain an action for it without showing any disclaimer by J. S. Upon the same principle, in Equity, if the plaintiff had filed a bill against the vendor, for a specific performance, he would not have been under the necessity of making J. S. a party to the suit, because, if he had succeeded in his object, performance of the contract to the plaintiff might have been shown in answer to an action at Law by J. S., whose title was merely that of agent to the plaintiff. It is, however, frequently the practice to join the auctioneer as co-plaintiff with the vendor in suits for specific

¹ *Cooke v. Cooke*, 2 Vern. 36; 2 Eq. Ca. Ab. 73, pl. 8; Story Eq. Pl. § 209.

² 2 J. & W. 588; and see *Rolls v. Yate*, Yelv. 177; 1 Bulst. 25, b.

³ *Crocker v. Higgins*, 7 Conn. 342. The party in interest in a contract, resting in parcel, may sue upon it. *Lapham v. Green*, 9 Vt. 407; Story Agency, § 418 *et seq.*; *Pitts v. Mower*, 18 Maine, 361; *Edmond v. Caldwell*, 15 Maine, 340; *Higdon v. Thomas*, 1 Har. & G. 153; *White v. Owen*, 12 Vt. 361; *Dunlap's Paley's Agency*, § 24, note; *Hogan v. Short*, 24 Wend. 461; *Thorp v. Farquer*, 6 B. Mon. 3.

In the case of the *United States v. Parmele*, 1 Paine C. C. 252, it was held that no action will lie in the name of the principal, on a written contract made by his agent in his own name, although the defendant may

have known the agent's character. See *Clarke v. Wilson*, 3 Wash. C. C. 560; *Newcomb v. Clark*, 1 Denio, 226; *Finney v. Bedford Ins. Co.*, 8 Met. 348; *Collyer Partn.* (Perkins's ed.) §§ 412, 653; *Dunlap's Paley's Agency*, § 24, note; *Harp v. Osgood*, 2 Hill, 216; *West Boylston Manuf. Co. v. Searle*, 15 Pick. 225; *Hubbard v. Borden*, 6 Whart. 79, 92. This, however is not universally true, as appears in the case of factors making written contracts in their own name for the purchase or sale of goods for their principals. So in cases of agents procuring policies of insurance in their own names, for the benefit of their principals, and in other cases, which will be found commented on in Story Agency, § 161.

⁴ 1 Camp. N. P. c. 337.

⁵ Cited 5 M. & S. 385.

performance of contracts entered * into at auctions ;¹ but that *196 is, because he has an interest in the contract, and may maintain an action upon it. He has also an interest in being protected against the legal liability which he may have incurred in an action by the purchaser to recover the deposit.²

In order to enable the plaintiff to dispense with the necessity for making the agent entering into a contract for his employer, in his own name, a party to a suit to enforce such contract, he must state in his bill, and be in a situation to show by evidence, that he was actually an agent in the transaction, as appears to have been done in the case of *Bethune v. Farebrother*,³ by proving that although the money was paid by the check of the agent, it was in fact the money of the purchaser. The fact of the person contracting being the agent of the plaintiff may likewise appear from the contract itself ; but if it does not appear from the contract itself, and the plaintiff is not in a situation to show the agency, by proving that the money was his own, or some act tantamount, he must make the agent a party either as co-plaintiff with himself or as a defendant, in order to bind his interest ; for otherwise such agent would have a right to sue either in Equity for a specific performance of the same contract, or to bring an action at Law for the recovery of the money paid to the defendant ; and parol evidence on the part of the defendant would in either case be inadmissible to show, in opposition to the written contract, that the purchase was made on behalf of another.⁴ The same rule will apply if the agent contracted as well on his own behalf as in the capacity of agent for another. In that event the bill must be filed in his own name, and in that of the person on whose behalf he acted, or at least such person must be a party to the suit ; and upon this principle, in *Small v. Attwood*,⁵ where a contract was entered into for the purchase of an estate by certain persons in their own names, but in fact on their own account, and also as agents for other parties, a bill to rescind the contract was filed in the names of both of the agents, and of the other parties for whom they contracted.

With respect to the effect of a sub-contract in rendering it necessary to bring the party concerned in it before the Court in a litigation between the original contracting parties, the following distinction has been made ; viz., if A. contracts with B. to convey to him an estate, and B. afterwards contracts with C. that he, B., will convey to him the same estate, in that case C. is not a necessary * party *197 to a suit between A. and B. for a specific performance ; but if the contract entered into by B. with C. had been, not that he, B.,

¹ See *Cutts v. Thodey*, 13 Sim. 206, 211 ; and see 7 Ves. 289.

² But where an auctioneer used fraud to enhance the price of property sold at auction, it was held, that in a suit in Equity by a purchaser for relief against the sale, it was not necessary to make the auctioneer a party. *Veazie v. Williams*, 8 How. U. S. 134.

³ Cited 5 M. & S. 385.

⁴ *Bartlett v. Pickersgill*, 1 Cox, 15 ; 1 Eden, 515 ; see 2 Sugden V. & P. (7th Am. ed.) 911, and notes ; *Botstord v. Burr*, 2 John. Ch. 409 ; *Hughes v. More*, 7 Cranch, 176.

⁵ 1 Young, 407.

should convey the estate, but that A., the original vendor, should convey it to C., then C. would have been a necessary party to a suit by B. against A. for a specific performance.¹

Upon the principle above stated, it is presumed that where a man enters into a contract which is expressed in the instrument itself to have been entered into by him as agent for another, he would not afterwards be allowed to sue for a performance of that contract on his own behalf, on the allegation that he was not authorized to act as agent, without bringing the party, on whose behalf it was expressed to be made, before the Court.² At Law it has been held, that a plaintiff under such circumstances could maintain an action, by procuring from the party on whose behalf he appeared to have entertained the contract, a renunciation of his interest.³

It is to be observed here, that although an agent entering into a contract in his own name, may be joined in a suit as co-plaintiff with his principal, as in the case before referred to of an auctioneer, who is frequently joined with the vendor in a bill against a purchaser, because he has an interest in the contract, or may bring an action upon it, it is merely on the ground of the interest which he has in the contract, and that the rule is indisputable, that wherever an agent has no interest whatever in the property in litigation or in the contract, and cannot be sued either at Law or in Equity respecting it, in such case he ought not to be made a party; and that if he is made a co-plaintiff in the suit, a demurrer upon that ground will be allowed;⁴ though now, in such a case, the Court may grant such relief as the special circumstances of the case require.⁵

Upon this principle it has also been determined, that an agent who bids at an auction for an estate, and signs the memorandum in his own name, need not be made a co-defendant with his employer in a bill for a specific performance of such agreement.⁶

Where the subject-matter in litigation is a legal *chose in action* which has been the subject of assignment, the assignor, or, if dead, his personal representative, should be a party;⁷ for as an as-

*198 signment *of a chose in action* is not recognized in a Court of

1 — *v. Walford*, 4 Russ. 372; and *Nelthorpe v. Holgate*, 1 Coll. 203, and the cases there cited; *McCreight v. Foster*, W. N. (1870) 157; 18 W. R. 905, L. C.

2 See Add. Cont. 600, 624.

3 *Bickerton v. Burrell*, 5 M. & S. 383.

4 *King of Spain v. Machado*, 4 Russell, 228; *vide etiam*, *Cuff v. Platell*, *ib.* 242, and *Makepeace v. Haythorne*, *ib.* 244; *Jones v. Hart*, 1 Hen. & M. 470.

5 15 & 16 Vic. c. 86, § 49.

6 *Kingsley v. Young*, *Rolls*, July 30, 1807, *Co. Eq. Pl.* 42; see also *Lissett v. Reave*, 2 Atk. 394; *Newman v. Godfrey*, 2 Bro. C. C. 332, cited *Ld. Red.* 160; see *Ayers v. Wright*, 8 Ired. Eq. 229.

7 *Corbin v. Emerson*, 10 Leigh, 663; *Bell*

v. Shrook, 2 B. Mon. 29; *Combs v. Tarlton*, *ib.* 194; *Allen v. Crockett*, 4 Bibb, 240; *Bromley v. Holland*, 7 Sumner's Ves. 3, note (c); *Voorhees v. De Myer*, 3 Sandf. Ch. 614; *The Auditor v. Johnson*, 1 Hen. & M. 536; *Bradley v. Morgan*, 2 A. K. Marsh. 369; *Elderkin v. Shultz*, 2 Blackf. 345; *Currier v. Howard*, 14 Gray, 511, 513; *Ensign v. Kellogg*, 4 Pick. 1. In *Trecothick v. Austin*, 4 Mason, 16, 41 *et seq.*, it was strenuously maintained by Mr. Justice Story, that the assignor in a *chose in action* is not, in Equity, a necessary party, where the suit is by the assignee and the assignment is absolute. *Miller v. Henderson*, 2 Stockt. Ch. (N. J.) 320; see *Ward v. Van Bokkelen*, 2 Paige, 289; *Bruen v. Crane*, 1 Green Ch. 347; *Everett v. Winn*, 1

Law, and is only considered good in Equity, the recovery in Equity by the *assignee would be no answer to an action at Law by *199

Sm. & M. Ch. 67; *Snelling v. Boyd*, 2 Monroe, 132; *Kennedy v. Davis*, 7 Monroe, 372; *Morey v. Forsyth*, Walk. Ch. 465; *Beach v. White*, Walk. Ch. 495; *Dixon v. Buell*, 21 Ill. 203; *Colerick v. Hooper*, 3 Ind. 316; *Varney v. Bartlett*, 5 Wis. 270; *Moor v. Veazie*, 32 Maine, 343, 355; *Whitney v. M'Kinney*, 7 John. Ch. 144; *Brown v. Johnson*, 53 Maine, 246, 247; *Pingree v. Coffin*, 12 Gray, 302, 303. In *Hobart v. Andrews*, 21 Pick. 526, 531, 532, Mr. Justice Wilde seems inclined to favor the same doctrine. And it was so held in *Haskell v. Hilton*, 30 Maine, 419; see *Anderson v. Wells*, 6 B. Mon. 540; *Clark v. Smith*, 7 B. Mon. 273; *Day v. Cummings*, 19 Vt. 496. In *Story Eq. Pl. § 153*, the law on this subject is thus stated: "In general, the person, having the legal title in the subject-matter of the bill, must be a party, either as plaintiff or as defendant, though he has no beneficial interest therein; so that the legal right may be bound by the decree of the Court. In cases, therefore, where an assignment does not pass the legal title, but only the equitable title, to the property, as, for example, an assignment of a *chose in action*, it is usual, if it be not always indispensable, to make the assignor, holding the legal title, a party to the suit. Indeed, the rule is often laid down far more broadly, and in terms importing, that the assignor, as the legal owner, must in all cases be made a party, where the equitable interest only is passed. [See *Corbin v. Emerson*, 10 Leigh, 663; *Smith v. Harley*, 8 Me. 559.] But it may perhaps be doubted, whether the doctrine thus stated is universally true. The true principle would seem to be, that in all cases, where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case. It is a very different question, whether he may not properly be made a party, as a legal owner, although no decree is sought against him; for in many cases a person may be made a party, though he is not indispensable. [See *Thompson v. McDonald*, 2 Dev. & Bat. Eq. 477; *Wilson v. Davidson County*, 3 Tenn. Ch. 536.] But where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor, which may be affected by the decree, there he is not only a proper, but a necessary, party." *Montague v. Lobdell*, 11 Cush. 114, 115; *Belton v. Williams*, 4 Florida, 11; see *Craig v. Johnson*, 3 J. J. Marsh. 573; *Houghton v. Davis*, 23 Maine, 33. The promisee named in a written contract to convey land, who has transferred it by an unconditional verbal assignment, need not be made a party to a suit by his assignee for specific performance of

the contract. *Currier v. Howard*, 14 Gray, 511. In *Field v. Maghee*, 5 Paige, 539, it was held, that the assignee of a *chose in action*, which has been absolutely assigned, is not authorized to file a bill for the recovery of the same, in the name of the assignor; see also *Miller v. Bear*, 3 Paige, 467, 468; *Whitney v. M'Kinney*, 7 John. Ch. 144; *Sedgwick v. Cleveland*, 7 Paige, 287; *Polk v. Gallant*, 2 Dev. & Bat. Eq. 395; *Snelling v. Boyd*, 5 Monroe, 172. But if the assignee be a mere nominal holder, without interest in the thing assigned, then the suit should be brought in the name of the party in interest. *Rogers v. Traders' Ins. Co.*, 6 Paige, 583.

It has been recently held in England, in the case of *Hammond v. Messenger*, 9 Sim. 327, that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor for it in Equity, unless some circumstances intervene, which show that his remedy at Law is, or may be, obstructed by the assignor. The same doctrine has also been distinctly held in New York and other States. *Carter v. United Ins. Co.*, 1 John. Ch. 463; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; *Adair v. Winchester*, 7 Gill & J. 141; *Smiley v. Bell*, Martin & Yerg. 378; *Moseley v. Brush*, 4 Rand. 392; see also *Rose v. Clark*, 1 Y. & Col. Ch. 534, 548; *Motteux v. The London Assurance Co.*, 1 Atk. 545; *Dhegetoft v. The London Assurance Co.*, *Moseley*, 83. It is remarked by Mr. Justice Story, that "this doctrine is apparently new; and never has been adopted in America. The general principle here established seems to be, that wherever an assignee has an equitable right or interest in a debt, or other property (as the assignee of a debt certainly has), there, a Court of Equity is the proper forum to enforce it, and he is not to be driven to any circuitry by instituting a suit at Law in the name of the person, who is possessed of the right." 2 *Story Eq. Jur. § 1057 a.*; *Townsend v. Carpenter*, 11 Ohio, 21. [But see *Walker v. Brooks*, 128 Mass. 241, where the conclusions of Judge Story are reviewed, and it is held, that Equity will not entertain a bill by an assignee of a strictly legal right, unless he show that the assignor refuses the use of his name, or that the action at Law would not afford adequate relief. To the same effect are *Angell v. Stone*, 110 Mass. 54; *Hogan v. Buck*, 44 Vt. 285.]

This subject underwent a thorough discussion in *Ontario Bank v. Mumford*, above cited, in which Chancellor Walworth cited with approbation the case of *Hammond v. Messenger*, and reaffirmed the doctrine it contains to its full extent. "As a general rule," said he, "this Court will not entertain a suit brought by the assignee of a debt, or of a *chose in action*, which is a mere legal demand; but will leave him to his remedy at Law by a suit in the name of the assignor." [See also *Gover v. Christie*, 2 Harr. & J. 67; *Winn v. Bowles*, 6 Mumf. 23.]

the assignor, in whom the *legal* right to sue still remains, and who might exercise it to the prejudice of the party liable;¹ in which case the party liable would be driven to the circuitous process of filing another bill against the plaintiff at Law, for the purpose of restraining his proceedings.

Upon this ground, where an obligee had assigned over a bond, and died, and the assignee sued for it in Equity, the cause was directed to stand over, to make the personal representative of the obligee a party;² and in another case,³ where the assignor of a bond was dead, and there was not a representative, it was held, on a bill filed by the assignee against the obligor for a *ne exeat*, that there was a want of parties. And in like manner, where a bill was filed by the assignees of a judgment, without the assignor being a party, it was held, that the plaintiffs could not go on with that part of their case which sought payment of the debt.⁴

For the same reason, where a bill was filed against the directors of an unincorporated joint-stock company, by a holder of shares, of which some were original, and some were alleged to be derivative, without stating with respect to the derivation of them, the manner in which he had become possessed of them, or whether they had been transferred to him, in the manner in which, according to the regulations of the company, such transfer ought to have been made, Lord Brougham appeared to think that the persons by whom the shares had been assigned to the plaintiffs ought to have been parties to the suit.⁵

The same principle appears to have been acted upon by the Court of Exchequer, in certain cases in which bills have been filed for tithes, by lessees, under parol demises (which, in consequence of tithes *200 being things lying in grant, are void at Law), in which *cases, upon demurrers being put in and submitted to, the Court has permitted the plaintiffs to amend their bills, by making the lessors parties to the suit.¹

Although the assignor of a *chose in action* is sometimes made a party defendant to a suit, yet the more general practice is (especially where the assignment contains, as it almost always does, a power of attorney

¹ See the remarks of Thomas J. in *Montague v. Lobdell*, 11 Cush. 111, 114, 115; and also the remarks of Wilde J. in *Hobart v. Andrews*, 21 Pick. 526, 531, 532, upon the above statement by Mr. Daniell. *Brown v. Johnson*, 53 Maine, 246.

[And see *Jones v. Farrell*, 1 De G. & J. 298, where the assignor sued at Law, and the debtor, with notice of the assignment before suit brought, paid him, the debtor was again compelled to pay the assignee on bill filed by such assignee. See also *Rolt v. White*, 31 Beav. 520, where it was held that the right of set-off by the debtor was the same in Equity as at Law.]

² *Brace v. Harrington*, 2 Atk. 235; *Coale*

v. Mildred, 3 Harr. & J. 278; see *Ensign v. Kellogg*, 4 Pick. 1.

³ *Ray v. Fenwick*, 3 Bro. C. C. 25.

⁴ *Cathcart v. Lewis*, 1 Ves. J. 463; *Partington v. Bailey*, 6 L. J. N. S. Ch. 170, M. R.; *M'Kinnie v. Rutherford*, 1 Dev. & Bat. Eq. 395; *Elliott v. Waring*, 5 Monroe, 339; *Pemberton v. Riddle*, *ib.* 401; *Young v. Rodes*, *ib.* 500; *Elderkin v. Shultz*, 2 Blackf. 346.

⁵ *Walburn v. Ingilby*, 1 M. & K. 61; *C. P. Coop. t. Brough*, 270; see, however, *Bagshaw v. Eastern Union Railway Co.*, 7 Hare, 114; 13 Jur. 602; affirmed, 14 Jur. 491, L. C.

¹ *Henning v. Willis*, 3 Wood, 29; *Jackson v. Benson*, M'Lel. 62.

from the assignor to the assignee to sue in his name), to make the assignor a co-plaintiff in the bill; although it seems, that even if the assignment is stated upon the bill, and, consequently, that there is an admission of the fact as between the co-plaintiffs, still it is necessary to prove the assignment, in order to show that there is no misjoinder of plaintiffs;² though now, it is conceived that such proof would certainly not be required.³

Upon the principle above laid down, it is held that although a creditor or legatee of a person deceased may, in some cases, under peculiar circumstances, such as an allegation of fraud or collusion,⁴ bring a bill against a debtor to,⁵ or creditor of,⁶ the estate, yet such a suit can in no case be maintained without the personal representative being a party.⁷ But it seems that a specific legatee, suing trustees for his legacy, need not make the executor a party, if he alleges that he has his assent.⁸ Again, although an executor has actually released his interest in the property sued for, it has been held that he must, nevertheless, be a party to the suit.⁹ And so it has been held, that an administratrix of an intestate, although she had assigned his interest in a partnership concern to his next of kin, was the proper person to file a bill against the surviving partners to have the partnership accounts taken.¹⁰

Where a testator, having been resident in India, where all his property was, died there, having made a will, whereby he bequeathed the residue of his estate to persons resident in this country, *but *201 appointed persons in India his executors, who proved the will there, and remitted the proceeds to their agent in this country, it was held, that the residuary legatees could not maintain a suit against the agent, without having a representative to the testator in England, before the Court.¹

² *Sayer v. Wagstaff*, 2 Y. & C. 230; *Cholmondeley v. Clinton*, 4 Bligh, 123; *Ryan v. Anderson*, 3 Mad. 174; *Blair v. Bromley*, 5 Hare, 554; 11 Jur. 115; affirmed, 2 Phil. 354; 11 Jur. 617.

³ 15 & 16 Vic. c. 86, § 49. [If the assignor be made a defendant, and admit the assignment, the opposite party is thereby concluded. *Burrows v. Stryker*, 47 Iowa, 477.]

⁴ *Gregory v. Forrester*, 1 M'Cord Ch. 325; *post*, ch. 6, § 4, and cases cited in notes to this point.

⁵ *Attorney-General v. Wynne*, Mos. 126; *Wilson v. Moore*, 1 My. & K. 126, 142; see also *Saunders v. Druce*, 3 Drew. 140; and this has been done in cases of partnership. *Bowsher v. Watkins*, 1 R. & M. 277; *Travis v. Milne*, 9 Hare, 141; and see *Stainton v. Carron Company*, 18 Beav. 146; 18 Jur. 137; *Harrison v. Righter*, 3 Stockt. (N. J.) 339; [*Evans v. Evans*, 8 C. E. Green, 71; *Yeatman v. Yeatman*, 7 Ch. Div. 210, where the limitations of the rule are discussed.]

⁶ *Earl Vane v. Rigden*, 18 W. R. 308, V. C. M.; see, however, *S. C. W. N.* (1870) 210; 18 W. R. 1092, L. C. & L. J. James.

⁷ *Rumney v. Maud*, Rep. temp. Finch,

336; *Griffith v. Bateman*, *ib.* 334; *Attorney-General v. Twisden*, *ib.* 336; *Conway v. Stroud*, 2 Freem. 188; *West v. Randall*, 2 Mason, 181. If, however, the executor is an outlaw and cannot be found, the suit may proceed without him. *Heath v. Percival*, 1 P. Wms. 682, 684; 2 Eq. Ca. Abr. 167, pl. 14; 630, pl. 2.

⁸ *Smith v. Brooksbank*, 7 Sim. 18, 21; see, however, *Moore v. Blagrave*, 1 Ch. Ca. 277, and observations on this case in *Smith v. Brooksbank*.

⁹ *Smithby v. Stinton*, 1 Ver. 31.

¹⁰ *Clegg v. Fishwick*, 1 M'N. & G. 294, 299; 12 Jur. 993. [And see where the uncollected debts were divided among the distributees by decree of Court. *Pennington v. McWhirter*, 8 Humph. 130.]

¹ *Logan v. Fairlie*, 2 S. & S. 284; see *Campbell v. Wallace*, 10 Gray, 162; *Campbell v. Sheldon*, 13 Pick. 8; *Story Conf. Laws*, § 513, and numerous cases cited in notes, § 514 b.; *Story Eq. Pl.* § 179. Executors residing abroad, or who have never acted on the estate, are not necessarily made parties to the suit. *Clifton v. Haig*, 4 Desaus. 330; *Story Eq. Pl.* § 179.

Where a claim on property in dispute would vest in a personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit will be necessary, to enable the Court to proceed to a decision on the claim; but now the Court is empowered, by the forty-fourth section of the Act 15 & 16 Vic. c. 86, if it thinks fit, to appoint a person in such cases to represent the estate, or to proceed in the absence of any such representative.

Where, however, the object of the suit is the general administration of the estate, a general personal representative is always necessary;² and the Court will not proceed in such a suit when the estate is only represented by an administrator *ad litem*;³ nor appoint a person to represent the estate under the section above referred to,⁴ and a general personal representative is a necessary party to a suit against an executor or administrator *de son tort*.⁵

When the object of the suit is only to bind the estate, it is sufficiently represented by an administrator *ad litem*;⁶ and, as a general proposition, it has been laid down that an administrator *ad litem* represents the estate to the extent of the authority which the letters of administration purport to confer;⁷ and when a limited administration has been granted, and general letters of administration are afterwards granted, the general administrator is bound by the proceedings in a cause in which the estate was represented by a limited administrator.⁸

*202 *It may not be out of place here to observe that the Attorney-General does not represent the estate of a deceased illegitimate person, so as to dispense with the necessity of a personal representative.¹

With regard to the power of the Courts to appoint a person to represent the estate of a deceased person, Lord Hatherley, then Vice Chancellor, observed, in the case of *Long v. Storie*, that “the forty-fourth section of the Statute is only intended to apply to a case in which there

² *Penny v. Watts*, 2 Phil. 149, 153; *Donald v. Bather*, 16 Beav. 26; *Barber v. Walker*, W. N. (1867) 127; 15 W. R. 728, L. J.J.; [*Dowdeswell v. Dowdeswell*, 9 Ch. App. 294.]

³ *Croft v. Waterton*, 13 Sim. 653; but see 2 Phil. 552; *Groves v. Levi*, or *Groves v. Lane*, 9 Hare App. 47; 16 Jur. 1061; and see *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514, V. C. S. If necessary for the protection of the estate, a bill praying an injunction and receiver, may be filed, although there is no personal representative. *Steer v. Steer*, 13 W. R. 235, V. C. K.; 2 Dr. & Sm. 311; but a bill filed before administration to protect the assets is demurrable, if it asks an account. *Rawlings v. Lambert*, 1 J. & H. 458; *Overington v. Ward*, 34 Beav. 175.

⁴ *Groves v. Levi*, *supra*; *Silver v. Steir*, 1 Drew. 295; 9 Hare App. 82; see, however, *Macleane v. Dawson*, 27 Beav. 21, 369; 5 Jur. N. S. 1091; *Williams v. Page*, 27 Beav. 373.

⁵ *Penny v. Watts*, 2 Phil. 149, 153; *Crea-*

sor v. Robinson, 14 Beav. 589; 15 Jur. 1049; *Beardmore v. Gregory*, 2 H. & M. 491; 11 Jur. N. S. 363; *contra*, *Cleland v. Cleland*, Pree. Ch. 64; and see *Cooke v. Gittings*, 21 Beav. 497.

⁶ *Ellice v. Goodson*, 2 Coll. 4; *Davis v. Chanter*, 2 Phil. 545, 549; *Devaynes v. Robinson*, 24 Beav. 97, 98; 3 Jur. N. S. 707, 708; *Macleane v. Dawson*, 27 Beav. 21, 369; 5 Jur. N. S. 1091; *Williams v. Allen*, 10 W. R. 512, L. J.J.; 4 De G., F. & J. 71; overruling *S. C.* 29 Beav. 292; 8 Jur. N. S. 276.

⁷ *Faulkner v. Daniel*, 3 Hare, 199, 207; *Davis v. Chanter*, *supra*; *Williams v. Allen*, 32 Beav. 650; *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514, V. C. S.

⁸ *Davis v. Chanter*, *supra*; and *Harris v. Milburn*, 2 Hagg. 64, referred to, 2 Phil. 552. [So, where the revivor was under a statute against the heirs of the decedent. *Anderson v. McRoberts*, 1 Tenn. Ch. 279.]

¹ *Bell v. Alexander*, 6 Hare, 543, 545.

is a difficulty, either from insolvency or some other cause, in obtaining representation to a deceased party;"² and the same learned Judge said, in another case, that it is always in the discretion of the Court whether it will act on the power conferred by this section;³ and in the case of *Gibson v. Wells*,⁴ Sir John Romilly M. R. said, "The object of the Statute is: where you have real litigating parties before the Court, but it happens that one of the class interested is not represented, then, if the Court sees that there are other persons present who *bonâ fide* represent the interest of those absent, it may allow that interest to be represented, but it will not allow the whole adverse interest to be represented." The observations of the learned Judges above quoted show generally the cases in which the Court will exercise the power conferred upon it by the forty-fourth section of the Act; and it will be useful now to refer, shortly, to some of the reported cases in which the Court has acted on this power, or has refused to do so. It has been determined that the enactment extends to those cases where the estate to be represented is sought to be made liable;⁵ and pending proceedings in the Probate Court, a representative has been appointed;⁶ and, again, where the next of kin refused, or after notice neglected, to take out administration;⁷ and where the executor, who had proved the will in India, refused to prove it in England;⁸ and where it was uncertain whether the person whose estate was to be represented, and who was a necessary party to the suit, and beneficially interested, was dead or alive.⁹ Where there are other persons parties to the suit in the same interest as the deceased party, it is conceived that the Court will, generally, permit the suit to proceed without any representative *of the estate, of such party;¹ so, also, when the deceased person was an accounting party, or without any beneficial interest, and died insolvent.² *203

Before the late Act, in some cases, when it has appeared at the hear-

² Kay App. 12; and see Joint Stock Discount Co. v. Brown, L. R. 8 Eq. 376, V. C. J.
³ Tarratt v. Lloyd, 2 Jur. N. S. 371, V. C. W.

⁴ 21 Beav. 620; and see Hewitson v. Todhunter, 22 L. J. C. H. 76, V. C. S.; Meades v. Guedalla, 10 W. R. 485, V. C. W.; *Re* Joint Stock Discount Company, Fyfe's case, 17 W. R. 870, M. R.

⁵ Dean and Chapter of Ely v. Gaylord, 16 Beav. 561; Joint Stock Discount Co. v. Brown, L. R. 8 Eq. 376, V. C. J.; and see *Re* Banking, L. R. 6 Eq. 601, V. C. G.

⁶ Hele v. Lord Bexley, 15 Beav. 340; Robertson v. Kemble, W. N. (1867) 305, M. R.

⁷ Tarratt v. Lloyd, *supra*; Ashmall v. Wood, 1 Jur. N. S. 1130, V. C. S.; Davies v. Boulcott, 1 Dr. & Sm. 23; see also Swallow v. Binns, 9 Hare App. 47; 17 Jur. 295; Haw v. Vickers, 1 W. R. 242.

⁸ Sutherland v. De Virenne, 2 Jur. N. S. 301, V. C. S.; see also Bliss v. Putnam, 29 Beav. 20; 7 Jur. N. S. 12; Mortimer v. Mortimer, 11 W. R. 740, M. R.

⁹ Mortimer v. Mortimer, 11 W. R. 740, M. R.

¹ Abrey v. Newman, 10 Hare App. 58; 17 Jur. 153; Cox v. Taylor, 22 L. J. Ch. 910, V. C. K.; Rucker v. Scholefield, 7 L. T. N. S. 504, V. C. W.; Twynham v. Porter, W. N. (1869) 228, V. C. J.; and see Bessant v. Noble, 26 L. T. Ch. 236, L. C. In Tarratt v. Lloyd, *supra*, however, the Court appointed a representative.

² Chafers v. Headlam, 9 Hare App. 46; Magnay v. Davidson, 9 Hare App. 82; Band v. Randle, 2 W. R. 331, V. C. W.; Rogers v. Jones, 1 Sm. & G. 17; 16 Jur. 968; Leycester v. Norris, 10 Jur. N. S. 1173, V. C. K.; 13 W. R. 201, V. C. K.; but see Cox v. Stephens, 9 Jur. N. S. 1144, 1145; 11 W. R. 929, V. C. K.; see also, Ashmall v. Wood, *supra*, where in a similar case a person was appointed to represent a deceased party; and see Whittington v. Gooding, 10 Hare App. 29. In Miles v. Hawkins, 1 C. P. Coop. t. Cott. 366, which was a similar case before the Act, an objection for want of parties was overruled; see also Goddard v. Haslam, 1 Jur. N. S. 251, V. C. W.; and Madox v. Jackson, 3 Atk. 406.

ing of a cause that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative, the Court has, on the hearing, made a decree, directing proceedings before one of the Masters of the Court, without requiring the representative to be made a party by amendment or otherwise; and has given leave to the parties in the suit to bring a representative before the Master, on taking the accounts or other proceedings directed by the decree.³

Having now noticed the principal cases in which the Court has acted on the power given by the Statute, those in which it has refused to do so will be shortly referred to. It has been held, that the enactment does not enable the Court to appoint a person to represent the estate, or to proceed without one, where he would have to be active in the execution of the decree which the Court is called upon to make;⁴ nor where the whole adverse interest is unrepresented;⁵ nor where the general administration of the estate to be represented is sought;⁶ nor where the deceased was an accounting party;⁷ nor where there is personal responsibility attached to the position;⁸ nor will the Court direct money to be paid to a person appointed under this section.⁹

The 44th section of the Act expressly refers to other proceedings, as well as suits; and it has accordingly been held that it applies to *204 special cases and petitions.¹⁰ The proper person to be *appointed under this section is the person who would be appointed administrator *ad litem*;¹ but the Court will not appoint a person against his will.² It would seem that the plaintiff may apply for, and obtain, an order under the 44th section on motion, without serving the other parties to the cause or proceeding;³ but notice must be given to the persons entitled to take out administration to the deceased party;⁴ the Court, can, how-

³ *Ld. Red.* 178.

⁴ *Fowler v. Bayldon*, 9 *Hare App.* 78.

⁵ *Cox v. Stephens*, 9 *Jur. N. S.* 1144, 1145; 11 *W. R.* 929, *V. C. K.*; *Gibson v. Wills*, 21 *Beav.* 620; and see *Vacy v. Vacy*, 1 *L. T. N. S.* 267, *V. C. W.*

⁶ *Groves v. Levi or Lane*, 9 *Hare App.* 27; 16 *Jur.* 1011; *Silver v. Stein*, 1 *Drew.* 295; 9 *Hare App.* 82; *James v. Ashton*, 2 *Jur. N. S.* 224, *V. C. W.*; *Bruiton v. Birch*, 22 *L. J. Ch.* 911, *V. C. K.*; *Williams v. Page*, 27 *Beav.* 273; *Maclean v. Dawson*, 27 *Beav.* 21, 369; 5 *Jur. N. S.* 1091.

⁷ *Rowland v. Evans*, 33 *Beav.* 202.

⁸ *Re Joint Stock Discount Company*, *Fyfe's case*, 17 *W. R.* 870, *M. R.*

⁹ *Bvam v. Sutton*, 19 *Beav.* 646; *Rawlins v. McMahon*, 1 *Drew.* 225; 9 *Hare App.* 82; *Jones v. Foulkes*, 10 *W. R.* 55, *V. C. K.*

¹⁰ *Swallow v. Binns*, 9 *Hare App.* 47; 17 *Jur.* 295; *Ex parte Cramer*, 9 *Hare App.* 47; *Hewitson v. Todhunter*, 22 *L. J. Ch.* 76, *V. C. S.*; *Re Ranking*, *L. R.* 6 *Eq.* 601, *V. C. G.*; and see *post*, Chap. XXXV., § 3; Petitions, and Chap. XLIII., special case.

¹ *Dean of Ely v. Gayford*, 16 *Beav.* 561; and see *Hele v. Lord Bexley*, 15 *Beav.* 340; *Ashmall v. Wood*, 1 *Jur. N. S.* 1130, *V. C. S.*; *Sutherland v. De Virene*, 2 *Jur. N. S.* 301, *V. C. S.*, where the Court appointed the executor who had not proved; see also *Mortimer v. Mortimer*, 11 *W. R.* 740, *M. R.*; *Swallow v. Binns*, 9 *Hare App.* 47; 17 *Jur.* 295; *Hewitson v. Todhunter*, 22 *L. J.* 76, *V. C. S.*; *Robertson v. Kemble*, *W. N.* (1867) 305, *M. R.*

² *Prince of Wales Association v. Palmer*, 25 *Beav.* 605; *Hill v. Bonner*, 26 *Beav.* 372; *Long v. Storie*, *Kay App.* 12; *Whiteaves v. Melville*, 5 *W. R.* 676, *V. C. W.*; *Joint Stock Discount Company v. Brown*, *L. R.* 8 *Eq.* 376, 380, *V. C. J.*

³ *Seton*, 1179; *Davies v. Boulcott*, 1 *Dr. & Sm.* 23; see, however, *contra*, *Chaffers v. Headlam*, 9 *Hare App.* 46

⁴ *Davies v. Boulcott*, *supra*; *Tarratt v. Wood*, 2 *Jur. N. S.* 371, *V. C. W.*; *Joint Stock Discount Co. v. Brown*, *L. R.* 8 *Eq.* 376, *V. C. J.* Where, after decree, the representative is required for the purpose of ac-

ever, make the order at the hearing.⁵ No appearance is required to be entered by the party appointed; but notice of his appointment, and of the name and address of the solicitor who will act for him, should be given to the Record and Writ Clerk, for the purpose of service; and the order should be produced to him for entry.⁶

It should here be observed, that under the Court of Probate Act, 1857 and 1858, the Court of Probate has power, pending litigation as to the validity of a will, or the right to administration, to appoint an administrator, who has all the powers of a general administrator, except the power of distributing the estate, but who is to act under the direction of the Court of Probate;⁷ and the same Statute also enables the Court of Probate, in certain cases, where necessary or convenient, to appoint any person, either general or limited administrator to a deceased person.⁸

It has also been enacted, that if, at the expiration of twelve calendar months from the death of any testator or intestate, the executor or administrator, to whom probate or administration has been granted, is then residing out of the jurisdiction of the Courts of Law and Equity, the Court of Probate may, upon the application of any creditor, next of kin or legatee, grant a special administration, limited "for the purpose to become and be made a party to a bill or bills to be exhibited against him * in any of her Majesty's Courts of Equity, and to carry the *205 decree or decrees of any of the said Courts into effect, and not further or otherwise;" and it has also been enacted, that the Court of Equity in which such suit shall be depending, may appoint (if it shall be needful) any person or persons to collect in any outstanding debts or effects due to such estate, and to give discharges for the same; such persons or person giving security, in the usual manner duly to account for the same. Moreover, the Accountant-General of the Court of Chancery, or the Secretary or Deputy Secretary of the Bank of England, are enabled to transfer, and the Bank is to suffer a transfer to be made, of any stock belonging to the estate of such deceased person, into the name of the Accountant-General, in trust for such purposes as the Court shall direct, in any suit in which the person to whom such administration has been granted shall be or may have been a party; provided, nevertheless, that if the executor or administrator, capable of acting as such, shall return to and reside within the jurisdiction of any of the said Courts pending such suit, such executor or administrator shall be made party to such suit; and the costs incurred by granting such administra-

counts or inquiries at chambers, the application for the order may be made there by *ex parte* summons. For forms of orders dispensing with and appointing representatives, see *Hele v. Lord Bexley*, 15 Beav. 340; *Seton*, 1178.

⁵ *Hewitson v. Todhunter*, 22 L. J. Ch. 76, V. C. S.; *Mendes v. Guedalla*, 10 W. R. 485, V. C. W.

⁶ *Braithwaite's Prac.* 561. Where a repre-

sentative is thus appointed of the estate of a deceased party to the cause, the title of the cause is corrected by introducing, after the deceased's name, "Since deceased, and also A. B. appointed by order, dated — day of — 187—, to represent his estate."

⁷ 20 & 21 Vic. c. 77, § 70; and see *Veret v. Duprez*, L. R. 6 Eq. 329, V. C. M.; *Tichborne v. Tichborne*, L. R. 1 P. & D. 730.

⁸ 20 & 21 Vic. c. 77, § 73.

tion, and by proceeding in such suit against such special administrator, shall be paid by such person or persons, or out of such fund, as the Court where such suit is depending shall direct. Where an infant is sole executor, administration with the will annexed must be granted to the guardian of such infant, or to such other person as the Court of Probate shall think fit, until such infant shall have attained the full age of twenty-one years; at which period, and not before, probate of the will shall be granted to him. And the person to whom such administration shall be granted shall have the same powers vested in him as an administrator has, by virtue of an administration granted to him *durante minore ætate* of the next of kin.¹ And now, by the "Court of Probate Act, 1858," such limited administration may be granted, whether it be or be not intended to institute proceedings in the Court of Chancery.²

In some cases, where the trustee has had no beneficial interest in the property, and was not possessed of a legal estate which he could set up at law to the annoyance of the defendant in Equity, the rule which requires that the trustees, or other persons having the legal estate in the thing demanded, should in all cases be before the Court, has been dispensed with, and the Court has permitted bills to be filed by the *cestui que trusts* without making such trustee a party, the *cestui que trusts*

undertaking for him that he shall conform to such decree as the *206 Court shall make.³ *Where, however, new trustees of a settlement had been duly appointed, but the trust property had not been assigned or transferred to them, they were held necessary parties to a suit for carrying the trusts of the settlement into execution.¹

Again, where a bill was filed to carry the trusts of a will into execution, whereby, amongst other things, lands were limited to trustees for a term of years, to raise a sum of money by way of portions for younger children, two of which younger children had assigned their shares of the sum to be raised to a trustee for the benefit of the others, but which last trustee was not before the Court; it was considered that as the trustees of the term who had the legal estate, and all the children who had the beneficial interest, were parties, there was no occasion to make the other trustee a party.² Upon the same principle, where a man had executed a deed, providing, in case of his death, for a woman and her children, and had deposited it in the hands of an attorney for the benefit of all parties, but afterwards procured possession of it himself, it was held, on demurrer, that the woman and her children could maintain a suit to compel him to deliver up the deed, without making the attorney with whom it was deposited, and against whom no breach of trust was alleged, a party.³

¹ 38 Geo. III. c. 87; 20 & 21 Vic. c. 77, § 74. and 21 & 22 Vic. c. 95, § 18; see *Collas v. Hesse*, 12 W. R. 565, V. C. K.; *Dickins v. Harris*, 1 W. N. 93, V. C. S.

² 21 & 22 Vic. c. 95, § 18.

³ *Kirk v. Clark*, Prec. in Ch. 275.

¹ *Nelson v. Seaman*, 1 De G., F. & J. 368; 6 Jur. N. S. § 258.

² *Head v. Ld. Teynham*, 1 Cox, 57.

³ *Knye v. Moore*, 1 S. & S. 61.

For the same reason it has been held, that although, as we have seen,⁴ the assignor of a *chose in action* is a necessary party to a suit by the assignee, yet the assignee of an equitable interest in the nature of a *chose in action* may maintain a suit for the assertion of that interest without bringing the assignor before the Court.⁵

The principle that the person having the legal right to sue for the matter which he might enforce at Law against the defendant, should be before the Court, applies to all persons who had legal demands against the defendants arising out of the same matter; thus, as it has been decided that at Law an assignee of a lease may be sued for non-performance of the covenants both by the lessor and the original lessee from whom he derives title, Courts of Equity will not permit either the lessor or lessee to institute proceedings against him in respect of his covenants, without having the other before them, in order that the rights of both may be settled at the same time. Upon this ground, where a man granted a lease of houses for thirty years to B., who covenanted to keep them in good repair, and died having bequeathed the term to his wife, and afterwards by *mesne* assignments, the term became vested in a pauper, * but the houses becoming out of repair and the *207 rent in arrear, a bill was brought by the lessor against the assignee for repairs and an account of the arrears of rent; upon an objection being taken, that the executors of the original lessee were not parties, the Lord Chancellor said, that to make the proceedings unexceptionable, it would be very proper to have them before the Court; for that it did not appear to him but that the plaintiff might have had a satisfaction at law against the executors, and, if so, the plaintiff's equity will be their equity.¹ The same objection was allowed in the case of the *City of London v. Richmond*,² which was also the case of a bill against the assignee of a lease, for payment of rent and performance of covenants.

The rule which requires all persons, having similar rights to sue at Law with that of the plaintiff, to be brought before the Court, does not apply to a bill filed by the last indorsee of a bill of exchange which has been lost, against the acceptor; in which case it has been held that neither the drawer³ nor the prior indorsees are necessary parties;⁴ because, in such cases, the ground of the application to a Court of Equity is the loss of the instrument; and relief is only given upon the terms of the plaintiff giving the defendant ample security against being called upon again by the drawer or indorsees, in case they should become possessed of the instrument.⁵ And it seems also, that the drawer

⁴ *Ante*, p. 198.

⁵ *Blake v. Jones*, 3 Anst. 651; *Sayles v. Gibbitts*, 5 R. I. 79; *Cator v. Croydon Canal Co.*, 4 Y. & C. Ex. 405, 419; 8 Jur. 277, L. C.; *Padwick v. Platt*, 11 Beav. 503; *Fulham v. McCarthy*, 1 H. L. Ca. 703; *Bagshaw v. Eastern Union Railway Co.*, 7 Hare, 114; 13 Jur. 602; affirmed, 14 Jur. 491.

¹ *Sainstry v. Grammer*, 2 Eq. Ca. Ab. 165.

c. 6.

² 2 Vern. 421; 1 Bro. P.C. ed. Toml. 516.

³ *Davies v. Dodd*, 4 Price, 176.

⁴ *Macartney v. Graham*, 2 Sim. 285.

⁵ Respecting the jurisdiction in cases of lost notes and bills, see 1 Story Eq. Jur. §§ 85, 86.

is not a necessary party, where a suit is instituted by an acceptor against the holder of a bill of exchange which is forthcoming, for the purpose of having it delivered up.⁶

The principle, that persons having co-existent rights with the plaintiff to sue the defendant must be brought before the Court in all cases where the subject-matter of the right is to be litigated in Equity, is not confined to cases where such co-existent rights to sue are at Law; it applies equally to cases where another person has a right to sue, for the same matter in Equity; in such cases the defendant is equally entitled to insist that the person possessing such right should be brought before the Court before any decree is pronounced, in order that such right may be bound by the decree.⁷ Thus, where a bill was filed by a vicar against a sequestrator for an account of the profits of a benefice, received during its vacation, it appears to have been thought by the Court that the bishop ought to have been a party to the suit, because the sequestrator

*208 * was accountable to him for what he had received;¹ and, on the other hand, where a bill was filed by a bishop and a sequestrator against an occupier for an account of tithes during the lunacy of the incumbent, who had been found a lunatic under a commission, it was held that the incumbent or his committee ought to have been a party.² It seems, however, that where a living is under sequestration for debt, the incumbent may maintain a suit for tithes without making the sequestrator or the bishop a party. This appears to have been the opinion of Lord Lyndhurst C. B., in *Warrington v. Sadler*,³ where a decree was made in a suit by a vicar for tithes, although the vicarage was under sequestration, and the occupiers had actually paid certain alleged moduses to the sequestrator. Upon the principle above stated, it is held, that in general, where a suit is instituted on behalf of a lunatic either by the Attorney-General or his committee, the lunatic himself must be a co-plaintiff, because he may recover his senses, and would not be bound by the decree.⁴

In the above cases, the person required to be a party had a concurrent right with the plaintiff in the whole subject of the suit; the same rule, however, applies where he has only a concurrent right in a portion of it; thus, where there are two joint-tenants for life, and one of them exhibits a bill, the other must be a party, unless the bill shows that he is dead;⁵ and where A., B., and C. were joint lessees under the City of London, and A. and B. brought a bill against the lessors to have certain allowances out of the rent, and it appeared upon the hearing that C. was living, an objection, because he was not a party to the bill was allowed;⁶

⁶ *Earle v. Holt*, 5 Hare, 180; see, however, *Penfold v. Nunn*, 5 Sim. 405.

⁷ See *Shields v. Thomas*, 18 How. U. S. 253.

¹ *Jones v. Barrett*, Bunb. 192.

² *Bishop of London v. Nicholls*, Bunb. 141.

³ 1 Young, 283.

⁴ See *ante*, pp. 9, 82; *Gorham v. Gorham*, 3 Barb. Ch. 24.

⁵ *Haycock v. Haycock*, 2 Ch. Ca. 124; *Weston v. Keighley*, Rep. temp. Finch, 82. But see *Platt v. Squire*, 12 Met. 494, in which this rule seems to have been disregarded. *Post*, 213, note.

⁶ *Stafford v. The City of London*, 1 P. Wms. 428; 1 Stra. 95; 1 S. C.

and so, where a bill is brought for a partition either by joint-tenants or tenants in common, as mutual conveyances are decreed, all persons necessary to make such conveyances must be parties to the suit;⁷ and where one tenant in common had granted a lease of his share for a long term of years, the lessee was held to be a necessary party to the suit, at the expense, nevertheless, of his lessor, who was to be responsible for his costs.⁸ Where, however, three out of forty-seven tenants in common filed a bill for an injunction to restrain the digging of stone on the common property, a demurrer, for want of parties was overruled;⁹ and where a tenant in common had demised his share for a long term of years, it was *held that the termor for years was entitled *209 to file a bill for a partition against the other tenants in common, without bringing the reversioner of the share demised before the Court;¹ and so it seems that where one of the parties is only tenant for life, he may maintain a suit for a partition without the party entitled in remainder.² Where the object of a suit is to ascertain boundaries, the rule is different, and the Court will not entertain a bill of that description without having the remainder-men and all parties interested before it.³

It is not in general necessary, in questions relating to real property, that the occupying tenants under leases should be parties, unless their concurrence is necessary, as in the case above referred to of the lessee of a tenant in common; or unless the object of the suit is to restrain an ejectment brought against them instead of against their landlord; as in the case of *Lawley v. Waldon*,⁴ in which Lord Eldon allowed a demurrer for want of parties to a bill by the owner of an estate, to restrain an action of ejectment against his tenant without making him a party, observing, however, that if the plaintiff in Equity had been made a defendant at Law, as he might have been, he should not have thought it necessary to make the tenant a party to the bill, notwithstanding his being a co-defendant; but that, as he was the only defendant at Law, he must be a party to the bill.⁵

⁷ *Anon.*, 3 Swan. 139; *Brasher v. Macey*, 3 J. J. Marsh. 93; see *Braker v. Devereaux*, 8 Paige, 513. Every person interested in land belonging to co-tenants should be made party to a bill for partition. *Borah v. Archers*, 7 Dana, 176.

⁸ *Cornish v. Gest*, 2 Cox, 27.

⁹ *Ackroyd v. Briggs*, 14 W. R. 25, V. C. S.

¹ *Baring v. Nash*, 1 Ves. & B. 555; *Heaton v. Dearden*, 16 Beav. 147.

² *Wills v. Slade*, 6 Ves. 498; see also *Brassey v. Chalmers*, 4 De G., M. & G. 528. It does not constitute any objection in Equity, that the partition may not finally conclude the interests of all persons, as, where the partition is asked only by or against a tenant for life, or where there are contingent interests to vest in persons not *in esse*. For the Court will still proceed to make partition between the parties before the Court, who possess com-

petent present interests, such as a tenant for life or for years. The partition in such cases, however, is binding only upon those parties who are before the Court, and those whom they virtually represent. 1 Story Eq. Jur. 656; *Gaskell v. Gaskell*, 6 Sim. 643; *Wotton v. Copeland*, 7 John. Ch. 140; *Striker v. Mott*, 2 Paige, 387, 389; *Woodworth v. Campbell*, 5 Paige, 518.

³ *Rayley v. Best*, 1 R. & M. 659; see also *Miller v. Warrington*, 1 J. & W. 484; *Speer v. Crawter*, 2 Mer. 410; *Attorney-General v. Stephens*, 1 K. & J. 724; 1 Jur. N. S. 1039; 6 De G., M. & G. 111; 2 Jur. N. S. 51; *Story Eq. Pl.* § 165. All the tenants in common should be parties to a suit for adjusting land titles. *Pope v. Melone*, 2 A. K. Marsh. 239.

⁴ 3 Swan. 142; *Poole v. Marsh*, 8 Sim. 528.

⁵ See *Story Eq. Pl.* § 151.

But, although it is not usual, in suits relating to property, to make the occupying lessees of such property parties to the proceedings, yet if such lessees, or other persons having only limited interests in the property, seek to establish any right respecting such property, it is necessary that they should bring the owners of the inheritance before the Court, in order that in case the suit is unsuccessful, the decree of the Court dismissing the bill may be binding upon them. Thus, to a bill by the lessees of property in a parish to establish a modus, the owner of

the inheritance must be a party; and for the same reason, if *210 there is a question concerning * a right of common, though a leaseholder may enforce it at Law, yet if he bring a bill in Equity to establish such right, he must bring the persons in whom the fee of his estate is vested before the Court;¹ and so, in a suit in Equity to establish a right to fees in an office, although in an action at Law for such fees it is not necessary to make any person a party but the one who has actually received such fees, yet in Equity it is necessary to have all persons before the Court who have any pretence to a right.²

Upon the same principle, where a bill filed by a lessee against a lord of a manor, and the tenant of a particular house, to have the house, which obstructed the plaintiff's way, pulled down, and to be quieted in the possession of the way for the future, the defendant's counsel objected for want of parties, because the plaintiff's lessor was not before the Court, and the objection was allowed.³

These cases all proceed upon the principle before laid down, namely, that of preventing a defendant from being harassed by a multiplicity of suits for the same thing; in consequence of which principle it is held to be a rule of a Court of Equity, that if you withdraw a question from a Court of Law for the purpose of insisting upon a general right, you must have all the parties before the Court who are necessary to make the determination complete, and to quiet the question.⁴

The application of this rule, however, is strictly confined to cases where the lessee seeks to establish a general right; where he only seeks that which is incidental to his situation as tenant, he need not make his landlord a party. Thus, a lessee of tithes may file a bill for tithes against an occupier, without making his lessor a party, because the claim to tithes abstracted, is merely possessory; and, upon the same principle, where an occupier who was sued for tithes by the lessee of an impropriate rector, filed a cross-bill against such rector for a discovery of documents, &c., a demurrer to such bill by the rector was allowed.⁵

In order to entitle a lessee to sue for tithes without his lessor, he must claim under a *demise* by *deed*, because tithes, being things which

¹ *Poore v. Clark*, 2 Atk. 515; *Story Eq. Pl.* § 121.

² *Pawlet v. Bishop of Lincoln*, 2 Atk. 296.

³ *Poore v. Clark*, 2 Atk. 515.

⁴ *Poore v. Clark*, 2 Atk. 515; see *Crews v. Burcham*, 1 Black, U. S. 312.

⁵ *Tooth v. The Dean & Chapter of Canterbury*, 3 Sim. 61.

lie in grant, cannot be demised by *parol*, and a decree in favor of a plaintiff claiming under a verbal demise, would therefore be no bar to another suit for the same tithes by the lessor. Upon this ground, in *Henning v. Willis*,⁶ the Court of Exchequer allowed a demurrer to the plaintiff's bill because the impropiator, who was the lessor, was not a party, and the plaintiff having submitted to the demurrer, obtained leave to amend his bill by making the impropiator *a *211 party.¹ A similar demurrer was put in to a bill for tithes by a lessee under a *parol* demise, in *Jackson v. Benson*,² and allowed; leave being also given to amend, by making the impropiator a party; and in *Williams v. Jones*,³ the principle to be deduced from the foregoing cases was recognized by Lord Lyndhurst C. B. In that case the vicar, who was the lessor, had been originally made a party to the suit, but as he had by his answer disclaimed all interest in the tithes in question, the plaintiff had dismissed the bill as against him, and brought the suit to a hearing against the occupier only; and Lord Lyndhurst held, that as the vicar had been originally a party, the circumstance of the bill having been dismissed as against him, made no difference, for although his disclaimer could not be read against the other defendants, no inconvenience could arise, because the lessor, after such disclaimer, would never be allowed to set up any claim against the occupier for the same tithes.

The rule, that persons claiming joint interests in an estate cannot sue without making their companions parties, applies equally whether the subject-matter of the suit be real or personal property; thus, where a legacy is given to two jointly, one cannot sue for it alone; though where there are several legacies, each may sue for his own.⁴ And so, where there are several persons interested as joint-tenants, in money secured by mortgage, they must all be made parties to a bill to foreclose such mortgage.⁵ This was decided to be the law of the Court by Lord Thurlow, in the case of *Lowe v. Morgan*,⁶ where a mortgagee had assigned the money secured by the mortgage to three persons as joint-tenants. In that case his Lordship appears to have laid a stress upon the circumstance of the parties interested in the money being joint-tenants; from which it has been inferred that a tenant in severalty or in common might foreclose as to his share, without making the other persons interested in the money parties; and a decree to this effect was actually made by Lord Alvanley M. R. in a case where trustees of

⁶ 3 Wood, 29; 3 Gwil. 898.

¹ The bill was amended, by making the lessor a defendant, and praying that the occupier might be decreed to account with the lessor, and that what should be found due in the account might be paid into Court for the benefit of the plaintiff. See Lord Lyndhurst's judgment in *Williams v. Jones*, *Young*, 255.

² M'Lel. 62; 13 Pri. 131.

³ 1 *Young*, 252.

⁴ *Haycock v. Haycock*, 2 Ch. Ca. 124. So where a legacy is given to A. and B. in equal moieties, a bill will lie by A. for his moiety,

without making B. a party to the suit. *Hughson v. Cookson*, 5 Y. & C. 578.

⁵ *Stucker v. Stucker*, 3 J. J. Marsh. 301; *Wing v. Davis*, 7 Greenl. 31; *Palmer v. Earl of Carlisle*, 1 S. & S. 423; *Noyes v. Sawyer*, 3 Vt. 160; *Woodward v. Wood*, 19 Ala. 213. [But where one joint tenant has mortgaged his interests, the other tenants are not necessary parties to a bill to foreclose. *Stephen v. Beall*, 22 Wall. 329.]

⁶ 1 Bro. C. C. 368; and see *Stansfield v. Hobson*, 16 Beav. 190.

money belonging to several individuals had laid it out on a mortgage, and afterwards one of the persons entitled to part of the mortgage money filed a bill against the mortgagor and the trustees for his *212 share of the mortgage money, or a foreclosure; which was * entertained, although the parties interested in the rest of the money were not before the Court.¹

In a case before Sir John Leach V. C., however, it was determined that there can be no redemption or foreclosure unless all the parties interested in the mortgage money are before the Court; and on this ground, a bill by a person entitled in severalty to one-sixth of the mortgage money, to foreclose one-sixth of the estate, was dismissed with costs.² The rule as laid down by Sir John Leach, in the case above cited, is now modified by the provision of the late Act enabling trustees, in suits relating to real or personal estate vested in them, to represent the persons beneficially entitled,³ unless the Court requires such persons to be parties; and the Court has, accordingly, in a redemption suit, dispensed with some of the beneficiaries, though it appears that it will not dispense with all.⁴ In a foreclosure suit, however, the trustees of the debt, under an assignment for the benefit of creditors, were held sufficiently to represent all the creditors,⁵

As a person entitled to a part only of the mortgage money cannot foreclose the mortgage without bringing the other parties interested in the mortgage money before the Court, so neither can a mortgagor redeem the mortgaged estate without making all those who have an equal right to redeem with himself parties to the suit.⁶

For this reason it was held, in *Lord Cholmondeley v. Lord Clinton*,⁷ that where two estates are mortgaged to the same person for securing the

¹ *Montgomerie v. The Marquis of Bath*, 3 Ves. 560. In Mr. Belt's note (1) to *Lowe v. Morgan*, 1 Bro. C. C. (Perkins's ed.) 368, he submits, that the decision in *Montgomerie v. M. of B.*, *ubi supra*, is evidently wrong. See also Story Eq. Pl. § 201.

² The assignee of a note secured by mortgage has an equitable interest in the mortgage, which a Court of Equity will uphold and protect; and, therefore, when a bill is brought to foreclose or redeem the mortgage the assignee should be made a party to the suit. *Stone v. Locke*, 46 Maine, 445. [A plaintiff in an attachment suit claiming a lien on a mortgage debt thereby is a necessary party defendant to a bill to foreclose the mortgage. *Pine v. Shannon*, 3 Stew. Eq. 501.]

³ 15 & 16 Vic. c. 86, § 42, r. 9.

⁴ *Stansfield v. Hobson*, 16 Beav. 189.

⁵ *Morley v. Morley*, 25 Beav. 253; see *Thomas v. Dunning*, 5 De G. & S. 618; *Knight v. Powell*, 24 Beav. 436; 4 Jur. N. S. 197. [See 257, n. 4.]

⁶ *Chapman v. Hunt*, 1 McCarter (N. J.), 149; Story Eq. Pl. § 201; Mitford's Pl. 39, 164; *Large v. Van Doren*, 1 McCarter (N. J.), 208; [*Bigelow v. Cassidy*, 11 C. E. Green,

557. All the owners of the equity of redemption are necessary parties to a bill to redeem. *Southard v. Sutler*, 68 Me. 575.]

A mortgagor, filing his bill to redeem, may bring before the Court all parties who might call for redemption; or he may bring his bill against the last mortgagee, if he choose to incur the risk of a foreclosure by a prior mortgagee during its pendency. *Stone v. Bartlett*, 46 Maine, 438, 443. In *Platt v. Squire*, 12 Met. 494, it was held that one of two joint assignees of a second mortgage could maintain a bill, in his individual name, to redeem the prior mortgage, without joining his co-assignee. Dewey J. said: "The plaintiff has a legal interest, as assignee of that mortgage, although not the entire interest. His redemption will enure to the benefit of his co-tenant. He can only redeem by payment of all claims of the defendant under the prior mortgage to the same extent as would have been paid if the co-assignee were a party to the bill; and therefore the defendant can sustain no injury." See *S. C. Platt v. Squire*, 5 Cush. 553. [And see, as to the requisites of a bill to enforce the right to redeem, *Malony v. Rourke*, 100 Mass. 190.]

⁷ 2 Jac. & W. 3, 134.

same sum of money, and afterwards the equity of redemption of one estate becomes vested in a different party from *the other, *214 the owner of one cannot redeem this part separately. The mortgagee is entitled to insist that the whole of the mortgaged estate shall be redeemed together; and, for this purpose, that all the persons interested in the several estates or mortgages should be made parties to a bill seeking an account and redemption.¹ The same rule prevailed in *Palk v. Lord Clinton*,² which differed from that of *Lord Cholmondeley v. Lord Clinton*, above cited, in the circumstance, only, of its being a bill by a second mortgagee of part of an estate to redeem a first mortgage, which embraced the whole property.

In the above cases, the mortgage of the two estates was for the same sum of money, and was part of the same transaction. The rule, however, has been extended to cases where a mortgage has been of two distinct estates to the same mortgagee for securing different sums of money; and it has been decided in many cases, that a mortgagee of two separate estates, upon distinct transactions from the same mortgagor, is entitled to hold both mortgages till the amount due upon both be discharged; and that even against the purchaser of the equity of redemption of one of the mortgaged estates without notice; so that the mortgages, although for distinct sums, are in effect for one sum. Upon this principle, where the purchaser of the equity of redemption of a mortgaged estate filed his bill against the mortgagee, to redeem, and the defendant, by his answer, stated a subsequent mortgage made to him, by the same mortgagor, of a distinct estate for a distinct debt, it was held that the persons interested in the equity of redemption of the second mortgage were necessary parties to the suit.³ And this rule prevails although one mortgage be a pledge of personalty and the other a mortgage of realty.⁴ It does not, however, hold longer than while both mortgages continue united in the same mortgagee; so that if a mortgagee, having two distinct mortgages on two separate estates, assigns one of the mortgages to a third person, the assignee of the assigned mortgages need not be brought before the Court in a suit to redeem the other.⁵

The rule which requires that in a bill filed for the purpose of redeeming a mortgage, the plaintiff should bring before the Court all those who, as well as himself, have a right to redeem, has been held to apply to a second incumbrancer filing a bill to redeem a prior incumbrance, who must, in such case, bring the mortgagor, *as well as *214

¹ *Bailey v. Myrick*, 36 Maine, 50. [And see, where two lots have been sold under a Chancery sale to the same person, who has paid the purchase-money of one lot and demands title, *McGoldrick v. McGoldrick*, 2 Tenn. Ch. 541.]

² 12 Ves. 48.

³ *Ireson v. Denn*, 2 Cox, 425.

⁴ *Jones v. Smith*, 2 Ves. J. 372, reversed

by House of Lords, see 6 Ves. 229, n.; see also *Watts v. Symes*, 1 De G., M. & G. 240; *Tassell v. Smith*, 2 De G. & S. 713; *Vint v. Padgett*, 2 De G. & J. 611; *Selby v. Pomfret*, 1 J. & H. 336; 3 De G., F. & J. 505; *ib.* 835, L. C. [*Beevor v. Luck*, L. R. 4 Eq. 537.]

⁵ *Willie v. Lugg*, 2 Eden, 78.

the prior incumbrancer before the Court.¹ This is a rule of long standing, and was followed by Lord Thurlow, when his adherence to it was very inconvenient in consequence of the heir-at-law of the mortgagor being abroad. His Lordship then said, that it seemed to him "impossible that a second mortgagee should come into Court against the first mortgagee without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or be foreclosed."² The same rule was confirmed by Lord Eldon, in *Palk v. Lord Clinton*,³ and has ever since been acted upon as the rule of the Court.⁴

But although a second mortgagee seeking to *redeem* a first mortgagee, must make the mortgagor or his heir a party, yet he may, if he please, *foreclose* the mortgagor and a third mortgagee, without bringing the first mortgagee before the Court, because by so doing he merely puts himself in the place of the mortgagor and subsequent mortgagee, and leaves the first mortgagee in the situation in which he stood before.⁵ And if, in such a case, he makes the prior mortgagee a party, he must offer to redeem him.⁶ For the same reason it has been held that a third mortgagee buying in the first, need not make the second mortgagee a party to a bill to foreclose the mortgagor.⁷ Upon the same ground it is

¹ *Thompson v. Baskerville*, 3 Ch. Rep. 215; *Farmer v. Curtis*, 2 Sim. 466; and see *Hunter v. Macklew*, 5 Hare, 238.

² *Fell v. Brown*, 2 Bro. C. C. 276.

³ 12 Ves. 48.

⁴ Story Eq. Pl. §§ 84, 186, 195; see *Hallock v. Smith*, 4 John. Ch. 649; 4 Kent, 186. In a suit for the foreclosure of a mortgage of real estate, claimed as a homestead, the wife being a necessary party to a full adjustment of the controversy, should be allowed to intervene. *Sargent v. Wilson*, 5 Cal. 504. So the wife should be made a party to a bill to foreclose a mortgage executed by her and her husband. *Johns v. Reardon*, 3 Md. Ch. 57. In a bill to redeem by a widow, who is entitled to dower in her husband's lands, subject to a mortgage executed in his lifetime, in which she joined to release dower, she may join as a co-defendant to the mortgagee, one who, after the execution of the mortgage, purchased her husband's interest in the land. *McCabe v. Bellowes*, 1 Allen, 269.

⁵ *Richards v. Cooper*, 5 Beav. 304; Lord Hollis's case, cited 3 Ch. Rep. 86; *Rose v. Page*, 2 Sim. 471; *Brisco v. Kenrick*, 1 C. P. Coop. t. Cott. 371; and see *Arnold v. Bainbrigge*, 2 De G., F. & J. 92; *Audsley v. Horn*, 26 Beav. 195; 1 De G., F. & J. 226; see *Person v. Merrick*, 5 Wis. 231; *Wright v. Bundy*, 11 Ind. 398.

⁶ *Gordon v. Horsfall*, 5 Moore, 393; 11 Jur. 569.

⁷ [The rule seems to be that, although prior and subsequent incumbrancers are proper, they are not indispensable parties. *Ante*, 194, note 6. A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making the first mortgagee a party: *Rose v. Page*, 2 Sim.

471; or against the mortgagor alone: *White v. Holman*, 32 Ark. 753. So, a bill may be filed to obtain payment of an annuity charged on land, without making the prior annuitants parties. *Delabere v. Norwood*, 3 Swanst. 144, note. So, to a bill of foreclosure, prior judgment creditors are not indispensable parties. *Rundell v. Marquis of Donegal*, 1 Hogan, 308; *Post v. Mackall*, 3 Bland, 495; *Wakeman v. Grover*, 4 Paige, 23. Nor, if made parties, are their rights affected where their lien is not assailed in the bill. *Farmers' Natl. Bk. v. Lloyd*, 3 Stew. Eq. 442; *Frost v. Koon*, 30 N. Y. 428. So, of prior incumbrancers upon realty which the bill seeks to subject to the debts of the deceased owner. *Parker v. Fuller*, 1 R. & M. 656. So, of subsequent incumbrancers. *Needler v. Deeble*, 1 Ch. Cas. 199; *Rosecarrick v. Barton*, 1 Ch. Cas. 217; *Greshold v. Marsham*, 2 Ch. Cas. 171; *Cockes v. Sherman*, 2 Freem. 13; *S. C.* 3 Ch. Rep. 83; *Lomax v. Hide*, 2 Vern. 185; *Draper v. Jennings*, 2 Vern. 518; *Godfrey v. Chadwell*, 2 Vern. 601; *Morret v. Westerne*, 2 Vern. 663; *Carroll v. Kershner*, 47 Md. 262; *Leonard v. Groome*, 47 Md. 499. In view of some of these decisions, which he cites, and after commenting on the language of *Marshall C. J.* in *Finley v. Bank of United States*, 11 Wheat. 306, Mr. Justice Curtis says: "We consider the true rule to be, that where it is the object of the bill to procure a sale of the land, and the prior incumbrancer holds the legal title, and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense, and for this purpose, he may be correctly said to be a necessary party, that is, necessary to such a decree. But it is in the power of the Court

unnecessary, in a bill by creditors or incumbrancers for the sale of an estate, to make annuitants, or other prior incumbrancers, parties; and so, in a suit for the execution of a trust by those claiming the ultimate benefit of the trust after the satisfaction of prior charges, it is held not to be necessary to bring before the Court the persons claiming the benefit of such prior charges; and, therefore, to a bill for the application of a surplus after payment of debts or legacies, or other prior incumbrances, the creditors, legatees, or incumbrancers need not be parties.⁸

*Under the provisions of the late Act above referred to with *215 regard to trustees representing their *cestui que trusts*,¹ it has been held, that when the mortgaged estate was vested in trustees, who also, as executors of a will or otherwise, were the persons who would be in possession of the funds for payment of the mortgage debt, they might properly represent the beneficiaries,² but that when this was not the case, the *cestui que trusts*, or some of them, must be before the Court.³

When the mortgagor has become bankrupt, he is not a necessary party to a suit for foreclosure, even if the assignees disclaim;⁴ though the last proposition appears to have been doubted by Sir James Wigram V. C.⁵

The same principle which calls for the presence of all persons having an interest in the equity of redemption in the case of bills to redeem a mortgage, requires that where a mortgagee seeks to foreclose the

to order a sale subject to the prior encumbrances." Hagan v. Walker, 14 How. 37. And see Young v. Montgomery & Eufaula R. Co., 2 Woods, 606; Western Ins. Co. v. Eagle Fire Ins. Co., 1 Paige, 284. The same rules apply to a bill by a judgment creditor to reach the interest of the debtor in the mortgaged property. Hudnit v. Nash, 1 C. E. Green, 550; Cloud v. Hamilton, 3 Yer. 81; Stark v. Cheatham, 3 Tenn. Ch. 300. On the strength of the early English cases above cited, it has been held in Tennessee that neither the creditors of the mortgagor, nor purchasers from him, nor prior mortgagees, nor subsequent mortgagees, are absolutely necessary parties to a bill of foreclosure by sale of the mortgaged premises, or the enforcement of a vendor's lien. Mims v. Mims, 1 Hum. 425; Rowan v. Mercer, 10 Humph. 363; Fletcher v. Coleman, 2 Head, 388; Wilkes v. Smith, 4 Heisk. 86. But a prior mortgagee is a proper party where there is substantial doubt as to the amount of the prior mortgage debt, or to have an account of rents if he has been in possession. Jerome v. McCarter, 94 U. S. 736; Trulock v. Robey, 15 Sim. 265; Hays v. Cornelius, 3 Tenn. Ch. 461.]

⁸ Ld. Red. 175. [Upon a bill to foreclose, the mortgagor is ordinarily a necessary party: Kunkel v. Markell, 26 Md. 407; Hallock v. Smith, 4 John. Ch. 449; Farmer v. Curtis, 2 Sim. 466; Worthington v. Lee, 2 Bland, 678; and his heir, or devisee, if he be dead: McGown v. Yorks, 6 John. Ch. 460. So is the purchaser of the mortgaged lands, if in possession. Noyes v. Hall, 97 U.

S. 68. But the mortgagor is not a necessary party, if he has sold and conveyed the mortgaged premises to a third person: Parker v. Small, 58 Ind. 349; Williams v. Smith, 49 Me. 564; nor if his equity of redemption has been sold *in invitum*; though, if made a party in such case, he may set up the defence of usury: Andrews v. Stelle, 7 C. E. Green, 478. And a decree of foreclosure against a mortgagor will not affect his grantee who is not made a party; but equity will not enforce the right to redeem in favor of the grantee against a superior equity, or where its enforcement would be inequitable. Mulvey v. Gibbons, 87 Ill. 367. After the mortgagor has sold the premises, he cannot maintain a bill to redeem. Phillips v. Leavitt, 54 Me. 405. And see, where the mortgagee has sold, *infra*, 260, n. 5, 277.]

¹ 15 & 16 Vic. c. 86, § 42.

² Hanman v. Riley, 9 Hare App. 40; Sale v. Kitson, 3 De G., M. & G. 119; 17 Jur. 170; 10 Hare App. 50; Wilkins v. Reeves, 3 W. R. 305; L. R. 3 Eq. 494, V. C. W.; Marriott v. Kirkham, 3 Giff. 536; 8 Jur. N. S. 379.

³ Goldsmith v. Stonehewer, 9 Hare App. 38; 17 Jur. 199; Young v. Ward, 10 Hare App. 58; Cropper v. Mellersh, 1 Jur. N. S. 299, V. C. S.; and see Siffken v. Davis, Kay App. 21; Wilkins v. Reeves, *supra*; Tuder v. Morris, 1 Sm. & G. 503; Watters v. Jones, 6 Jur. N. S. 530, V. C. S.

⁴ Collins v. Shirley, 1 R. & M. 638; Kerrick v. Saffery, 7 Sim. 317; see also Cash v. Belcher, 1 Hare, 310; 6 Jur. 190; Ford v. White, 16 Beav. 120.

⁵ Singleton v. Cox, 4 Hare, 326.

mortgagor, he should bring before the Court all persons claiming an interest in the mortgage; ⁶ therefore, a derivative mortgagee must make the original mortgagee, or, if dead, his representative, a party to a bill against the mortgagor for foreclosure.⁷

If, however, a mortgagee has assigned or conveyed away from himself, not only the money due on the mortgage, but also the mortgaged premises, the assignee may, as we have seen, foreclose without making the original mortgagee a party,⁸ and upon the same principle, it *216 may also be inferred, from the case of *Renvoize v. Cooper*,¹ that where a mortgagee has devised his interest in the mortgage in such a manner as to pass not only the mortgage money but the estate mortgaged, the devisee alone may foreclose without making the heir-at-law of the original mortgagee a party,² unless he claims to have the will established;³ in which case he must be made a defendant, because it has been held that a devisee and heir cannot join in the same suit, even upon an allegation that they have agreed to divide the matter in question between them.⁴

The rule which requires that all parties interested in the object of a suit should be parties to the bill, applies to all cases in which an account is sought against a defendant. One person cannot exhibit a bill against an accounting party without bringing before the Court all persons who are interested in having the account taken, or in the result of it, otherwise the defendant might be harassed by as many suits as there are parties interested in the account.⁵ Thus, in a suit for a partnership account, or for a share of a partnership adventure, it is in general necessary that all persons having shares in the same adventure should be parties,⁶ and a residuary legatee seeking an account and share of the residue, must bring before the Court all the parties interested

⁶ See *Story Eq. Pl.* § 199; 4 *Kent*, 186; *Western Reserve Bank v. Potter*, 1 *Clarke*, 432. [Where a tenant in common of an equity of redemption has not been made a party to foreclosure proceedings, his subsequent written consent to be made and treated as a party, and to execute a release of his interest to the purchaser under the foreclosure, is not equivalent to being actually a party. *Walbridge v. English*, 1 *Stew. Eq.* 266. So, of the assignee of an interest in mortgaged premises. *Kelly v. Israel*, 11 *Paige*, 147.]

⁷ *Hobart v. Alobot*, 2 *P. Wms.* 643.

⁸ *Miller v. Henderson*, 2 *Stockt. (N. J.)* 320, 194. A mortgagee of land who has assigned his interest in the mortgage since the breach of the condition may be included as a defendant in a bill to redeem. *Doody v. Pierce*, 9 *Allen*, 141. [In a bill to foreclose a mortgage on a railroad by the trustee, and holders of the bonds, who only hold them as collateral security for less than the amount of the bonds, the assignor is a necessary party. *Ackerson v. Lodi Branch R. Co.*, 1 *Stew. Eq.* 542.]

¹ 6 *Mad.* 371.

² *Graham v. Carter*, 2 *Hen. & M.* 6.

³ *Lewis v. Nangle*, 2 *Ves.* 631.

⁴ *Cholmondeley v. Clinton*, 1 *T. & R.* 104, 116.

⁵ *McCabe v. Bellowes*, 1 *Allen*, 269, 270; *New England, &c., Bank v. Newport Steam Factory*, 6 *R. I.* 154. [See *Buie v. Mechanics' Building Association*, 74 *N. C.* 117; *Fisher v. Hubbell*, 65 *Barb.* 74.]

⁶ *Ireton v. Lewis*, *Rep. t. Finch*, 96; *Moffatt v. Farquharson*, 2 *Bro. C. C.* 338, and *Mr. Belt's note* (1); but it is to be observed, that notwithstanding the decision in this case, they may be made *quasi* parties by the plaintiff suing on behalf of himself and on their behalf. *Good v. Blewit*, 13 *Ves.* 397; and see *Hills v. Nash*, 1 *Phil.* 594; 10 *Jur.* 148; *Cullen v. Duke of Queensberry*, 1 *Bro. C. C.* 101, and *Mr. Belt's note*; *Dozier v. Edwards*, 3 *Litt.* 72; *Story Eq. Pl.* § 166; *Story Partn.* § 449; *Collyer Partn. (Perkins's ed.)* § 361; *Wells v. Strange*, 5 *Geo.* 22; *Mudgett v. Gager*, 52 *Maine*, 541. [See *Parsons v. Howard*, 2 *Woods*, 1.] When a bill in Equity, brought by one of four partners, against one only of the other three, for an account, &c., alleges that the other two are not within the jurisdiction of the Court; that all the others have received their full share of the

in that residue :⁷ either active parties, by making them plaintiffs or *defendants to the bill ; or passive parties, by serving them *217 with notice of the decree.¹ And so, where a moiety of a residue was given to one of the defendants for life, and, upon his decease, to such persons as she should appoint, and, in default of appointment, to certain other persons for life, it was held that the other persons, although their interests depended upon such a remote contingency, ought to be before the Court.²

Upon the same principle it is, that in suits by next of kin against a personal representative for an account, the Court requires that all the next of kin should be parties to the suit,³ in the same manner as in the case of residuary legatees ; either as plaintiffs or defendants to a bill, or by being served with notice of the decree.⁴ It is to be observed, that in all⁵ cases where the parties claim under a general description,

partnership effects ; and that the defendant has received much more than his share, and the plaintiff much less ; a demurrer to the bill, for non-joinder of the other partners as defendants, will not be sustained. *Towle v. Pierce*, 12 Met. 329 ; see *Story Eq. Pl. § 78* ; *Vose v. Philbrook*, 3 Story, 335 ; *Lawrence v. Rokes*, 53 Maine, 110, 116 ; *Mallow v. Hinde*, 12 Wheat. 193 ; *Fuller v. Benjamin*, 23 Maine, 255 ; *Mudgett v. Gager*, 52 Maine, 541.

Representatives of a deceased partner should be made parties to a bill to dissolve a partnership, and the bill may be amended for that purpose. *Buchard v. Boyce*, 21 Geo. 6. [So, the administrator and heirs of a deceased partner are necessary parties to a bill filed by a surviving partner to administer lands bought with partnership funds. *Whitney v. Cotton*, 53 Miss. 689. But the surviving partner may sell and convey firm realty, and the title to the purchaser will be good, whether the sale be required to pay debts or not. *Solomon v. Fitzgerald*, 7 Heisk. 552. And a surviving partner may sue a firm debtor for an account without making the representatives of the deceased partner parties. *Haig v. Gray*, 1 De G. & S. 741.] To a claim seeking payment of a partnership debt out of the assets of a deceased partner, the surviving partner is a necessary party. *Hills v. McRea*, 5 Eng. Law & Eq. 233. So the heirs of a deceased partner must be parties when a sale of real estate is sought for the payment of firm debts. *Pugh v. Currie*, 5 Ala. 446 ; *Lang v. Waring*, 25 Ala. 625 ; *Andrews v. Brown*, 21 Ala. 437.

⁷ *Parsons v. Neville*, 3 Bro. C. C. 365. In *Cockburn v. Thompson*, 16 Ves. 328, Lord Eldon said, this admits of exception, where it is not necessary, or inconvenient. *Story Eq. Pl. § 89*, and notes, § 203, 204 ; *Pritchard v. Hicks*, 1 Paige, 253 ; *Sheppard v. Starke*, 3 Munf. 29 ; *Brown v. Ricketts*, 3 John. Ch. 533 ; *Davoue v. Fanning*, 4 John. Ch. 199 ; *West v. Randall*, 2 Mason, 181, 190-199 ; *Huson v. McKenzie*, Dev. Eq. 463 ; *Arendell v. Blackwell*, *ib.* 354 ; *Bethel v. Wilson*, 1 Dev. & Bat. Eq. 610. In *Brown v. Ricketts*, 3 John. Ch. 553, Mr. Chancellor Kent seems to have thought, that all the residuary legatees

should be technically parties by name. So in *Davoue v. Fanning*, 4 John. Ch. 199. It has, however, been intimated and maintained in other cases that a residuary legatee might sue in behalf of himself and all others, without making them technically parties. See *Kettle v. Crary*, 1 Paige, 417, 419, 420, and note ; *Ross v. Crary*, 1 Paige, 416 ; *Hallett v. Hallett*, 2 Paige, 19, 20 ; *Egbert v. Woods*, 3 Paige, 517. Rule 1, adopted in 15 & 16 Vic. c. 86, provides that "any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person."

¹ 15 & 16 Vic. c. 86, § 42, rr. 1, 8.

² *Sherrit v. Birch*, 3 Bro. C. C. 229 (*Perkins's* ed. note) ; *Davies v. Davies*, 11 Eng. Law & Eq. 199 ; *Lenaghan v. Smith*, 2 Phil. 301 ; 11 Jur. 503 ; but not when the share has been ascertained and invested. *Smith v. Snow*, 3 Mad. 10 ; *Hares v. Stringer*, 15 Beav. 206 ; see also *Grace v. Terrington*, 1 Coll. 3. A contingent interest depending on the event of a suit is not such an interest as to make the person having it a necessary party. *Barbour v. Whitlock*, 4 Monroe, 180 ; see *Reid v. Vanderheyden*, 5 Cowen, 719.

³ See *Hawkins v. Hawkins*, 1 Hare, 543, 546 ; 6 Jur. 638, explaining *Caldecott v. Caldecott*, C. & P. 183 ; 5 Jur. 212 ; and see *Shuttleworth v. Howarth*, C. & P. 230 ; 5 Jur. 499 ; *Noland v. Turner*, 5 J. J. Marsh, 179 ; *West v. Randall*, 2 Mason, 181 ; *Kellar v. Beclor*, 5 Monroe, 573 ; *Oldham v. Collins*, 4 J. J. Marsh, 50 ; *Story Eq. Pl. § 89*, and cases cited ; see also Rule 1 in preceding note 1.

⁴ 15 & 16 Vic. c. 86, § 42, rr. 1, 8.

⁵ Where one of the next of kin of an intestate, who died in India, procured letters of administration to his effects here, it was held that he might sue the person who had taken out an Indian administration, and had afterwards come to this country, without making the rest of the next of kin parties. *Sandilands v. Innes*, 3 Sim. 264 ; but see *Story Eq. Pl. § 179* ; *Story Conf. Laws*, §§ 513, 514.

or of being some of a class of persons entitled, the Court would not formerly make a decree without being first satisfied that all the individuals of the class, or who came under the general description, were before it. For this purpose the Court, in cases of this description, before directing an account, or other relief prayed by the bill, referred it to one of the Masters to inquire who the individuals of the class, or answering the general description, were; and then, if it turned out that any of them were not before the Court, the plaintiff must file a supple-

mental bill, for the purpose of bringing them in before the cause
 *218 *was finally heard.¹ And according to Sir James Wigram V. C., in an administration suit, in which inquiries are necessary to ascertain who are the parties beneficially interested in the estate, it is irregular to direct the accounts to be taken until after the inquiries have been made, and the Master has made his report. But where the parties interested are the children of a party to the suit, or are persons of a class in such circumstances, that the Court may be reasonably satisfied, at the hearing, that all parties beneficially interested are parties to the record, the Court may, at the time of directing the inquiries, also order that, if the Master shall find that all the persons beneficially interested are parties to the suit, he do then proceed to take the account; this is, however, an irregularity; and the Court will not make the order in that form, unless it be reasonably clear that all the persons interested are parties.² Under the present practice of the Court, however, it being no longer necessary to make all the residuary legatees or next of kin parties for the purpose of the decree, although it is usual still to direct such an inquiry as above mentioned, yet it should not in terms be made preliminary to taking the accounts, in order that the Judge's discretion to proceed in the absence of the parties may not be fettered.³

In like manner as in the case of residuary legatees and next of kin, one legatee interested in a legacy charged upon real estate, one of the persons interested in the proceeds of real estate directed to be sold, or one residuary devisee or heir, may have an administration decree, without making the others of the class parties in the first instance; though they must be served with notice of the decree.⁴

The rule that all persons interested in an account should be made parties to a suit against the accounting party, will not apply where it

¹ But see *Waite v. Templer*, 1 S. & S. 319; Story Eq. Pl. § 90, and notes. But one of several of the next of kin of an intestate, entitled to distribution, may sue for his distributive share without making the other distributees parties, if the latter are unknown, or cannot be found, and that fact is charged in the bill. *Id.* In such case the bill may properly be filed on behalf of the plaintiff, and also of all the other persons who may be entitled as distributees. *Id.* Rule 5 adopted in 15 & 16 Vic. 86, provides that "In all cases of suits for the protection of property pending litigation,

and in all cases in the nature of trusts, any person may sue on behalf of himself and of all persons having the same interest."

² *Baker v. Harwood*, 1 Hare, 327; see also *Hawkins v. Hawkins*, 1 Hare, 543; 6 Jur. 638; *Say v. Creed*, 3 Hare, 455; 8 Jur. 893; *Phillipson v. Gatty*, 6 Hare, 26; 12 Jur. 430.

³ *Seton*, 188; Ord. XXXV. 18; and as to evidence necessary to support such an inquiry, see *Miller v. Priddon*, 1 M.N. & G. 687.

⁴ 15 & 16 Vic. c. 86, § 42, rr. 2, 3, 8.

appears that some of the parties interested in such account have been accounted with and paid; thus, in the case of a bill by an infant *cestui que trust* coming of age, for his share of a fund, it is the constant practice to decree an account without requiring the other *cestui que trusts* who have come of age before, * and have received their *219 shares, to be before the Court.¹ And in the case of a partnership, where a bill was filed against factors by the persons interested in one moiety of a cargo of tobacco, for a discovery and account as to that moiety, without making the person interested in the other moiety a party, and it appeared that the defendants had distinguished in their accounts between him and the plaintiffs, and had divided the funds, and kept separate accounts, the Court held that the owner of the other moiety was not a necessary party to the suit.² And where A., B., C., being partners together, A. agreed with D. to give him a moiety of his share in the concern, it was held that an account might be decreed between A. and D. without making B. and C. parties.³ It is also held, that to a bill by a person entitled to a certain aliquot portion of an ascertained sum in the hands of trustees, the *co-cestui que trusts* are not necessary parties.⁴ In some cases where a party having a joint interest with the plaintiffs in the taking of an account has been abroad, the cause will be allowed to go on without him;⁵ thus, in the Exchequer, where a bill was filed by some of the children of a freeman of London, who was dead, for an account and division of his personal estate, and it appeared that one of the children was beyond sea, the Court was moved that they might hear the cause without him; and that if it appeared that he had any right, he might come before the deputy remembrancer on the account; and though no precedent was produced of such an order, the Court gave liberty to hear the case without him.⁶

The question whether a trustee of an estate can be called upon by a purchaser of a portion of an estate sold to different persons under a trust for sale, without bringing all the other persons interested in the same estate before the Court, was discussed before Lord Eldon, in the case of *Goodson v. Ellison*.⁷ In that case the persons beneficially in-

¹ *D'Wolf v. D'Wolf*, 4 R. I. 450. So where the division of an estate in pursuance of a will, is not to be made at one and the same time, but at the several periods when any one or more of the legatees shall separate from the testator's family, it is not necessary that all the legatees be made parties to each suit in Chancery for a division; but only those entitled to participate in the division *then in question*. *Branch v. Booker*, 3 Munf. 43. So where it appeared, that some of the legatees had obtained decrees, in another suit, for their portions, it was proper to dismiss the bill as to them, they having been made defendants. *Moore v. Beauchamp*, 5 Dana, 71.

² *Weymouth v. Boyer*, 1 Ves. J. 416; see also *Anon.*, 2 Eq. Ca. Ab. 166, pl. 7; *Hills v. Nash*, 1 Phil. 594, 597; 10 Jur. 148.

³ *Brown v. De Tastet*, Jac. 284; see also *Bray v. Fromont*, 6 Mad. 5.

⁴ *Perry v. Knott*, 5 Beav. 293; *Smith v. Snow*, 3 Mad. 10; *Story Eq. Pl. §§ 207, 212*; *Hares v. Stringer*, 15 Beav. 206; *Lenaghan v. Smith*, 2 Phil. 301; 11 Jur. 503; *Hunt v. Peacock*, 6 Hare, 361; 11 Jur. 555.

⁵ *Story Eq. Pl. §§ 78-89*, and cases cited: *Milligan v. Milledge*, 3 Cranch, 220; *West v. Randall*, 2 Mason, 196; *Weymouth v. Boyer*, 1 Sumner's Ves. 416, note (c), and cases cited; *Towle v. Pierce*, 12 Met. 329; *Story Eq. Pl. § 78*; *Vose v. Philbrook*, 3 Story, 335; *ante*, 216, note; *Lawrence v. Rokes*, 53 Maine, 110; *Mudgett v. Gager*, 52 Maine, 541; [*Palmer v. Stevens*, 100 Mass. 461.]

⁶ *Rogers v. Linton*, Bunn. 200.

⁷ 3 Russ. 583, 593, 596.

*220 terested in an estate vested in trustees had, * many years before the commencement of the suit, proceeded to sell the entirety in various lots, one of which was purchased by the plaintiff, and all the persons beneficially interested joined in conveying it to him. The trustee, however, did not join, and upon his death the legal estate became vested in the defendants, upon whose refusal to convey without the sanction of the Court, the bill was filed, and a decree for a conveyance by the defendants was pronounced by Lord Gifford M. R., who directed that they should pay the costs of the suit. Upon appeal, however, to Lord Eldon, his Lordship expressed considerable doubts whether a trustee could be called upon to divest himself of a trust by conveying different parcels of the trust property at different times, and whether it was not therefore necessary to have all the other *cestui que trusts* before the Court; but upon re-argument the Lord Chancellor stated, that he thought there were parties enough before the Court to enable him to make a decree, but as it was the case of an old trust, he thought the Court was bound to inquire into the facts, and that the trustees had a right to have the conveyance settled in the Master's office.

It is a general rule, arising out of the preceding principles, admitting of very few exceptions, that a trustee cannot, under ordinary circumstances, institute proceedings in Equity relating to the trust property, without making the *cestui que trusts* parties to the proceeding.¹ Thus, where a bill is filed by trustees for sale, against a purchaser, for a specific performance of the contract, the *cestui que trusts* of the purchase-money must be parties unless there is a clause in the trust deed declaring the receipt of the trustees to be a sufficient discharge, which is considered as a declaration by the author of the trust, that the receipt of the persons beneficially interested in the produce of the sale

¹ Kirk v. Clark, Prec. Cha. 275; Large v. Van Doren, 1 McCarter (N. J.), 208; Phillipson v. Gatty, 6 Hare, 26; 12 Jur. 430; see, however, Alexander v. Cana, 1 De G. & S. 415. A mere nominal trustee cannot bring a suit, in his own name, without joining his *cestui que trusts* with him. Stilwell v. M'Neely, 1 Green Ch. 205; Schenck v. Ellingwood, 3 Edw. Ch. 175; Helm v. Hardin, 2 B. Monr. 232; Malin v. Malin, 2 John. Ch. 238; Fish v. Howland, 1 Paige, 20; Bifield v. Taylor, 1 Beatty, 93; Story Eq. Pl. §§ 207, 209; Busney v. Spear, 17 Geo. 223; Hall v. Harris, 11 Texas, 300; Woodward v. Wood, 19 Ala. 213; Richards v. Richards, 9 Gray, 313. Where a bill in Equity to enforce the specific performance of a contract involves the title of the *cestui que trusts* to the property in dispute, or where they are interested, not only in the fund or estate respecting which the question at issue has arisen, but also in that question itself, they are necessary parties. Van Doren v. Robinson, 1 C. E. Green (N. J.), 256. [And the *cestuis que trust* should be joined with the trustee in a suit for the recovery of the trust property: Elmer v. Loper, 10 C. E. Green, 475; and

are necessary parties to a bill by their trustee for foreclosure: Allen v. Roll, 10 C. E. Green, 163; but the holders of bonds secured are not; Williamson v. New Jersey Southern R. Co., 10 C. E. Green, 13. Nor is it necessary that all the creditors secured by a trust assignment should be made parties to a suit by the trustee to sell land for the payment of the debts. Robinson v. Robinson, 11 Bush, 174.]

Rule 4, adopted in 15 & 16 Vic. c. 86, provides that "any one of several *cestui que trusts* under any deed or instrument may, without serving any other of such *cestui que trusts*, have a decree for the execution of the trusts of the deed or instrument;" see M'Leod v. Annesley, 16 Beav. 607; Jones v. James, 9 Hare App. 80. The *cestui que trusts* are not necessary parties to a suit in which a mortgage for their benefit is brought in question,—their trustees are the proper parties to represent them. New Jersey, &c., Co. v. Ames, 1 Beasley (N. J.), 507; Ashton v. Atlantic Bank, 3 Allen, 219, 220; Shaw v. Norfolk County R. R. Co., 5 Gray, 170, 171; Wright v. Bundy, 4 Ind. 398.

shall not be necessary ;² and * where a bill was filed by certain *221 persons, describing themselves as trustees for a society consisting of a great number of persons, for the specific performance of an agreement entered into by themselves for the benefit of the society, and a demurrer was put in because the members of the society were not parties to the suit, upon the argument of which, it was insisted that a trustee could not file a bill respecting the trust property, without making the *cestui que trust* a party ; and that, although the members of the society were so numerous that it was not practicable to make all of them parties, the bill ought to have been filed by some of them on behalf of themselves and the others, and that it did not appear by the bill that the plaintiffs were even members of the society, the demurrer was upon these grounds allowed.¹ Upon the same principle, if a mortgagee dies, and his heir files a bill of foreclosure, the executor of the mortgagee must be a party,² because, although at Law the legal right to the estate is in the heir, yet in Equity he is only considered as a trustee for the executor, who is the person entitled to the mortgage money ;³ and for this reason, where the heir of the mortgagee had foreclosed the mortgagor without making the executor of the mortgagee a party, and a bill was filed by the executor against the heir, the land was decreed to the executor.⁴ It seems, however, that although the personal representative is the person entitled to receive the money, the heir has a right to say that he will pay off the mortgage to the executor, and take the benefit of the foreclosure himself ;⁵ and for this reason as well as that before stated, the heir of a mortgagee is a necessary party to a bill of foreclosure by the personal representative,⁶ unless the mortgagee has devised the mortgaged estate, in which case, as we have seen, his heir is not a necessary party to a bill by the devisee to foreclose the equity of redemption.⁷

There are instances in which, under peculiar circumstances, trustees are allowed to maintain a suit, without their *cestui que trusts* as in the case before mentioned, of trustees under a deed, by which estates are vested in them upon trusts to sell and to apply the proceeds amongst creditors or others, with a clause, declaring the receipt of the trustees

² Per Sir J. Leach V. C., *Calverly v. Phelp*, 6 Mad. 232.

¹ *Douglas v. Horsfall*, 2 S. & S. 184.

² See *Graham v. Carter*, 2 Hen. & M. 6 ; *Story Eq. Pl. § 200*. [A mortgage executed to persons in an official capacity may be foreclosed by their successors in office in their own names, as equitable assignees. *Iglehart v. Bierce*, 86 Ill. 133.]

³ *Freake v. Horsey*, Nels. 93 ; 2 Freem. 180, S. C. ; 1 Ch. Ca. 51, S. C. ; 2 Eq. C. Ab. 77, S. C. ; *Dexter v. Arnold*, 1 Sumner, 113 ; *Com. Dig. Tit. Chan.*, 4 A. 9 ; *Demarest v. Wynkoop*, 3 John. Ch. 145 ; *Scott v. Macfarland*, 13 Mass. 309 ; *Grace v. Hunt*, Cooke (Tenn.), 344 ; [*Jones v. Kirkpatrick*, 2 Tenn. Ch. 698] *Denn v. Spinning*, 1 Halst. 471.

⁴ *Gobe v. Carlisle*, cited 2 Vern. 66.

⁵ *Clerkson v. Bowyer*, 2 Vern. 66.

⁶ *Davis v. Hemingway*, 29 Vt. 438. The heirs of a deceased mortgagee cannot, however, sustain a bill for foreclosure, but it must be brought in the name of the executor or administrator. *Roath v. Smith*, 5 Conn. 133. [And the heir is a necessary party to a bill filed by the personal representative of the vendor to enforce the lien for unpaid purchase-money, if the legal title has not been made to the purchaser. *Mott v. Carter*, 26 Gratt. 127. So, if the bill be to enjoin a sale of land by a trustee, on the ground that the trust debt was paid by the debtor in his lifetime. *Stewart v. Jackson*, 8 W. Va. 29.]

⁷ *Renvoize v. Cooper*, 6 Mad. 371.

*222 to be a good discharge to the *purchasers.¹ And now by the 30th Order of August, 1841, in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner, and to the same extent as the executors or administrators in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit.² But the Court

¹ See *Calverly v. Phelps*, 6 Mad. 229; as to foreclosure in such cases, see *post*, S. C. Where it appears on the face of the contract that it was the intent of the parties to exclude the *cestui que trust* from the necessity of taking any part in the transaction relating to the management of the trust, the *cestui que trust* is not a necessary party. *Bifield v. Taylor*, 1 Beat. 91; S. C. 1 Moll. 192. So where a bill is brought by the trustee to obtain possession of the trust property, and the *cestui que trust* has no interest in the possession. *Ferguson v. Applenhite*, 10 Sm. & M. 301; *Ashton v. Atlantic Bank*, 3 Allen, 219, 220. A trustee may maintain a bill to redeem a mortgage, made by himself, of the trust estate, without making his *cestui que trust* a party. *Boyd v. Partridge*, 2 Gray, 190.

Where a mortgage deed of land has been executed to a trustee, to secure the payment of debts to sundry persons, the trustee may maintain a bill to foreclose, without making the *cestui que trusts* parties. *Swift v. Stebbins*, 4 Stew. & P. 467; *Shaw v. Norfolk County R. R. Co.*, 5 Gray, 170, 171.

A conveyance in trust may be cancelled by a decree in Equity though the *cestui que trusts* be not made parties. *Campbell v. Watson*, 8 Ohio, 500.

[In a suit affecting a fund held in trust for a mother, for life, and then to go to her children, the trustee and mother sufficiently represent the fund to prevent an objection for want of parties prevailing at the hearing. *Sweet v. Parker*, 7 C. E. Green, 453.]

² This rule has been adopted by the Supreme Court of the United States. *Equity Rule*, 49. But it has been abrogated in England by Cons. Ord., Prel. Ord. r. 1; the cases which it was intended to meet being included in the more comprehensive enactments of 15 & 16 Vic. c. 36, § 42, r. 9; whereby it is provided, that in all suits concerning real or personal estate, which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner, and to the same extent, as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate, and in such cases, it shall not be necessary to make the persons beneficially interested under the trust parties to the suit, but

the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons or any of them to be made parties. This rule is retrospective, and applies to all suits, as well as redemption and foreclosure suits. *Fowler v. Boyldon*, 9 Hare App. 78; *Goldsmid v. Stonehewer*, 9 Hare App. 38; 17 Jur. 199; *White v. Chitty*, 14 W. R. 366, V. C. W. It has been held that, in an administration suit, the trustees of settled shares sufficiently represent their *cestui que trusts*. *Densem v. Elworthy*, 9 Hare App. 42. [And so, in a suit to obtain a declaration of forfeiture, an unascertained class taking on the forfeiture, are sufficiently represented by the trustees. *White v. Chitty*, 14 W. R. 366. So, where the suit was for sale and partition by testamentary trustees. *Stace v. Gage*, 8 Ch. Div. 451.] It has also been held, that executors with a power of sale, and also devisees in trust subject to payments of debts, are trustees within the rule; *Shaw v. Hardingham*, 2 W. R. 657, M. R.; *Smith v. Andrews*, 4 W. R. 353, V. C. K.; but that an executor with only an implied power of sale, is not. *Bolton v. Stannard*, 4 Jur. N. S. 576, M. R.; see, however, 22 & 23 Vic. c. 35, §§ 14, 16. The rule does not apply when the *cestui que trusts* have concurred in breaches of trust. *Jesse v. Bennett*, 6 De G., M. & G. 609; 2 Jur. N. S. 1125. And where an estate is sold under a decree of the Court, as a general rule (with a possible exception in some cases of extreme difficulty), the Court will, in the exercise of its discretion, require all the persons interested in the proceeds to be parties to the suit; or to be served with notice of the decree, in order to secure a proper and advantageous sale, and protect the title of purchasers from being open to inquiry or impeachment; *Doody v. Higgings*, 9 Hare App. 32; *Pigott v. Pigott*, 2 N. R. 14, V. C. W.; and wherever the trustees' personal interest may prevent them protecting the interest of the *cestui que trusts*, the Court will require the *cestui que trusts*, or some of them, to be made parties. *Read v. Prest*, 1 K. & J. 183. Trustees cannot, however, represent some of the *cestui que trusts* in any contention *inter se*; but only where the contention is between all the *cestui que trusts* on the one hand, and a stranger on the other. *Hamond v. Walker*, 3 Jur. N. S. 686, V. C. W.; *Payne v. Parker*, L. R. 1 Ch. App. 327; 12 Jur. N. S. 221, L. JJ.

may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties. This order applies, * not only to suits by persons claiming adversely against the estate, but also to suits by some of the persons beneficially interested, seeking relief in respect of alleged misconduct of the trustees; and in such cases, it renders it unnecessary that persons having charges on the estate should be parties.¹ It is necessary, however, that the trustees who are empowered to give discharges, should themselves be entitled to the legal estate, otherwise the order does not apply, and the *cestui que trusts* must be made parties to the suit.² In cases, also, where the interest of the *cestui que trusts* is collateral to the rights between the plaintiff and the defendant, a person standing in the place of trustee has been allowed to maintain a suit respecting the trust property, without making the persons for whom he is trustee parties; thus the pawnee of a chattel or his representative may maintain a suit for the chattel without making the pawner a party.³ And so in the case of *Saville v. Tancerd*,⁴ where a bill was brought for an account, and for the delivery of a strong-box, in which were found jewels, and a note in these words: "Jewels belonging to the Duke of Devonshire," in the hands of Mr. Saville, whose representative the plaintiff was, and in whose possession they had been for fifty years, and an objection was taken that the Duke's representative ought to have been a party, it was held that the plaintiff might sustain the suit without him.⁵ And upon the same principle, where one of two trustees had been prevailed upon by his co-trustee to transfer the trust fund into his name alone, and the co-trustee afterwards sold the stock, and received the produce, and never replaced it; upon a bill filed by the trustee against his co-trustee to compel him to replace the stock, a demurrer was put in, on the ground that the *cestui qui trusts* of the fund were not made parties, which, upon argument, was overruled.⁶ And where a trustee filed a

¹ *Osborne v. Foreman*, 2 Hare, 656; 8 Jur. 55; *Ward v. Bassett*, 5 Hare, 179; see also, upon the construction of this order, *Cox v. Barnard*, 5 Hare, 253; *Lloyd v. Smith*, 13 Sim. 457; 7 Jur. 460; *Miller v. Huddleston*, 13 Sim. 467; 7 Jur. 504; *Reeve v. Richer*, 1 De G. & S. 624; 11 Jur. 960; *Jones v. How*, 7 Hare, 270; 14 Jur. 145.

² *Turner v. Hind*, 12 Sim. 414. It seems doubtful whether the order applies to the case of a bill of foreclosure of freeholds devised in trust for sale. *Wilton v. Jones*, 2 Y. & C. 244.

³ [Or by making him a defendant.] *Michigan State Bank v. Gardner*, 3 Gray, 305.

⁴ 1 Ves. Sen. 101; 3 Swanst. 141, S. C.

⁵ *Story Eq. Pl.* § 221.

⁶ *Franco v. Franco*, 3 Ves. 77; *Bridget v. Hames*, 1 Coll. 72; *May v. Selby*, 1 Y. & C. 235; 6 Jur. 52; *Horsley v. Fawcett*, 11 Beav. 565; *Peake v. Ledger*, 8 Hare, 313; 4 De G. & S. 137 (which was the case of executors); *Baynard v. Woolley*, 20 Beav. 583; see, however, *Chancellor v. Morecraft*, 11

Beav. 262; and see *Bridget v. Hames*, 1 Coll. 72; [see, also *Butler v. Butler*, 5 Ch. Div. 554; S. C. on appeal, 7 Ch. Div. 116, where it was held that one trustee could not maintain a bill against a co-trustee for realizing the trust fund by sale of the property in which it is invested, without bringing the *cestui que trust* before the Court. See also *Luke v. South Kensington Hotel Co.*, 7 Ch. Div. 789;] *Story Eq. Pl.* § 213, and a discussion of this subject in the note; *Cunningham v. Pell*, 5 Paige, 607. [If the object of the bill of a trustee be to recover the fund with a view to its administration by the Court, the parties interested must be represented. But if it merely seeks to recover the trust moneys, the beneficiaries are not necessary parties. *Carey v. Brown*, 92 U. S. 171; *Adams v. Bradley*, 6 Mich. 346; *Potts v. Thames Haven and Dock Co.*, 7 Eng. L. & E. 262. And the objection of the want of parties must be made either by demurrer or plea. *Carey v. Brown*, 92 U. S. 173.] If a trustee has fraudulently or improperly parted with trust property, the *cestui que*

bill to foreclose a mortgage, it being a breach of trust to have
 *224 lent the money *upon such a security, it was held that the
cestui que trusts, who had never authorized or adopted the mortgage, were unnecessary parties.¹ If, however, the *cestui que trusts* have concurred in the breach of trust, one trustee cannot sue his co-trustee, without making them parties.²

And here it may be observed, that the personal representative in all cases represents the personal estate of the deceased, and is entitled to sue for it in Equity as well as Law, without making the residuary legatees, or any other persons interested in it, parties to the suit.³ For this reason, where a woman by her will gave all her personal estate to her bastard child, and made B. and C. her executors, and died; and within a short time after the bastard died intestate; upon a bill filed by the executor against a person in whose hands the property of the mother was, praying for an account, the defendant demurred, because the representative of the bastard and the Attorney-General were not parties; and the demurrer was overruled, it being held that the executor was legally entitled to the estate of his testatrix; and though this may be in trust for another, yet as the executor has the legal title, he can give a good discharge to the defendant.⁴ And in every case, an executor, though a bare trustee, and though there be a residuary legatee, is entitled to sue for the personal estate in Equity as well as at Law, unless the *cestui que trusts* will oppose it.⁵ Where, however, there has been a great lapse of time since the death of the testator, and it seems doubtful who are the persons beneficially interested under his will, the Court will not, as of course, order payment to a personal representative of funds recovered in the cause, but may direct them to be paid into Court.⁶

So, also, assignees of bankrupts or insolvent debtors may either maintain or defend suits relating to the estates vested in them as such assignees, without the creditors for whom they are trustees being made parties to the suit.⁷ Nor is it necessary, in such case, that the
 *225 bankrupt or insolvent, though interested in the residue, *should be before the Court,¹ though, from a decision in Vernon's Re-

trust may proceed against the trustee alone, to compel satisfaction for the breach of trust, or he may at his election join the assignee also, if he were a party to the fraud, or if he seeks redress against him. *Bailey v. Ingles*, 2 Paige, 278; *West v. Randall*, 2 Mason, 197; *Franco v. Franco*, 3 Sumner's Ves. 75, note (a).

¹ *Allen v. Knight*, 5 Hare, 272, 277; 10 Jur. 943.

² *Jesse v. Bennett*, 6 De G. & G. 609; 2 Jur. N. S. 1125.

³ See *Miles v. Davis*, 19 Miss. 408.

⁴ *Jones v. Goodchild*, 3 P. Wms. 33; see also *Peake v. Ledger*, 8 Hare, 313; *Smith v. Bolden*, 33 Beav. 262.

⁵ *Ib.* 48.

⁶ *Loy v. Duckett*, 1 Cr. & Ph. 305; *Ex*

parte Ram, 3 M. & C. 25; 1 Jur. 668; *Re Malony*, 1 J. & H. 249; *Pennington v. Buckley*, 6 Hare, 451, 459; 11 Jur. 468; *Edwards v. Harvey*, 9 Jur. N. S. 453; 11 W. R. 330, M. R.; [*Peacock v. Saggors*, 4 De G., F. & J. 406; *Samson v. Samson*, 18 W. R. 530;] and see *Adams v. Barry*, 2 Coll. 285, where the Court required the residuary legatee to be made a party.

⁷ *Spragg v. Binkes*, 5 Ves. 587. [An assignee in bankruptcy may maintain a suit to set aside a conveyance by the bankrupt in fraud of creditors. *Re Gurney*, 7 Biss. 414; *Cady v. Whaling*, 7 Biss. 430; *Johnson v. Helinstaedter*, 3 Stew. Eq. 124.]

¹ *De Golls v. Ward*, 3 P. Wms. 311, *in notis*; *Kaye v. Fosbrooke*, 8 Sim. 28; *Dyson v. Hornby*, 7 De G., M. & G. 1. Similarly

ports, it appears to have been formerly considered necessary in suits by assignees to have the bankrupt before the Court.² Where, however, creditors, instead of seeking relief under the Commission, proceed at Law against the bankrupt, the bankrupt may file a bill of discovery in aid of his defence at Law, and for an injunction; and where there are complicated accounts, he may pray to have them taken, and to have the balance due to him from the defendants set off against the demand of the creditors, without making his assignees parties,³ but he cannot pray to have the balance paid to him, because that belongs to his assignees.

The rule that, where the person by law entitled to represent the personal estate is the party suing, legatees or other persons interested in the estate need not be parties, does not extend to the case of a residuary legatee suing for his share of the residue; in which case, as we have seen, it is generally necessary that all the residuary legatees should be made parties to the suit, either as plaintiffs or defendants, or by being served with notice of the decree,⁴ although where the number of the class is great, the Court has sometimes dispensed with the necessity of making them all parties, and allowed one to sue on behalf of the others.⁵ And where legacies are charged upon real estates, it will not, in general, be sufficient to bring the executors before the Court, for, except in cases coming within the 30th Order of August, 1841, above mentioned, all the other legatees must be parties;⁶ it seems, however, that trustees of a real estate for payment of debts, have been allowed before that order, to sue without bringing before the Court the creditors or legatees for whom they are trustees;⁷ but *it is apprehended *226 that, in such cases, the Court would now generally allow the

the debtor is not a necessary party to suits by or against trustees of a deed duly registered under former bankrupt law: *Fenton v. Queen's Ferry Wire Company*, W. N. (1868) 296; 17 W. R. 155, V. C. M.; L. R. 7 Eq. 267.

² *Sharpe v. Gamon*, 2 Vern. 32; 1 Eq. Ca. Ab. 72, Pl. 7 S. C.

³ *Lowndes v. Taylor*, 1 Mad. 423.

⁴ 15 & 16 Vic. c. 86, § 42, rr. 1, 8; and see *post*, Chap. VII. § 2, *Proceedings by Service of Notice of the Decree*.

⁵ *Harvey v. Harvey*, 4 Beav. 215, 220; see also *Sinart v. Bradstock*, 7 Beav. 500; *Bateman v. Margerison*, 6 Hare, 496, 499; but see *Jones v. Howe*, 7 Hare, 267; 14 Jur. 145; see also *Dood v. Higgins*, 9 Hare App. 32, particularly the observations of Sir George Turner V. C. at p. 38; *Gould v. Hayes*, 19 Ala. 438. All the distributees are necessary parties to a bill for distribution. *Hawkins v. Craig*, 1 B. Mon. 27; *Osborne v. Taylor*, 12 Graton (Va.), 117; but see *Moore v. Gleaton*, 23 Geo. 142; *Keeler v. Keeler*, 3 Stockt. (N. J.), 458.

⁶ *Morse v. Sadler*, 1 Cox, 352; *Hallett v.*

Hallett, 2 Paige, 15; *Todd v. Sterrett*, 6 J. J. Marsh. 432; *Howland v. Fish*, 1 Paige, 20. In this last case the Court remark: "In *Morse v. Sadler*, 1 Cox, 352, the Master of the Rolls decided, that every legatee, whose legacy was charged on the real estate, must be a party to the bill. It is true that case was overruled by Chancellor Kent, in *Brown v. Ricketts*, 3 John. Ch. 553, where it was held that one legatee might file a bill in favor of himself and all others, who might choose to come in under the decree. But even then, Chancellor Kent considers it necessary, that the bill should state the fact that it is filed in behalf of the plaintiff and all others, &c. The reason of the rule seems to be, that the defendants may not be charged with a double defence."

⁷ *Ld. Red. 174*; see, however, *Harrison v. Stewardson*, 2 Hare, 530; *Thomas v. Dunning*, 5 De G. & S. 618. [Executors suing for legacies charged upon land after the estate has been settled must join the legatees as complainants with them. *Cool v. Higgins*, 10 C. E. Green, 117.]

trustees, under the ninth rule above referred to, to represent the creditors.¹

And now one of several *cestui que trusts*, under any deed or instrument, may be a plaintiff or defendant, as representative of his class, in a suit for the execution of the trusts of the deed or instrument, the others of the class being served with notice of the decree,² but any *cestui que trusts* who have concurred in the breach of trust must be parties to a suit to make a trustee liable for the loss occasioned thereby.³

Although, in ordinary cases, the executor represents the whole personal estate, and no legatee need be a party, the appointees under the will of a *feme covert* are in a different situation, and must be made parties;⁴ therefore, where the administrator with the will annexed of a married woman, filed a bill, praying that the defendants might pay over to him a sum of money, as to which a testamentary appointment had been executed by the testatrix, by virtue of a power in her marriage settlement, without making the appointees parties, the case was ordered to stand over, with leave for the plaintiff to amend by bringing the appointees before the Court.⁵ It is apprehended, however, that the Court would not now require the *cestui que trusts* to be parties in such a case.⁶ Where the appointees were very numerous, and the bill was filed by some of them on behalf of themselves and the others, the Court dispensed with the general rule which required them all to be parties.⁷ It is to be observed that in *Craker v. Parrott*,⁸ on a bill filed by one of four children, who were appointees of their mother, to set aside the appointment on account of the unfairness of the distribution, it was held that all the other children who were appointees need not be parties, because they might go in before the Master.

Where there are more than one executor or administrator, they must all be parties to the suit, though one of them be an infant.⁹

Where, however, one executor of several has alone proved, he

¹ *Morley v. Morley*, 25 Beav. 253. In *Knight v. Pocock*, 24 Beav. 136; 4 Jur. N. S. 197, it was held that trustees did not represent creditors who had not acceded to the deed. [And see, on this point, *Johns v. James*, 8 Ch. Div. 744.]

² 15 & 16 Vic. c. 86, § 42, rr. 4, 6; *M'Leod v. Amesley*, 16 Beav. 600; *Jones v. James*, 9 Hare App. 80; and see *post*, Chap. III. § 2. *Proceedings by Service of Notice of the Decree*.

³ *Jesse v. Bennett*, 6 De G., M. & G. 609; 2 Jur. N. S. 1125; *Williams v. Allen*, 29 Beav. 292. [One of several *cestuis que trust* cannot, on an allegation that the trustees refused to take proceedings, maintain a suit against a debtor to the trust. The remedy is by a general bill for the execution of the trust, and the appointment of a receiver to

sue. *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. App. 597.]

⁴ *Story Eq. Pl.* § 204, and note.
⁵ *Court v. Jeffery*, 1 S. & S. 105; but see *Owens v. Dickenson*, *ante*, pp. 186, 187.

⁶ *Musters v. Wright*, 2 De G. & S. 777; and see *Sewell v. Ashley*, 3 De G., M. & G. 933; *Re Newbery*, *Allcroft v. Farnan*, 10 W. R. 378, V. C. K.

⁷ *Manning v. Thesiger*, 1 S. & S. 106; *Story Eq. Pl.* § 217.

⁸ 2 Cha. Ca. 228.

⁹ *Offley v. Jenney*, 3 Cha. Rep. 92; *Wms. Exors.* 1724; *Cramer v. Morton*, 2 Moll. 108. Rule 6, adopted in 15 & 16 Vic. c. 86, provides that "any executor, administrator, or trustee may obtain a decree against any legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts."

they have not renounced.¹ And where a person devises that his executors shall sell his land, and leaves two executors who renounce, and administration is granted to A., who brings a bill against the heir to compel a sale, it seems the renouncing executors, in whom the power of sale collateral to the executorship was vested, ought not to be made parties.² It is not, however, necessary that the executors or administrators should be all co-plaintiffs; for in Equity it is sufficient that all parties interested in the subject of the suit should be before the Court, either as plaintiffs or defendants;³ and, therefore, one executor may sue without his co-executor joining, if the co-executor be made a defendant.⁴

The rule that all persons claiming concurrent interests with the plaintiff are necessary parties, equally applies whether the interest be in possession, remainder, or reversion; and upon this principle it is held, that in all cases in which an estate is claimed by a person deriving title under a settlement, made either by deed or will, it is necessary to make all the persons claiming under such settlement parties to the suit, *down to the person entitled to the first vested estate of inheritance, either in fee or in tail, inclusive.*⁵ And where A. was tenant for years, with remainder to B. for life, with remainder to C. in fee, and B. brought a bill against A. for an injunction to restrain his committing waste, it was held that the remainder-man, or the reversioner in fee, ought to be before the Court.⁶ It will be borne in mind, however, that where the property is vested in trustees under a deed or will, the trustees now generally represent all the *cestui que trusts*.⁷

It is not necessary in such cases, to bring before the Court any *person entitled in remainder or reversion after the first vested *228 estate of inheritance, because such person is considered sufficient to support all those who are in remainder behind him.¹ And it

¹ Davies v. Williams, 1 Sim. 5; Dyson v. Morris, 1 Hare, 413; Rinehart v. Rinehart, 2 McCarter (N. J.), 144; Marsh v. Oliver, 1 McCarter (N. J.), 262. It will be seen on referring to the Report of the case of Davies v. Williams, *supra*, that Sir John Leach V. C. is reported to have said: "Where one executor has alone proved, he may sue in Equity, as well as at Law, without naming the others as parties;" but in Cummins v. Cummins, 3 Jo. & Lat. 92, Ld. St. Leonards, then Lord Chancellor of Ireland, speaking of this case said: "This may he do as to suits in Equity, but certainly it is not the case as to actions at Law." And see Hensloe's case, 3 Rep. 366; Kilby v. Stanton, 2 Y. & J. 77; and see Wms. Exors. 1724, and cases there cited; Add. Cont. 1050. But an executor, though he has not proved the will, is a necessary party defendant to a suit to carry the trusts of the will into execution. Ferguson v. Ferguson, 1 Hayes & J. 300; Yates v. Compton, 2 P. W. 308; Cramer v. Morton, 2 Moll. 108; Thompson v. Graham, 1 Paige, 384; see Judson v. Gibbons, 5 Wend. 224.

² Yates v. Compton, 2 P. Wms. 308.

³ Wilkins v. Fry, 1 Mer. 244, 262.

⁴ Blount v. Burrow, 3 Bro. C. C. 90; [Smith v. Lawrence, 11 Paige, 208; Lucas v. Seale, 2 Atk. 56; McGregor v. McGregor, 35 N. Y. 218; Ransom v. Geer, 3 Stew. Eq. 249;] see Dane v. Allen, 1 Green Ch. 288. It appears to have been at first doubted whether a co-executor refusing to join as co-plaintiff was entitled to his costs. 3 Bro. C. C. 90.

⁵ Finch v. Finch, 2 Ves. 492; Sohler v. Williams, 1 Curtis, 479; Story Eq. Pl. § 144, note. Where the first tenant in tail was a lunatic, the person entitled to the next estate of inheritance was held a necessary party. Singleton v. Hopkins, 1 Jur. N. S. 1199.

⁶ By Lord King, in Mollineux v. Powell, cited 3 P. Wms. 268, n.; but see 1 Dick. 197, 198, and Eden on Injunctions, 163; Story Eq. Pl. § 159.

⁷ 15 & 16 Vic. c. 86, § 42, r. 9.

¹ Anon., 2 Eq. Ca. Ab. 166, Pl. 8; Lloyd v. Johnes, 9 Ves. 37, 55; Eagle Fire Ins. Co. v. Cammett, 2 Edw. Ch. 127; [Baker v.

has repeatedly been determined, that if there be a tenant for life, remainder to his first son in tail, remainder over, and the tenant for life is brought before the Court before he has issue, the contingent remainder-men are barred.²

Although in cases of this description, the first person in existence who is entitled to a vested estate of inheritance is sufficient to represent all remainders behind him, yet it is necessary, that all persons entitled to intermediate estates, prior to the first vested estate of inheritance, should be before the Court; thus, where a marriage settlement was made of lands on the husband for life, remainder to the wife for life, with divers remainders over, and a bill was brought by the husband, in order to have the opinion of the Court whether a certain parcel of land was not intended to be included in the settlement, and the wife was not a party, the case was ordered to stand over, in order that she might be made a party, the Court being of opinion, that if a decree should be made against the husband, it would not bind her;³ and so, where a bill was brought by a son, who was remainder-man in tail under a settlement, against his father, who was tenant for life under the same settlement, to have the title-deeds brought into Court that they might be forthcoming for the benefit of all parties interested; and objections were taken for want of parties, one of which was, that a daughter of the defendant, who was interested in a trust term for years, prior to the limitation to the plaintiff, was not before the Court, Lord Hardwicke held the objection good.⁴

Another objection in the same case was, because certain annuitants of the son, upon his reversion after the death of his father, were not parties, and Lord Hardwicke held, that he could not make the order prayed until the annuitants were first heard, and that consequently the objection must be allowed.⁵ From this it would seem, that although a remainder-man in tail may maintain a suit without bringing the persons entitled to subsequent remainders before the Court, yet if he has charged or incumbered his estate in remainder, the persons interested in such charge or incumbrance must be parties; and it is held, that a person claiming under a limitation by way of executory devise, not subject to any preceding estate of inheritance by which it may be defeated, *229 must be a party to a suit in which his rights are involved;¹ but executory devisees not *in esse*, may be bound by a decree against the first estate of inheritance.

Where the intermediate estate is contingent, and the person to take is

Baker, 1 Rich. Eq. 392; *Bosil v. Fisher*, 3 Rich. Eq. 1; *Ex parte Dodd*, Phil. Eq. (N. C.) 97; *Freeman v. Freeman*, 9 Heisk. 306; *Parker v. Peters*, 6 Rep. 347; *Gray v. Barnard*, 1 Tenn. Ch. 304; *Brevoort v. Brevoort*, 70 N. Y. 136. And see where the estate is subject to a contingency. *Infra*, 266, note 4.]

² Per Lord Redesdale, in *Giffard v. Hort*, 1 Sch. & L. 408; and see also, as to tenants

for life representing persons contingently entitled in remainder, in a suit as to personality. *Fowler v. James*, 1 C. P. Coop. t. Cott. 290; 1 Phil. 803; and see *Roberts v. Roberts*, 2 Phil. 534; 12 Jur. 148; 2 De G. & S. 29.

³ *Herring v. Yeo*, 1 Atk. 290.

⁴ *Pyncent v. Pyncent*, 3 Atk. 571.

⁵ *Ibid.*

¹ *Ld. Red. 174.*

not ascertained, it is sufficient to have before the Court the trustees to support the contingent remainder, together with the first person *in esse* entitled to the first vested estate of inheritance.² Lord Hardwicke, in *Hopkins v. Hopkins*,³ states the practice upon this point thus: "If there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of the inheritance is vested; and they that may come after will be bound by the decree, though not *in esse*, unless there be fraud or collusion between the trustees, and the first person in whom the remainder of the inheritance is vested." Thus, in *Lord Cholmondeley v. Lord Clinton*,⁴ in which the estate which was the subject of litigation was settled upon Baron Clinton for life, and, after remainders to his children (who were unborn) and their heirs in tail, upon the person who should then be entitled to claim as Baron Clinton in tail, with ultimate remainder to the existing Lord Clinton in fee, it was objected that the person presumptively entitled to the barony, ought to have been a party; but Sir William Grant M. R. overruled the objection upon the ground above stated.

If a person entitled to an interest prior in limitation to any estate of inheritance before the Court, should be born pending the suit, that person must be brought before the Court by supplemental bill;⁵ and if the first tenant in tail is plaintiff in a suit and dies without issue before the termination of the suit, the next remainder-man in tail, although he claims by new limitation, and not through the first plaintiff as his issue, is entitled to continue the suit of the former tenant in tail by supplemental bill, and to have the benefit of the evidence and proceedings in the former suit;⁶ and so where a tenant in tail who is a defendant dies,⁷ or his interest ceases by the birth of a tenant in tail prior in limitation,⁸ the plaintiff is entitled to carry on the proceedings, in bringing the person who has become the first tenant in tail before the Court.

In all the preceding cases the rights of the several parties to the subject-matter in litigation were consistent with each other, and

* were the result of the same state of facts, so that the same evi- *230
dence which would establish those facts would establish the rights of all the parties to maintain the litigation; the rules, therefore, of Equity require that all those parties so deriving their right of litigation from the same facts, should, subject to the exceptions which we have noticed, be brought before the Court, in order that such their rights may be simultaneously disposed of. In cases, however, where the claims of

² Lord Cholmondeley v. Lord Clinton, 2 J. & W. 1, 133; see *Sohier v. Williams*, 1 Curtis, 479; *Nodine v. Greenfield*, 7 Paige, 544. Trustees to support contingent remainders are now no longer necessary; 8 & 9 Vic. c. 106, § 8.

³ 1 Atk. 590; but as to the report of this case, see 2 J. & W. 13, 192.

⁴ 2 J. & W. 1, 133.

⁵ *Ld. Red.* 174.

⁶ *Lloyd v. Johns*, 9 Ves. 58.

⁷ *Cresswell v. Bateman*, 6 W. R. 206, 220, V. C. K.; Reg. Lib. 1857, A. 424.

⁸ *Egremont v. Thompson*, L. R. 4 Ch. Ap. 448, L. C.

the several parties to the subject-matter of the suit do not arise out of the same state of circumstances, but can only be supported upon grounds which are inconsistent with each other, so that, if the grounds upon which the plaintiff supports his claim be correct, the case relied upon by the other parties claiming the same thing cannot be supported, then such other parties need not be brought before the Court. And the reason of this is obvious; for if a plaintiff resting his case upon a particular title which is inconsistent with the title set up by the other claimants, is able to establish the truth of his case by evidence, he will be entitled to a decree against the defendant whom he sues; if he is not in a situation to establish his case, his bill must of course be dismissed; and the circumstance of his having brought other parties claiming under a different title before the Court, would be of no advantage to the defendant principally sued; because, if the plaintiff fails in his claim, the bill must be dismissed as against them as well as against the principal defendant, and such dismissal can be no bar to prevent the other parties themselves, from asserting their claim against the defendant.¹

In suits for specific performance, it is a general rule, that none but parties to the contract are necessary parties to the suit;² and a mere stranger claiming under an adverse title should not be made a party to such a suit,³ although a person claiming by virtue of an antecedent agreement is a proper party to a suit by a purchaser for specific performance, and to have the right to the purchase-money ascertained.⁴ Where, however, there are other persons so interested in the subject-matter of the contract as that their concurrence is necessary for the completion of the title, it is the duty of the vendor to bring them forward, to assist in giving effect to his contract;¹ but, as plaintiffs, they have no right to sue; and if such persons should be infants, and it were attempted, by making them co-plaintiffs with the vendor, to bind their rights by a decree, the fact of their being so made parties would be a fatal objection to the suit; and whether the point was or was not raised by the other parties the Court would refuse to

¹ For application of this principle to suits for tithes by impropriator or vicar. *Williamson v. Lonsdale*, Dan. Ex. 171; 9 Price, 187, S. C.; *Williams v. Price*, Dan. 13; 4 Price, 156; *Carte v. Ball*, 3 Atk. 500; and *Petch v. Dalton*, Scacc. Jan. 1819, cited 1 J. & W. 515; *Daws v. Benn*, *ib.* 513; Jac. 95; *Bailey v. Worrall*, Bunb. 115; *Cook v. Blunt*, 2 Sim. 417; *Wing v. Morrell*, M'Cl. & Y. 625; *Tooth v. Dean and Chapter of Canterbury*, 3 Sim. 49; *Pierson v. David*, 1 Clarke (Iowa), 23.

² *Tasker v. Small*, 3 M. & C. 63, 69; 1 Jur. 936; *Wood v. White*, 4 M. & C. 460; *Robertson v. The Great Western Railway Company*, 10 Sim. 314; *Humphreys v. Hollis*, Jac. 73; *Paterson v. Long*, 5 Beav. 186; *Peacock v. Penson*, 11 Beav. 355; 12 Jur. 951; *Petre v. Duncombe*, 7 Hare, 24; *De Hoghton*

v. Money, L. R. 2 Ch. Ap. 164, 170, L. J.J.; *Bishop of Winchester v. Mid Hants Railway Co.*, L. R. 5 Eq. 17, V. C. S.; *Aberaman Iron Works Company v. Wickens*, L. R. 4 Ch. Ap. 101, L. C.; *Fenwick v. Bulman*, L. R. 9 Eq. 165, V. C. S.; see, however, *Daking v. Whimper*, 26 Beav. 588; see *Morgan v. Morgan*, 2 Wheat. 290; *Lord v. Underdunk*, 1 Sandf. Ch. 46; *Hoover v. Donally*, 3 Hen. & M. 316. [*Infra*, 279, n. 1.]

³ *Tasker v. Small*, 3 M. & C. 63, 69; 1 Jur. 936; *De Hoghton v. Money*, L. R. 2 Ch. Ap. 164, 170, L. J.J. But see *Carter v. Mills*, 30 Mis. (9 Jones) 432, cited *infra*.

⁴ *West Midland Railway Company v. Nixon*, 1 H. & M. 176; and see *Chadwick v. Maden*, 9 Hare, 188.

¹ *Wood v. White*, 4 M. & C. 460, 483; *Chadwick v. Maden*, 9 Hare, 188.

pronounce a decree.² It would appear also, that, in some cases, where, subsequently to the contract, another person has acquired an interest under the vendor, with notice of the rights of the purchaser, the latter has, in a suit for specific performance, been allowed to join such person with the vendor as a defendant to the suit;³ and where the vendor has parted with the possession, he must join the lessee of the purchaser as defendant to a suit for specific performance, and a declaration of his lien for unpaid purchase-money.⁴

Formerly it was the invariable practice of Courts of Equity to require the heir-at-law to be a party to a suit in all cases where the trusts of a will of real estate were sought to be executed. This practice arose from the peculiar principle adopted by Courts of Equity in cases of wills relating to real estate; namely, that they would not carry into effect a will of real estate, until the due execution had been either admitted by the heir or proved against him. For this purpose, it was necessary that the heir should be made an adverse party. The case of an heir-at-law was, therefore, an exception to the rule above laid down, that persons claiming under titles inconsistent with those of the plaintiff, need not be made parties to the suit. This exception has now been in a great measure abolished, for by the 31st Order of August, 1841,⁵ it is provided, "that in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make him a party when he desires to have the will established against him." Before this order, it was necessary in *suits for the administration of real assets under 3 & 4 Will. IV. *232 c. 104, that the heir-at-law, as well as the devisee, should be a party;¹ and where the suit was brought against the devisee, under

² Wood v. White, 4 M. & C. 460, 483. See Williams v. Leech, 28 Penn. St. 89; Burger v. Potter, 32 Ill. 66.

³ Spence v. Hogg, 1 Coll. 225; Collett v. Hover, 1 Coll. 227; but see Cutts v. Thodey, 13 Sim. 206; 6 Jur. 1027; and 1 Coll. 212, n. (a); 223 n.; see also Leuty v. Hillas, 2 De G. & J. 110; 4 Jur. N. S. 1166. In a suit for the specific performance of a contract to convey land, a person not made a party, who claims a superior title to the land in question under the party of whom performance is sought, may come in and assert his rights; as a decree might affect them injuriously by casting a cloud upon his title. Carter v. Mills, 30 Mis. (9 Jones) 432.

⁴ Bishop of Winchester v. Mid Hants Railway Company, L. R. 5 Eq. 17, V. C. S.; and see Attorney-General v. Sittingbourne & Sheerness Railway Company, 35 Beav. 268, 271; L. R. 1 Eq. 636, 639; Goodford v. Stonehouse & Nailsworth Railway Company, W. N. (1869) 67; 17 W. R. 515, V. C. M.; Marling v. Stonehouse & Nailsworth Railway Company, W. N. (1869) 60; 17 W. R. 484, V. C. J. [To a bill for the specific execution of a contract for the sale of land made by the complainant as president of a manufacturing

company, for the benefit of the company and relating to its lands, the company is a necessary party. Nichols v. Williams, 7 C. E. Green, 63. So, to a bill filed by the purchaser, at execution sale, of the interest of a vendee in land, against the original vendor, for specific performance, the vendee is a necessary party. Alexander v. Hoffman, 70 Ill. 114. And to a bill against the vendor to cancel the contract, a person interested in the subject-matter of sale and entitled to half the purchase-money, is a necessary party. Atkins v. Billings, 72 Ill. 597. And the assignee in bankruptcy of a claimant of real estate is a necessary party to a bill seeking to affect the title to the realty. Harris v. Cornell, 80 Ill. 54. And see as to a bill for the enforcement of vendor's lien for purchase-money, *infra*, 1653, note 6.]

⁵ Ord. VII. 1. This Order has been adopted in the Equity Rules of the United States Supreme Court. Rule 50.

¹ Brown v. Weatherby, 10 Sim. 125; now it is so no longer: Weeks v. Evans, 7 Sim. 546; Bridges v. Hinxman, 16 Sim. 71; Goodchild v. Terrett, 5 Beav. 398; Burch v. Coney, 14 Jur. 1009, V. C. K. B.

the Statute of Fraudulent Devises,² the heir-at-law was a necessary party.³

Although, however, the heir-at-law was a necessary party to suits instituted for the purpose of making devised estates applicable to the payment of debts, he was not a necessary party to suits instituted by creditors claiming under a deed whereby estates had been conveyed to trustees to sell for payment of debts, unless he was entitled to the surplus of the money arising from the sale.⁴

Even before the last-mentioned Order, there were some cases in which the Court would direct the execution of the trusts of a will, where the heir-at-law was not a party; thus, where a trustee had been dead several years, and freehold lands, subject to the trust, had been quietly enjoyed under the will, a sale was decreed without the heir being a party.⁵ So, where the heir-at-law was abroad, or could not be found, or made default at the hearing, the trusts of a will have been executed in his absence, but without a declaration that the will was well proved;⁶ and even upon some occasions the Court has, upon due proof of the execution of the will and of the sanity of the testator, declared the will well proved in the absence of the heir.⁷

As there is no provision in the Order⁸ to make evidence of the execution of the will, and the sanity of the testator, taken in the absence of the heir-at-law, admissible against him or any one claiming under him, the Court still continues unable, by decree in his absence, to insure the title against his rights.⁹ As the Order provides for the execution of the trusts of a will in the absence of the heir, and also gives liberty to make him a party, where it is sought to have the will established

against him, it seems scarcely probable that, under any circumstances, the old *practice, of declaring a will well proved in the absence of the heir will be continued.¹ It was formerly the practice, where the heir-at-law could not be found, to make the Attorney-General a party to a bill for carrying the trusts of a devise of real estates into execution, on the supposition that the escheat is in the

² 3 & 4 W. & M. c. 14.

³ Story Eq. Pl. § 163. Where the real estate of the deceased party is by statute made assets for the payment of debts, it is unnecessary to make the heir or devisee of the estate a party to the suit for the administration of the assets. Story Eq. Pl. § 163, and note; *Ex parte Rulluff*, 1 Mass. 240; *Grignon v. Astor*, 2 How. U. S. 319, 338; but see *Gladson v. Whitney*, 9 Iowa, 267; [and *Frazier v. Pankey*, 1 Swan, 75], where the contrary was held.

⁴ To a bill to charge a legacy on land of a married woman, she is a necessary party. *Lewis v. Darling*, 16 Peters, 1.

⁵ *Harris v. Ingledew*, 3 P. Wms. 92, 94.

⁶ *French v. Baron*, 1 Dick. 138; 2 Atk. 120, S. C.; *Stokes v. Taylor*, 1 Dick. 349; *Cator v. Butler*, 2 Dick. 438; *Braithwaite v. Robinson*, *ib.* 439, n.; Story Eq. Pl. § 87. On a bill by an executor against a devisee, of

land charged with the payment of debts, for an account of the trust fund, the creditors are not indispensable parties to the suit. *Potter v. Gardner*, 12 Wheat. 498.

⁷ *Banister v. Way*, 2 Dick. 599; *vide* *acc.* *Williams v. Whinyates*, 2 Bro. C. C. 399; *Seton*, 224, *et seq.*; *Ld. Red.* 173.

⁸ Ord. VII. l.

⁹ *Ld. Red.* 172. A will may now be established in England against the heir in the Probate Court; see 20 & 21 Vic. c. 77, §§ 61, 62; *Seton*, 226; see *post*, chap. on *Evidence*.

¹ All the devisees are held to be necessary parties to a bill to set aside a will; the executor, unless he has refused to act, should also be made a party. *Vancleave v. Beam*, 2 Dana, 155; see *Hunt v. Acre*, 28 Ala. 580; *Vanderpoel v. Van Valkenburgh*, 2 Selden (N. Y.), 190. So all the legatees are indispensable parties in such a case. *McMaken v. McMaken*, 18 Ala. 576.

Crown, if the will set up by the bill should be subject to impeachment. If any person should claim the escheat against the Crown, that person may be a necessary party.²

The rule which has been before noticed, that persons claiming under titles which are inconsistent with that of the plaintiff, should not be made parties to a suit, even though they are in a situation to molest the defendant in the event of the plaintiff being unsuccessful in establishing his claim, is equally applicable to prohibit their being made parties as co-plaintiffs or as defendants.³ Thus, in the case of the *Attorney-General v. Tarrington*,⁴ where an information and bill was exhibited in the Exchequer by the King's Attorney-General, and the Queen-dowager and her trustees as plaintiffs, against the lessees of the Queen, of certain lands which had been granted to her by the Crown for her jointure, in respect of the breach of the covenants in their leases; it was held that the King and Queen-dowager could not join, because their interests were several; and so, in the case of *Lord Cholmondeley v. Lord Clinton*,⁵ where a bill was filed by two persons, one claiming as devisee, and the other as heir-at-law;⁶ and the question was whether they could maintain a suit to redeem a mortgage, on the allegation "that questions having arisen as to which of them was entitled to the estate, they had agreed to divide the estate between them," Sir Thomas Plumer M. R. strongly expressed his opinion that the Court could not proceed on a bill so framed. In a subsequent case between the same parties, the title of the plaintiff was stated in the same way as in the first, and Lord Eldon, though he allowed the demurrer which was put into the bill upon other grounds, expressed a very strong opinion, that two persons claiming the same thing by different titles, but averring that it is in one or the other of them, and each contending that it was in himself, could not join in a suit as co-plaintiffs. His Lordship said, "that the difficulty of maintaining a suit where there are two plaintiffs, * A. and B., each *234 asserting the title to be in him, is this, that if the Court decides that A. is entitled, and the defendants do not complain, how is B., as a co-plaintiff to appeal from that decree?"¹ And in the recent case of *Saumerez v. Saumerez*,² where the interests of a father and his chil-

² I.d. Red. 172.

³ The objection does not apply where a sole plaintiff unites in himself two conflicting interests. *Miles v. Durnford*, 2 De G., M. & G. 641; *Carter v. Sanders*, 2 Drew. 248; *Foulkes v. Davies*, L. R. 7 Eq. 42 V. C. G. [But see *Coleman v. Pinkard*, 2 Humph. 185; *Moody v. Fry*, 3 Humph. 567; *Gilliam v. Spence*, 6 Humph. 163. And it is not permissible for a complainant to unite in his bill two inconsistent causes for equitable relief. *Wilkinson v. Dobbie*, 12 Blatchf. 298; *Bosley v. Philips*, 3 Tenn. Ch. 649. *Infra*, 313, n. 8.]

⁴ *Hardres*, 219.

⁵ 2 J. & W. 1, 135; affirmed, 4 Bli. 1;

Sugd. Law, pp. 61, 74; see also *Fulham v. McCarthy*, 1 H. L. Cas. 703; 12 Jur. 757.

⁶ A bill cannot be filed against the heirs and devisees jointly, for satisfaction of a debt of the deceased. *Schermerhorn v. Barhydt*, 9 Paige, 28.

¹ *Lord Cholmondeley v. Lord Clinton*, T. & R. 107, 115; but see *Jopp v. Wood*, 2 De G., J. & S. 323.

² 4 M. & C. 336; see also *Robertson v. Southgate*, 6 Hare, 536; but see *Griggs v. Staplee*, 2 De G. & S. 572; 13 Jur. 29, which was a suit to set aside a settlement, as a fraud on the marital right. Sir J. L. Knight Bruce, V. C., there said that if the case had been proved he should probably have relieved

dren who were joined as co-plaintiffs in the suit were at variance one with another; Lord Cottenham said, that as the record was framed, it would be quite irregular to make any adjudication concerning their conflicting interests, and directed a new bill to be filed.

In a case before the same judge, when Master of the Rolls, where a bill had been filed by the settlor in a voluntary settlement, for the purpose of avoiding the settlement, in which another person claiming as a purchaser, under the 27 Eliz. c. 4, against the parties entitled under the voluntary settlement was joined as a co-plaintiff; his Honor held, that, as the settlement was of personal property, it was not within the statute, and that, consequently, the purchaser, not having the protection of the statute, could not have a better title than the settlor from whom he purchased; but that, if he had shown a good title in himself, he could have had no relief in that suit, having associated himself as co-plaintiff with the settlor; it having been in several late cases decided that, under such circumstances, no decree can be made, although the plaintiff might, in a suit in which he was sole plaintiff, have been entitled to relief.³ Upon the same principle, it has been held, that a person who is liable to account to the other plaintiffs cannot be joined as co-plaintiff.⁴

It should be here observed, that the consequences of a misjoinder of plaintiffs, such as above considered, are no longer the same as formerly, for then the bill would have been dismissed; whereas now, the Court is empowered to grant such relief as the circumstances of the case require, to direct such amendments as it shall think fit, and to treat any of the plaintiffs as defendants.⁵

*235 * The rule that persons claiming under different titles cannot be joined as plaintiffs in the same suit, does not apply to cases where their titles, though distinct, are not inconsistent with each other.¹ Thus, all the creditors of a deceased debtor, although they claim under distinct titles, may be joined as co-plaintiffs in the same suit, to administer the assets of the debtor,² although it is not necessary that they should be so joined, as one creditor may sue for his debt against the personal estate, without bringing the other creditors before the Court.³

against the transaction, although the wife was a co-plaintiff. See 2 De G. & S. 583.

³ Bill v. Cureton, 2 M. & K. 503; see Newcomb v. Horton, 18 Wis. 566; Crocker v. Craig, 46 Maine, 327; Fletcher v. Holmes, 40 Maine, 364; Gates v. Boomer, 17 Wis. 455.

⁴ Jacob v. Lucas, 1 Beav. 436, 443; Griffith v. Vanheythuysen, 9 Hare, 85; 15 Jur. 421. [*Ante*, 233, n. 3.]

⁵ 15 & 16 Vic. c. 86, § 49. For cases of misjoinder since the Act, see Clements v. Bowes, 1 Drew. 684; Evans v. Coventry, 3 Drew. 75; 2 Jur. N. S. 557; 5 De G., M. & G. 911; Beeching v. Lloyd, 3 Drew. 227; Williams v. Salmond, 2 K. & J. 463; 2 Jur. N. S. 251; Stupart v. Arrowsmith, 3 Sm. &

G. 176; Barton v. Barton, 3 K. & J. 512; 3 Jur. N. S. 808; Carter v. Sanders, 2 Drew. 248; Hallows v. Fernie, 3 Ch. Ap. 467, L. C.; and see *post*, Chap. V. § 4, *Joinder of Uninterested Parties*.

¹ Conro v. Port Henry Iron Co., 12 Barb. 27; Merchants' Bank v. Stevenson, 5 Allen, 402, 403.

² See Crosby v. Wicliffe, 7 B. Mon. 120; Cheshire Iron Works v. Gay, 3 Gray, 534, 535.

³ Anon., 3 Atk. 572; Peacock v. Monk, 1 Ves. 127, 131. A creditor's bill under Mass. Gen. Sts. c. 113, § 2, may be brought by one creditor for himself alone. Silloway v. Columbian Ins. Co., 8 Gray, 199; see Crompton v. Anthony, 13 Allen, 33, 36, 37;

The joining, however, of several creditors in the same suit, although it might save the expense of several suits by different creditors, might nevertheless, where the creditors are numerous, be productive of great inconvenience and delay by reason of the danger which would exist of continual abatements. Courts of Equity have, therefore, adopted a practice, which at the same time that it saves the expense of several suits against the same estate, obviates the risk and inconvenience to be apprehended from joining a great number of individuals as plaintiffs, by allowing one or more of such individuals to file a bill on behalf of themselves and the other creditors upon the same estate, for an account and application of the estate of a deceased debtor; in which case, the decree being made applicable to all the creditors, the others may come in under it and obtain satisfaction for their demands as well as the plaintiffs in the suit; and if they decline to do so, they will be excluded the benefit of the decree, and will yet be considered bound by acts done under its authority.⁴ It is matter rather of convenience than indulgence, to permit such a suit by a few on behalf of all the creditors, as it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burdensome to the fund to be administered; for if a bill be brought by a single creditor for his own debt, he may, as at Law, gain a preference by the judgment in his favor over the other creditors in the same decree, who may not have used equal diligence.⁵

In suits by one creditor, on behalf of himself and the others, for *administration of the estate of a deceased debtor, the de- *236

[Barry v. Abbott, 100 Mass. 396. And where new parties come in under a creditor's bill, their names need not be interlined. Hazard v. Durant, 9 R. I. 602. To enable a creditor to question a conveyance of his debtor on the ground of fraud, he must show a lien by judgment or otherwise. Davis v. Dean, 11 C. E. Green, 436; Bigelow v. Magee, 12 C. E. Green, 392; Tennent v. Battey, 18 Kan. 324. And that he is a *bonâ fide* creditor. Townsend v. Tuttle, 28 N. J. Eq. 449. And the right to file the bill will be lost by the expiration of the lien by efflux of time. Fleming v. Grafton, 54 Miss. 79. But the creditors of a deceased debtor, who have exhausted their remedy at Law against the estate, although they have not obtained judgments on their claims, may file such a bill. Haston v. Castner, 29 N. J. Eq. 536; Shurts v. Howell, 3 Stew. Eq. 418. And the assignee of a demand has an equally good right with the original creditor to maintain a creditor's suit. Cook v. Ligon, 54 Miss. 652. And see, for cases in which Chancery entertains a creditor's bill, Fleming v. Grafton, 54 Miss. 79; Morgan v. Boyne, 7 Neb. 429. In Tennessee, by statute, the bill may be filed without the recovery of judgment. Spencer v. Armstrong, 12 Heisk. 707.] Seton, 117.

⁴ Ld. Red. 166; see 48th of the Equity Rules of the United States Courts.

⁵ Ld. Red. 166; Ridgely v. Bond, 18 Md. 433; see Attorney-General v. Cornthwaite, 2 Cox, 45; where it was admitted at the bar that where a single creditor files a bill for the payment of his own debt only, the Court does not direct a general account of the testator's debts, but only an account of the personal estate and of that particular debt, which is ordered to be paid in a course of administration; and all debts of a higher or equal nature may be paid by the executor, and allowed him in his discharge. See Gray v. Chiswell, 9 Ves. 123; Story Eq. Pl. §§ 99-102; 1 Story Eq. Jur. §§ 546-550; Brooks v. Reynolds, 1 Bro. C. C. (Perkins's ed.) 183, note (2), 180, note (5), and cases cited; Paxton v. Douglas, 8 Sumner's Ves. 520; Thompson v. Brown, 4 John. Ch. 619; Shephard v. Guernsey, 9 Paige, 337; Ram on Assets, c. 21, § 1, p. 292; Rush v. Higgs, 4 Sumner's Ves. 638, note (a), and cases cited; Hallett v. Hallett, 2 Paige, 15; Lloyd v. Loaring, 6 Sumner's Ves. 773, note (a); West v. Randall, 2 Mason, 181; Lucas v. Bank of Darien, 2 Stewart, 280; New London Bank v. Lee, 11 Conn. 112; Ballentine v. Beall, 3 Scam. 206; Coe v. Beckwith, 31 Barb. (N. Y.) 339; Hazen v. Durling, 1 Green Ch. 133. But single creditor suits are much out of use. Seton, 117.

fendant may, at any time before decree, have the bill dismissed on payment of the plaintiff's debt and all the costs of the suit.¹

In suits of this nature, the plaintiff cannot waive an account against the estate of a deceased administrator of the debtor.²

If the debt of the plaintiff be admitted or proved, and the executor or administrator admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment, and not a mere decree for an account;³ but an admission by the executor that he has paid the legacies given by the testator's will, is not an admission of assets for the payment of the plaintiff's debt, so as to entitle him to such an immediate decree.⁴

One creditor may also sue, where the demand is against the real as well as the personal assets;⁵ but although one creditor may file a bill on his own behalf alone, for administration of the personal estate, he cannot have a decree for administration of the real estate, unless he sue on behalf of himself and all the other creditors.⁶

*237 * Again in the case of creditors under a trust deed for payment of debts, a few have been permitted to sue on behalf of themselves and the other creditors named in the deed, for the execution of the trusts, although one creditor could not, in that case, have sued for his single demand, without bringing the other creditors before the Court.¹

¹ *Pemberton v. Popham*, 1 Beav. 316; 2 Jur. 1009; *Holden v. Kynaston*, 2 Beav. 204; *Manton v. Roe*, 14 Sim. 353; *post*, Chap. XIX., § 1, *Dismissing Bills*. As to costs, see cases above referred to, and *Penny v. Beavan*, 7 Hare, 133; 12 Jur. 936.

² *Wadson v. Rudge*, 1 C. P. Coop. t. Cott. 369; but see *Symes v. Glynn*, and *Pease v. Cheesborough*, cited *Seton*, 115. [See *Woodfin v. Anderson*, 2 Tenn. Ch. 331.]

³ *Woodgate v. Field*, 2 Hare, 211; 6 Jur. 871; see also *Owens v. Dickinson*, C. & P. 48, 56; 4 Jur. 1151; *Field v. Titmus*, 1 Sim. N. S. 218; 15 Jur. 121. For form of decree for payment, see *Seton*, 115, No. 3.

⁴ *Savage v. Lane*, 8 Hare, 32; *Field v. Titmus*, 1 Sim. N. S. 218; 15 Jur. 121; *Hutton v. Rossiter*, 7 De G., M. & G. 9.

⁵ *Leigh v. Thomas*, 2 Ves. S. 312, 313.

⁶ *Bedford v. Leigh*, 2 Dick. 707; *May v. Selby*, 1 Y. & C. C. 235; 6 Jur. 52; *Blair v. Ormond*, 1 De G. & S. 428; 11 Jur. 665; *Ponsford v. Hartley*, 2 J. & H. 736; *Seton*, 117; *Johnson v. Compton*, 4 Sim. 47; [*Woraker v. Pryer*, 2 Ch. Div. 109, overruling *Cooper v. Blisset*, 1 Ch. Div. 691.] See form of contingent prayer, in a bill by one creditor, *Tomlin v. Tomlin*, 1 Hare, 236. In such cases leave to amend will generally be given at the hearing; see cases above cited. After decree in a single creditor's suit, an account was taken of the real estate; the bill being taken as a bill on behalf of all the creditors; *Woods v. Sowerby*, 14 W. R. 9, V. C. W.; see *Story Eq. Pl.* § 161, note. Although one incumbrancer cannot sue without making other incumbrancers parties, yet it has been held that this is cured by a decree

directing an account to be taken of all the mortgages and incumbrances affecting the estate. See *Vin. Ab. tit. Party (B)*, ca. 51. Where a bill has been filed by a single bond creditor to establish his claim against the real estate of his deceased debtor, the Court has permitted it to be amended by making it a bill "on behalf of himself and of the other specialty creditors." *Johnson v. Compton*, *ubi supra*. Where a judgment creditor files a bill to obtain aid in enforcing the payment of his judgment at Law, it is no ground of demurrer that other creditors, not in equal degree, are not made parties to the bill. *Way v. Bragaw*, 1 C. E. Gr. en (N. J.), 213, 216, 217; *Edgell v. Haywood*, 3 Atk. 357; see *Clarkson v. Depeyster*, 3 Paige, 320; *Parmelee v. Egan*, 7 Paige, 610; *Grosvenor v. Allen*, 9 Paige, 74; *Farnham v. Campbell*, 10 Paige, 598.

¹ *Corry v. Trist*, Ld. Red. 167; *Murphy v. Jackson*, 5 Jones Eq. (N. C.) 11; see, however, *Harrison v. Stewardson*, 2 Hare, 530, where Sir J. Wigram V. C. decided, that twenty creditors interested in a real estate were not so large a number as that the Court would, on the ground of inconvenience alone, allow a few of them to represent the others, and dispense with such others as parties, in a suit to recover the estate against the whole body of creditors. See *Story Eq. Pl.* §§ 150, 207; *Bainbridge v. Burton*, 2 Beav. 539; *Johnson v. Candage*, 31 Maine, 28; *Bryant v. Russell*, 23 Pick. 508; *Stevenson v. Austin*, 3 Met. 474. In case of an assignment for the benefit of creditors, all the creditors should be joined in a bill to compel a distribution of the fund; but one creditor

And where the trust fund was to be distributed amongst the joint and separate creditors of the firm, a bill of this description was permitted by a separate creditor only, on behalf of himself and the other joint and separate creditors.²

In suits for marshalling assets, simple-contract creditors must be joined as plaintiffs, as well as creditors by specialty; for, upon a bill by specialty creditors only, the decree would be merely for the payment of the debts out of the personal estate, and, if that should not prove sufficient for the purpose, for the sale and application of the real estate. The right to call for such an arrangement of the property as will throw those who have debts payable out of both descriptions of estate upon the real estate, in order that the personalty may be left clear for those whose demands are only payable out of the personal estate, belongs to the simple-contract creditors, who have an equity either to compel the payment of the specialty debts out of the real estate, or else to stand in the place of the specialty creditors, as against the real estate, for so much of the personal estate as they shall exhaust. It is proper, therefore, in bills of this nature, to file them in the names of a specialty *cred- * 238 itor and of a creditor by simple contract, on behalf of themselves and of all others the specialty and simple-contract creditors.¹

By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and the other legatees; because, as he might sue for his own legacy only, a suit by one on behalf of all the legatees, has the same tendency to prevent inconvenience and expense, as a suit by one creditor on behalf of all creditors of the same fund.² For the same reason, where it has been sought to apply personal estate amongst next of kin, or amongst persons claiming as legatees under a general description, and it may be uncertain who are the persons answering that description, bills have been admitted by one claimant on behalf of himself and of others equally interested.³

alone may maintain a bill for a violation of the trust injurious to himself separately. *Dimmock v. Bixby*, 20 Pick. 368. When creditors claim under a deed of trust for the payment of debts, they need not make as parties to their bill those who are in a posterior class to themselves, but they must make, as parties, all who are in their own class. *Patton v. Bencini*, 6 Fred. Eq. 204. No decree for the distribution of a fund in Court can be made, until all persons interested are made parties. *De La Vergne v. Evertson*, 1 Paige, 181; *Greene v. Sisson*, 2 Curtis C. C. 171. All the distributees are necessary parties to a bill for distribution. *Hawkins v. Craig*, 1 B. Mon. 27. All persons interested in the trust estate ought to be joined in a suit for its administration. *Elam v. Garrard*, 25 Georgia, 557; *High v. Worley*, 32 Ala. 709; *D'Wolf v. D'Wolf*, 4 R. I. 450; *Gould v. Hayes*, 19 Ala. 438; *Keeler v. Keeler*, 3 Stockt. (N. J.) 458.

Creditors of a testator may intervene by petition, and be made parties to a suit by the

legatees and devisees, brought for the purpose of falsifying the accounts of the executor. *Smith v. Britton*, 2 P. & H. (Va.) 124.

² *Weld v. Bonham*, 2 S. & S. 91; and see *Richardson v. Hastings*, 7 Beav. 323; *Smart v. Bradstock*, 7 Beav. 500.

¹ By the 32 & 33 Vic. c. 46, it is enacted that in the administration of the estate of any person dying on or after the 1st Jan. 1870, no debt shall be entitled to preference merely because it is a specialty debt, but all the creditors shall be treated as standing in equal degree, and be paid accordingly out of the assets, whether legal or equitable.

² *Ld. Red. 167*; *Story Eq. Pl. § 104*; *Brown v. Ricketts*, 3 John. Ch. 553; *Fish v. Howland*, 1 Paige, 20, 23; *Kettle v. Crary*, 1 Paige, 417, note; *Hallett v. Hallett*, 2 Paige, 20, 21.

³ *Ld. Red. 169*; *Smith v. Leathart*, 20 L. J. Ch. 202, V. C. K. B.; *Story Eq. Pl. § 105*; see now 15 & 16 Vic. c. 86, § 42, r. 1.

So, also, in the case of appointees under the will of a married woman, made in pursuance of a power, where they were very numerous, a bill was permitted by some in behalf of all.⁴

The right of a few persons to represent the class is not confined to the instances of creditors and legatees;⁵ and the necessity of the case has induced the Court, especially of late years, frequently to depart from the general rule in cases where a strict adherence to it would probably amount to a denial of justice, and to allow a few persons to sue on behalf of great numbers having the same interest;⁶ thus, some of the proprietors of a trading undertaking, where the shares had been split or divided into 800, were permitted to maintain a suit on behalf of themselves and others, for an account against some of their copartners, without bringing the whole before the Court,⁷ "because it would have been impracticable to make them all parties by name, and there would be continual abatement by death and otherwise, and no coming at justice,

if they were to be made parties;" and in case of a trade partnership of more than twenty-five persons formed * before the 7 & 8 Vic. c. 110, and registered under § 58 of that Act, but not otherwise registered, some members were allowed to sue on behalf of themselves and other members to restrain a nuisance;¹ and so, where all the inhabitants of a parish had rights of common under a trust, a suit by one, on behalf of himself and the other inhabitants, was admitted;² and a freeholder and copyholder of a manor may sue on behalf of himself and all other the freehold and copyhold tenants, to have their rights of common ascertained, notwithstanding the rights of each freeholder are separate and distinct from those of the copyholders;³ but although one copyholder may sue on behalf of himself and the other copyholders to have the rights of common ascertained, he cannot sue on behalf of himself alone for that purpose.⁴ So, also, one owner of lands in a township has been permitted to sue on behalf of himself and the others to establish a contributory modus for all the lands there.⁵ Upon the same principle, a bill was allowed by the cap-

⁴ Manning v. Thesiger, 1 S. & S. 106.

⁵ See per *Ld. Eldon*, in *Lloyd v. Loaring*, 6 Ves. 779.

⁶ *Ld. Red.* 169; *Story Eq. Pl.* § 94 *et seq.*, and the cases cited in notes; *West v. Randall*, 2 Mason, 192-196; *Wendell v. Van Rensselaer*, 1 John. Ch. 349; *Hallett v. Hallett*, 2 Paige, 18-20; *Cullen v. Duke of Queensberry*, 1 Bro. C. C. (Perkins's ed.) 101, and *Mr. Belt's notes*; *Moffats v. Farquharson*, 2 *id.* 338, note (1); *Lloyd v. Loaring*, 6 Sumner's Ves. 773, note (a), and cases cited; *Willis v. Henderson*, 4 Seam. 20; *Mann v. Butler*, 2 Barb. Ch. 362; *Per Foster J.* in *Williston v. Michigan Southern & Northern R.R. Co.*, 13 Allen, 406; *Peabody v. Flint*, 6 Allen, 52; *Mason v. York & Cumberland R.R. Co.*, 52 Maine, 107-109; *March v. Eastern R.R. Co.*, 40 N. H. 566; *Smith v. Swomstedt*, 16 How. U. S. 288; 43rd of the Equity Rules of the United States Courts.

⁷ *Chancey v. May*, *Prec. Ch.* 592.

¹ *Wormsley v. Merritt*, L. R. 4 Eq. 695, V. C. M.

² *Blackham v. The Warden and Society of Sutton Coldfield*, 1 Ch. Ca. 269. It has been doubted whether the Attorney-General ought not to have been a party to that suit. See *Ld. Red.* 149; and see *Attorney-General v. Hoelis*, 2 S. & S. 67; but see *Attorney-General v. Moses*, 2 Mad. 294.

³ *Smith v. Earl Brownlow*, L. R. 9 Eq. 241, M. R.; see *Warrick v. Queen's College, Oxford*, W. N. (1870) M. R.; 18 W. R. 719, M. R.; L. R. 10 Eq. 105; *Betts v. Thompson*, W. N. (1870) 203; 18 W. R. 1099, M. R.

⁴ *Phillips v. Hudson*, L. R. 2 Ch. Ap. 243, L. C.

⁵ *Chaytor v. Trinity College*, 3 Anst. 841; *Story Eq. Jur.* § 121, and cases cited.

tain of a privateer on behalf of himself and of all other the mariners and persons who had signed certain articles of agreement with the owners, for an account and distribution of the prizes made by the ship.⁶ And in *Lloyd v. Loaring*,⁷ Lord Eldon expressed his opinion, that some of the members of a lodge of Freemasons, or of one of the inns of court, or of any other numerous body of persons, might sustain a suit on behalf of themselves and the others, for the delivery up of a chattel in which they were all interested.

The great increase in the number of Joint-Stock Companies, and trading associations, in which large classes of persons are jointly interested, has had the effect, in modern times, of extending the practice, which allows a few persons to sue in Equity on behalf of themselves and others similarly interested.⁸ In the case of *Walworth v. Holt*,⁹ the bill was filed by the plaintiffs on behalf of themselves and all others, the shareholders and partners of the banking company, called the Imperial Bank of England, except those who were made defendants. It did not in terms pray a dissolution, or a final winding up of the affairs of the company, *but it prayed the assistance of the Court in *240 the realization of the assets of the company, and in the payment of its debts, and that for that purpose a receiver might be appointed, and authorized to sue for calls unpaid and other debts due to the company in the name of the registered officer, who was one of the defendants. To this bill a demurrer was put in, upon the argument of which the two most important objections to the bill were, 1st, That it was not the practice of the Court to interfere between partners, except upon a bill praying a dissolution; and 2dly, That all the parties interested in the concern were necessary parties to the bill. Lord Cottenham overruled the demurrer, and in his judgment observed,¹ "The result, therefore, of these two rules, the one binding the Court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it, would be, that the door of this Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties; which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law; for, as I have said upon other occasions,² I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different

⁶ *Good v. Blewitt*, 13 Ves. 397. In that case the bill was originally filed by the captain in his own right, but was allowed to be amended by introducing the words, "on behalf of himself," &c., 13 Ves. 398; see *West v. Randall*, 2 Mason, 193, 194; *Story Eq. Pl.* § 98.

⁷ 6 Ves. 773, 779; see *Sumner's ed. note (a)*.

⁸ *Beatty v. Kurtz*, 2 Peters, 566; *Smith v. Swomestedt*, 16 How. U. S. 288; *Whitney v. Mayo*, 15 Ill. 251; *Putnam v. Sweet*, 1 Chand. (Wis.) 286; *Morgan v. New York and Albany R.R. Co.*, 10 Paige, 290.

⁹ 4 M. & C. 635.

¹ *Ibid.*

² See *Mare v. Malachy*, 1 M. & C. 559; *Taylor v. Salmon*, 4 M. & C. 134, 141.

circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to. It is the ground upon which the Court has, in many cases, dispensed with the presence of parties who would, according to the general practice, have been necessary parties.”³

In *Mozley v. Alston*,⁴ Lord Cottenham said, that this form of suit is “subject to this restriction: that the relief which is prayed must be one in which the parties whom the plaintiff professes to represent, have all of them an interest identical with his own; for if what is asked may by possibility be injurious to any of them, those parties must be made defendants; because each and every of them may have a case to

* 241 make, adverse to the interests of the parties *suing. If, indeed, they are so numerous that it is impossible to make them all defendants, that is a state of things for which no remedy has yet been provided.” If, however, such persons are so numerous that it is impossible to make them parties, it is apprehended that, according to the present practice, the Court will, in such cases, permit the suit to proceed, upon one or several of such parties having interests not identical with the plaintiff, or of each class of them, if there are several classes, being made defendant to represent the others; unless indeed the object of the suit is to have the partnership or company dissolved.¹

The fact of a company being incorporated by Act of Parliament does not appear necessarily to prevent individual members of the corporation suing on behalf of themselves and the other members of the company. In *Foss v. Harbottle*,² Sir J. Wigram V. C. observed, “corporations of this kind are in truth little more than private partnerships; and in cases

³ Story Eq. Pl. §§ 76, 96, 115, 115 a, 115 b; West v. Randall, 2 Mason, 181; Colt v. Lesnier, 9 Cowen, 320, 330; Deeks v. Stanhope, 14 Sim. 57; Collyer Partn. (Perkins's ed.) 361, in note; Taylor v. Salmon, 4 M. & C. 134, 141. Representatives of a deceased partner should be made parties to a bill to dissolve a partnership, and the bill may be amended for that purpose. Buchard v. Boyce, 21 Geo. 6.

⁴ 1 Phil. 790, 798; 11 Jur. 315; Moseley v. Cressey's Company, L. R. 1 Eq. 405; 12 Jur. N. S. 46, V. C. W.; see also Milligan v. Mitchell, 3 M. & C. 72; 1 Jur. 888; Hichens v. Congreve, 4 Russ. 562, 574; Gordon v. Pym, 3 Hare, 223, 227; Apperly v. Page, 1 Phil. 779, 785; 11 Jur. 271; Richardson v. Hastings, 7 Beav. 323, 326; 11 Beav. 17; 8 Jur. 72; Beeching v. Lloyd, 3 Drew. 227; Moor v. Veazie, 32 Maine, 355.

¹ Richardson v. Larpent, 2 Y. & C. C. C. 507, 514; 7 Jur. 691; Pare v. Clegg, 29 Beav. 589, 602; 7 Jur. N. S. 1136; Bromley v. Williams, 32 Beav. 177; 9 Jur. N. S. 240; Hoole v. Great Western Railway Company, L. R. 3 Ch. Ap. 262, 273, L. J.J.; Cramer v. Bird, L. R. 6 Eq. 143, 148; Pickering v. Williams, 15 W. R. 218, V. C. S.; see, however, Carlisle v. South Eastern Railway Co., 1 M.N.

& G. 689, 699; 14 Jur. 535; Fawcett v. Lawrie, 1 Dr. & S. 192, 203; as to making the Corporation a defendant in its corporate character, see Bagshaw v. Eastern Union Railway Co., 7 Hare, 114; 13 Jur. 602; 2 M.N. & G. 389; 14 Jur. 491.

² 2 Hare, 491; see also Preston v. Grand Collier Dock Co., 11 Sim. 327, 344; S. C. nom. Preston v. Guyon, 5 Jur. 146; Bagshaw v. Eastern Union Railway Co., and Carlisle v. South Eastern Railway Co., *ubi supra*; Graham v. Birkenhead Railway Co., 2 M.N. & G. 146, 156; 14 Jur. 494; Colman v. Eastern Counties Railway Co., 10 Beav. 1, 12; 11 Jur. 74; Salomons v. Laing, 12 Beav. 339; 14 Jur. 279; Fraser v. Whalley, 2 H. & M. 10; East Pant Du Co. v. Merryweather, 10 Jur. N. S. 1231; 13 W. R. 316, V. C. W.; 2 H. & M. 254; Moseley v. Cressey's Company, L. R. 1 Eq. 405; 12 Jur. N. S. 46, V. C. W.; Hoole v. Great Western Railway Company, L. R. 3 Ch. Ap. 262, L. J.J.; Bloxam v. Metropolitan Railway Co., L. R. 3 Ch. Ap. 237, L. C.; Atwood v. Merryweather, L. R. 5 Eq. 464, n. (3); V. C. W.; Clinch v. Financial Corporation, L. R. 5 Eq. 450, V. C. W.; affirmed, L. R. 4 Ch. Ap. 117, L. C. & L. J.J.; Cramer v. Bird, L. R. 6 Eq. 143, M. R.; Kernaghan v. Williams, L. R. 6 Eq. 228,

which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, *inter se*, because, in order to make their common objects more attainable, the Crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such a character the protection of those rights to which in their corporate capacity they were entitled; I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Walworth v. Holt*,³ and other cases, would apply, and the *claims of justice would be *242 found superior to any difficulties arising out of technical rules, respecting the mode in which corporations are required to sue."¹ In the case last referred to, the Vice Chancellor allowed a demurrer, on the ground that upon the case as stated in the bill, there was nothing to prevent the company from obtaining redress in respect of the matters complained of in its corporate character, and that, therefore, the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation.²

It is generally necessary, in order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent.³ Where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained;⁴ and a plaintiff cannot, in one portion of a bill, sue on behalf of himself and all the other members of a company, and by another portion seek to establish a demand against the company.⁵ Where

M. R.; *Salisbury v. Metropolitan Railway Company*, W. N. (1869) 52, W. N. (1870) 70; 18 W. R. 484, V. C. J.; *ib.*, W. N. (1870) 74, L. J. G.; *ib.* 182, V. C. J., 13 W. R. 974, V. C. J.; *Sweny v. Smith*, L. R. 7 Eq. 324, M. R.

³ 4 M. & C. 635.

¹ One stockholder of a manufacturing corporation cannot alone maintain a bill in Equity to compel the execution of a trust, by persons who have taken a conveyance of the company's property in trust to pay its debts, because he stands in the same right with all the other stockholders, who have a common interest with him in enforcing the trust, and all of whom should be made parties, if not too numerous, or, if too numerous, the bill should be brought by some in behalf of all, so that the rights of all may be duly adjudicated in the final decree. *Heath v. Ellis*, 12 Cush. 601; *Allen v. Curtis*, 26 Conn. 456. Where the plaintiff sued on behalf of himself and others, it was held, that the defendant, after answering to the merits of the bill, could not

object that the plaintiff had no right to bring his bill in that form. *Messervy v. Barelli*, 2 Hill Ch. 567; see *ante*, pp. 26, 144, notes.

² See also *Mozley v. Alston*, 1 Phil. 790, 797; *Lord v. The Governor and Company of Copper Miners*, 2 Phil. 740, 749; *Yetts v. Norfolk Railway Co.*, 3 De G. & S. 293; 13 Jur. 249. [*Macdougall v. Gardner*, 1 Ch. Div. 14; *Pender v. Lushington*, 6 Ch. Div. 70; *Duckett v. Gover*, 6 Ch. Div. 82.]

³ *Gray v. Chaplin*, 2 S. & S. 267, 272, *Attorney-General v. Heelis*, 2 S. & S. 67, 75; *Colman v. Eastern Counties Railway Company*, 10 Beav. 1, 13; *Carlisle v. South Eastern Railway Company*, 1 M. & G. 689, 698; *Mullock v. Jenkins*, 14 Beav. 628; *Williams v. Salmond*, 2 K. & J. 463; 2 Jur. N. S. 251; *Moseley v. Cressey's Company*, L. R. 1 Eq. 405; 12 Jur. N. S. 46, V. C. W.

⁴ *Van Sandau v. Moore*, 1 Russ. 441, 445; *Lovell v. Andrew*, 15 Sim. 581, 584; 11 Jur. 485; *Bainbridge v. Burton*, 2 Beav. 536.

⁵ *Thomas v. Hobler*, 4 De G., F. & J. 199; 8 Jur. N. S. 125.

three of the subscribers to a loan of money to a foreign State filed a bill on behalf of themselves and all other subscribers to that loan, to rescind the contracts of subscription, and to have the subscription moneys returned, it was held, that the plaintiffs were not entitled, in that case, to represent all the other subscribers, because it did not necessarily follow that every subscriber should, like them, wish to retire from the speculation, and every individual must, in that respect, judge for himself.⁶ And upon the same principle, one of the inhabitants of a district, who claims a right to be served with water by a public company, cannot file a bill on behalf of himself and the other inhabit-

*243 ants, to compel that company to supply water *to the district upon particular terms; because, what might be reasonable with respect to one, might not be so with regard to the others.¹ This form of suit cannot be adopted where each of the class on behalf of whom it is instituted has a separate demand in Equity: ² and, therefore, a suit by a shareholder in a joint-stock company, on behalf of himself and the other shareholders, seeking relief from the shares, and the return of the deposits, on the ground of fraud or misrepresentation in the prospectus, cannot be maintained; for the case of each person who has been deceived is peculiar to himself, and must depend upon its own circumstances.³ Neither can this form of suit be adopted where the act complained of is voidable and capable of confirmation by the members of the company, nor where it is a mere matter of internal regulation.⁴ Where, however, the object sought is such that a suit of this nature may be instituted, it may be maintained, although a majority of the class on behalf of whom it is instituted disapprove of it.⁵

Where the object of the suit is the dissolution of a partnership, all the partners must, it would seem, be parties to the suit, and a suit by one partner on behalf of himself and others, cannot be maintained.⁶ In

⁶ *Jones v. Garcia Del Rio*, T. & R. 297, 300.

¹ *Weale v. West Middlesex Waterworks*, 1 J. & W. 358, 370; see *Beaumont v. Meredith*, 3 V. & B. 181; *Story Eq. Pl.* §§ 120, 123, 125.

² *Jones v. Garcia Del Rio*, T. & R. 297, 300; *Blain v. Agar*, 1 Sim. 37, 43; 2 Sim. 289; *Croskey v. The Bank of Wales*, 4 Giff. 314; 9 Jur. N. S. 595; *Hallows v. Fernie*, L. R. 3 Ch. Ap. 467, L. C.; *Turquand v. Marshall*, L. R. 6 Eq. 112, M. R.

³ *Croskey v. The Bank of Wales*, 4 Giff. 314; 9 Jur. N. S. 595; *Hallows v. Fernie*, L. R. 3 Ch. Ap. 467, L. C.

⁴ *Foss v. Harbottle*, 2 Hare, 461; *Mozley v. Alston*, 1 Phil. 790; 11 Jur. 315; *Lord v. Governor and Company of Copper Miners*, 2 Phil. 740; 12 Jur. 1059; *Yettis v. Norfolk Railway Company*, 3 De G. & S. 293; 13 Jur. 249; *Browne v. The Monmouthshire Railway and Canal Company*, 13 Beav. 32; *Stevens v. South Devon Railway Company*, 9 Hare, 313; *Macdougall v. Jersey Imperial Hotel Company*, 2 H. & M. 528; *Clinch v. Financial Corporation*, L. R. 5 Eq. 451, 482.

V. C. W., affirmed L. R. 4 Ch. Ap. 117, L. C. & L. J.J.; *Lambert v. Northern Railway of Buenos Ayres*, 18 W. R. 180, V. C. M. For exceptional circumstances under which such a bill was permitted, see [*Ante*, 26, n. 1.]

⁵ *Bromley v. Smith*, 1 Sim. 8; *Small v. Attwood*, *Younge*, 407, 456; and see *William v. Salmond*, 2 K. & J. 463; 2 Jur. N. S. 251; *Kernaghan v. Williams*, L. R. 6 Eq. 228, M. R.

⁶ *Long v. Yonge*, 2 Sim. 369, 385; *Beaumont v. Meredith*, 3 V. & B. 180; *Abraham v. Hannay*, 13 Sim. 581; *Deeks v. Stanhope*, 14 Sim. 57; 8 Jur. 349; *Wilson v. Stanhope*, 2 Coll. 629; 10 Jur. 421; *Richardson v. Larpent*, 2 Y. & C. C. 507; 7 Jur. 691; *Richardson v. Hastings*, 7 Beav. 301; 11 Beav. 17; 8 Jur. 72; *Van Sandau v. Moore*, 1 Russ. 441, 456; *Cooper v. Webb*, 15 Sim. 454, 463; on appeal, 11 Jur. 443; *Apperly v. Page*, 1 Phil. 779, 785; 11 Beav. 271; *Harvey v. Big-nold*, 8 Beav. 343, 345. But see *Lindley Partn.*, 917, 1029; *Cockburn v. Thompson*, 16 Ves. 321, 325.

cases of joint-stock companies, the difficulties attending a suit for winding up their affairs have led to the introduction of a special mode of so doing.⁷

Where the object of the suit is to restrain the commission of acts which are *ultra vires*, or such that they cannot be confirmed by the members of a corporation, any one member may sue on behalf of himself and the other members to restrain them;⁸ but it is *not *244 necessary he should adopt that form of suit, and he may sue in his own name.¹

In suits of this nature, the plaintiff, as he acts upon his own mere motion, and at his own expense, retains (as in other cases) the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure; after decree, however, he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it.²

One of the objections which has been suggested to suits being framed in this manner is, that if the bill is dismissed with costs, other members of the partnership or company may still file another bill for the same object: but in *Barker v. Walters*,³ Lord Langdale M. R. said, that where a company had authorized some of its members to enter into obligations for it, and they then came to the Court for relief against third parties, in the name and for the benefit of all, and the Court dismissed the suit, his impression was, that the Court would not allow other members to prosecute another suit for the same object.

In adopting this form of suit, care must be taken in selecting the plaintiff; for as, on the one hand, a plaintiff, who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested, though no other may wish to sue; so, although there are a hundred who wish to institute a suit and are entitled to sue, still, if they sue by a plaintiff only, who has personally precluded himself from suing,

⁷ The Companies Act, 1862 (25 & 26 Vic. c. 89), Part IV.

⁸ *Hodgkinson v. The National Live Stock Insurance Company*, 26 Beav. 473; 5 Jur. N. S. 478; 4 De G. & J. 422; 5 Jur. N. S. 969; *Lyde v. Eastern Bengal Railway Company*, 36 Beav. 10; *Bloxam v. Metropolitan Railway Company*, L. R. 3 Ch. Ap. 337, L. C.; *Clinch v. Financial Corporation*, L. R. 5 Eq. 450, V. C. W.; affirmed, L. R. 4 Ch. Ap. 117, L. C. & L. J.; *Kernaghan v. Williams*, L. R. 6 Eq. 228, M. R.; *Gray v. Lewis*, L. R. 8 Eq. 526, V. C. M. [*Ante*, 26, n. 1.]

¹ *Hoole v. Great Western Railway Company*, L. R. 3 Ch. Ap. 262, L. J.

² See *post*, Chap. XIX., *Dismissing Bills*, *Handford v. Storie*, 2 S. & S. 196; *York v. White*, 10 Jur. 168, M. R.; *Armstrong v. Storer*, 9 Beav. 277; see also *Brown v. Lake*, 2 Coll. 620; *Johnson v. Hammersley*, 24 Beav. 498; *Whittington v. Edwards*, 7 W. R. 72, L. C.; *Inchley v. Alsop*, 7 Jur. N. S. 1181; 9 W. R. 649, M. R.; *Hubbell v. War-*

ren, 8 Allen, 173, 177; *Udlike v. Doyle*, 7 R. I. 446, 462; *Collins v. Taylor*, 3 Green Ch. 163. But in *Atlas Bank v. Nahant Bank*, 23 Pick. 480, 492, *Shaw v. C. J.* said: "The plaintiffs having once instituted the proceedings as a statute remedy for themselves and others, they go on afterwards for the benefit of all parties concerned, and the original plaintiffs have no power to discontinue any more than a petitioning creditor could discontinue the proceedings under a commission of bankruptcy." And now it is enacted by statute in Massachusetts that after a suit in Equity to enforce the liability of stockholders or officers of manufacturing corporations, shall have been commenced, it shall not be competent for the plaintiff to dismiss the same without order of Court, and such notice to other creditors as the Court may deem reasonable under the circumstances. St. 1862, c. 218, § 8.

³ 8 Beav. 97; 9 Jur. 73.

the suit cannot proceed.⁴ A plaintiff thus suing must be a *bonâ fide* shareholder, and sue *bonâ fide* for the benefit of the company;

*245 therefore, where a *director in another company took shares for the purpose of filing a bill, and was indemnified by such company, the bill was dismissed.¹

In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.²

In all cases, where one or a few individuals of a large number, institute a suit on behalf of themselves and the others, they must so describe themselves in the bill; otherwise a demurrer or plea for want of parties will lie.³ Thus, where a part of a ship's crew appointed two of their number to be agents, and a bill was filed by such agents in their own name, and not on behalf of themselves and the others, a demurrer was allowed for not having made the whole crew parties;⁴ and where a bill was filed by three partners in a numerous trading company, against the members of the committee for managing the trading concerns of the company, it was dismissed, because it was not filed by the plaintiffs "on behalf of themselves and the other partners, not members of the committee."⁵ And the Court is bound to ascertain, by strict proof, that the parties by whom the bill is filed have the interests which they say they have.⁶

The Court will generally at the hearing allow a bill, which has originally been filed by one individual of a numerous class in his own right, to be amended, so as to make such individual sue on behalf of himself, and the rest of the class.⁷

⁴ Per L. J. Knight Bruce, *Burt v. The National Life Assurance Association*, 4 De G. & J. 158, 174; *Hubbell v. Warren*, 8 Allen, 173, 177. See as to requiring security for costs from a plaintiff in such a suit who is insolvent, *Tredwell v. Byrch*, 1 Y. & C. Ex. 476.

¹ *Forrest v. Manchester, Sheffield and Lincolnshire Railway Company*, 30 Beav. 40; 7 Jur. N. S. 749; *ib.* 887; 4 De G. & J. 126; see also, *Colman v. Eastern Counties Railway Company*, 10 Beav. 1; 11 Jur. 74; *Bloxam v. Metropolitan Railway Company*, L. R. 3 Ch. Ap. 337, L. C.; *Salisbury v. Metropolitan Railway Company*, W. N. (1869) 52, V. C. J. 2 15 & 16 Vic. c. 86, § 42, r. 5; and see *Ackroyd v. Briggs*, 14 W. R. 25, V. C. S.

³ *March v. Eastern R.R. Co.*, 40 N. H. 506. In a bill in Equity brought by an administrator of an insolvent estate, to obtain a reconveyance of land alleged to have been conveyed by the intestate, without consideration, to defraud his creditors, it must be alleged in the bill that the suit is instituted for the benefit of all the creditors of the estate. *Crocker v. Craig*, 46 Maine, 327; *Fletcher v. Holmes*, 40 Maine, 364; [*Boxy v. McKay*, 4 Sneed, 286].

⁴ *Leigh v. Thomas*, 2 Ves. 312.

⁵ *Baldwin v. Lawrence*, 2 S. & S. 18; and see *Douglass v. Horsfall*, 2 S. & S. 184.

⁶ *Clay v. Rufford*, 8 Hare, 281, 288; 14 Jur. 803; and see *Smith v. Leathhart*, 20 L. J. Ch. 202, V. C. K. B. A suit instituted by a plaintiff having only a nominal interest on behalf of a body of shareholders, not for the benefit of the plaintiff, but for improper purposes, at the instigation of another person, who indemnifies the plaintiff against the costs of the suit, will be treated as an imposition on the Court, and the bill will be ordered to be taken off the file. *Robson v. Dodds*, L. R. 8 Eq. 301; see *Seaton v. Grant*, L. R. 2 Ch. Ap. 459.

⁷ *Lloyd v. Learing*; see also *Milligan v. Mitchell*, 1 M. & C. 433; *Gwatkin v. Campbell*, 1 Jur. N. S. 131, V. C. W.; *Reese River Silver Mining Company v. Atwell*, L. R. 7 Eq. 347, M. R.; and *post*, on *Amending Bills*. If a bill is brought in behalf of the plaintiff and such others having a like interest as may come in to prosecute the suit, and no others come in, the plaintiff has the control of the suit for himself alone, and, in order to maintain his bill, he must show that he is himself entitled to equitable relief. *Hubbell v. Warren*, 8 Allen, 173.

* SECTION II. — *Of Necessary Parties to a Suit, in respect of their interest in resisting the Demands of the Plaintiff.*¹ *246

A person may be affected by the demands of the plaintiff in a suit, either immediately or consequentially.² Where an individual is in the actual enjoyment of the subject-matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claims, in such cases he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit; but there may be other persons who, though not immediately interested in resisting the plaintiff's demands, are yet liable to be affected by them consequentially, because the success of the plaintiff against the defendants who are immediately interested, may give those defendants a right to proceed against them, for the purpose of compelling them to make compensation, either in the whole or in part, for the loss sustained. Those persons, therefore, as being consequentially liable to be affected by the suit, must frequently also be parties to it. The question, therefore, of who are necessary parties to a suit in respect to their interest in resisting the plaintiff's demands, resolves itself into two; namely, Who are necessary parties, *first*, in respect of their immediate interest? and *secondly*, in respect of their consequential interest?

The reader's attention will be first directed to the question, who are necessary parties to a suit, in respect of their immediate interest in resisting the plaintiff's demand. And here it is to be observed, that where parties are spoken of as having an interest in the question, it is not intended to confine the definition to those only who are beneficially interested, but it is to be considered as extending to all persons who have any estate, either legal or equitable, in the subject-matter, whether such estate be beneficial to themselves or not.³

* Under this definition are included all persons who fill the *247 character of trustees of the property in dispute. But the rule is subject to exception, where the party is in the situation of a mere naked trustee, without any estate vested in him, in which case he need not, in

¹ See *ante*, notes to pp. 190, 191, and Equity Rules 22 & 48 of the United States Courts.

² A town must be a party to a bill in Equity to restrain its treasurer from paying out money voted at legal meetings of the town for illegal purposes. *Allen v. Turner*, 11 Gray, 436; see *Clark v. Wardwell*, 55 Maine, 61.

³ In a suit seeking to reform a deed, the holder of an equity of redemption not barred by lapse of time, under a mortgage not foreclosed, is a party in interest, and must be notified; and so also of the grantor and grantee in the deed sought to be reformed. *Pierce v. Faunce*, 47 Maine, 507.

Where A. contracts to convey land to B., but actually conveys the land to C., both A. and C. are proper parties to a bill filed by B. for specific performance. *Daily v. Litchfield*, 10 Mich. 29. In a suit to set aside a deed for fraud against creditors, both the grantor and grantee are necessary parties. *Lovejoy v. Ireland*, 17 Md. 525. [*Ante*, 231, n. 4.]

If the trustee in an assignment to secure a note dies, the maker of the trust and note is a necessary party to a bill for the appointment of a new trustee. *Holden v. Stickney*, 2 McAr. 141; *Maxwell v. Finnie*, 6 Coldw. 434; *Edmondson v. Harris*, 2 Tenn. Ch 437.]

general, be made a party. Thus, a broker or agent signing a contract in his own name for the purchase or sale of property, is not considered a necessary party to a bill for a specific performance of such contract against his principal.¹ And so, where a person having no interest in the matter joins with another who has, in a contract for sale, as where a man having gone through a fictitious ceremony of marriage with a woman, joins with her as her husband in an agreement to sell her property, he is not a necessary party to a suit to enforce the contract.²

In all cases, however, in which any estate is vested in an individual filling the character of trustee, or, if he has no estate, where the circumstances are such, that in the event of the plaintiff succeeding in his suit, the defendant may have a demand over against him, he is a necessary party.³ Thus in *Jones v. Jones*,⁴ where a plaintiff sought to set aside a lease on the ground of forgery, without bringing before the Court the trustees who were parties to the lease, and to whom the fraud was imputed, the objection for want of parties was allowed, because if the plaintiff prevailed, the defendant might have a remedy over against the trustees. Upon the same principle, where the trustees of real estates had conveyed them over to purchasers, it was determined, that on a bill by the *cestui que trusts* against the purchasers to set aside the conveyance, the trustees were necessary parties.⁵

A trustee, however, who is named in a will, but has never acted, and has released all his interest to his co-trustee, ought not to be made a party to a bill to set aside the will on the ground of fraud.⁶

Where a trustee has assigned his interest in the trust-estate to another, it is necessary to have, not only the trustee who has assigned, but the assignee before the Court.⁷ It is improper, however, to *248 make the agent of a trustee a party;⁸ and a person who *had assumed to act as a trustee, though not duly appointed, was held to be an agent for this purpose.¹

¹ *Kingsley v. Young*, Coop. Eq. Pl. 42; see *ante*, p. 248; Story Eq. Pl. § 231; *Lang v. Brown*, 29 Geo. 628; see *Miller v. Whitaker*, 23 Ill. 453.

² *Sturge v. Starr*, 2 M. & K. 195.

³ See *McKinley v. Irvine*, 13 Ala. 681; *Cassiday v. McDaniel*, 8 B. Mon. 519; *Morrow v. Lawrence*, 7 Wis. 574.

⁴ 3 Atk. 110.

⁵ *Harrison v. Pryn*, Barnard. 324. Where a bill alleged a fraudulent combination between the maker of a deed of trust and one of the trustees therein named, and it was sought to set aside a preference given to such trustee, it was held that the maker of the deed as well as the trustee should be made a party. *Murphy v. Jackson*, 5 Jones Eq. (N. C.) 11.

⁶ *Richardson v. Hulbert*, 1 Anst. 65.

⁷ *Burt v. Dennett*, 2 Bro. C. C. 225, Perkins's ed. note (a); Story Eq. Pl. § 209; *Bailey v. Inglee*, 2 Paige, 278. If the trustee has assigned his trust absolutely, the as-

signee should be made a party in his stead, and the trustee need not be made a party, unless the assignment is a breach of trust. Story Eq. Pl. §§ 211, 213, 214; *Bromley v. Holland*, 7 Sumner's Ves. 3, and note (c); *Munch v. Cockerell*, 8 Sim. 219. But if the bill is brought to remove the trustee, and recover from a stranger property improperly sold by the trustee, it is not a case of misjoinder. *Whitman v. Abernathy*, 33 Ala. 154; see *Webber v. Taylor*, 5 Jones Eq. (N. C.) 36. [And the trustee is, in such case, a necessary party. *Cowdry v. Cheshire*, 75 N. C. 285.]

⁸ *Attorney-General v. Earl of Chesterfield*, 18 Beav. 596; 18 Jur. 686; *Maw v. Pearson*, 28 Beav. 196; and see *Robertson v. Armstrong*, 28 Beav. 123; see, however, *Attorney-General v. Corporation of Leicester*, 7 Beav. 176, 179. But see *Hardy v. Caley*, 33 Beav. 365.

¹ *Ling v. Colman*, 10 Beav. 370, 373.

It was, formerly, generally necessary, where there were more trustees than one, that they should all be parties, if amenable to the process of the Court;² but this rule has been in some respects modified by a General Order of the Court,³ which enables a plaintiff who has a joint and several demand against several persons, to proceed against one or more of the several persons liable without making the others parties; and even before this order, in some cases where there were merely accounting parties, one might be sued for an account of his own receipts and payments, without bringing the others before the Court.⁴ Thus, where a bill was filed against the representative of one of several trustees who were dead, for an account of the receipts and payments of his testator, who alone managed the trust, an objection that the representatives of the other trustees were not before the Court, was overruled; because the plaintiff insisted only upon having an account of the receipts and disbursements of the trustee, whose representative was before the Court, and not of any joint receipts or transactions by him with the other trustees.⁵ And so, where a bill was filed by a creditor against the representatives of B. and C. as two trustees of estates conveyed in trust to pay debts, for an account of the produce of the sales, and payment of their debts; and the representatives of B. alleged by their answer, that not only C. but D. also were trustees, and that D. had acted in the trust, although they did not know whether he had received any of the produce, Lord Kenyon M. R., and afterwards Lord Arden M. R., held D. to be an unnecessary party. The reporter of this case adds a query, because at the bar the general opinion was that D.'s representatives ought to have been parties, nor could one creditor suing waive, on behalf of absent parties in joint interest with himself, the benefit or possible benefit of any part of the trust fund.⁶ This query seems to be in accordance with the principles laid down in *Williams v. Williams*.⁷ Where a *cestui que trust* seeks a general account, he must bring all the accounting parties before the Court, notwithstanding the order.⁸

*The rule which requires the trustees of property in litigation *249 to be brought before the Court, renders necessary the presence of the committees of the estates of idiots and lunatics in suits against the idiots or lunatics committed to their care;¹ because they are the trustees of such estates. Upon the same ground, the assignees of

² 16 Vin. Ab. Party, B. 257, Pl. 68.

³ Ord. VII. 2.

⁴ *Lady Selyard v. The Executors of Harris*, 1 Eq. Ca. Ab. 74; but see *Munch v. Cockerell*, 8 Sim. 219; Story Eq. Pl. § 214, note.

⁵ See Story Eq. Pl. §§ 207 a, 212, 213, 214, and notes; *Fleming v. Gilmer*, 35 Ala. 62.

⁶ *Routh v. Kinder*, 3 Swan. 144, n., from Lord Colchester's MSS.

⁷ 9 Mod. 299; see also *Wadeson v. Rudge*,

1 C. P. Coop. t. Cott. 369; but see *Masters v. Barnes*, 2 Y. & C. C. C. 616; 7 Jur. 1167; and *Symes v. Glynn*, and *Pease v. Cheesbrough*, cited Seton, 115.

⁸ *Coppard v. Allen*, 10 Jur. N. S. 622; 13 W. R. 943. L. J.J.; 2 De G., J. & S. 173.

¹ Ld. Red. 30. It seems that upon a bill for the recovery of a debt, due from a drunkard, against his committee, the drunkard is a proper, though not a necessary party. *Beach v. Bradley*, 8 Paige, 146.

bankrupts or insolvents, are necessary parties to suits relating to the property of such bankrupts or insolvents.²

For the like reason, wherever a demand is sought to be satisfied out of the personal estate of a deceased person, it is necessary to make the personal representative a party to the suit. Thus although, as we have seen, a creditor or a legatee may bring a bill against a debtor to the testator's estate upon the ground of collusion between him and the executor,³ yet in all cases of this description, the personal representative must be before the Court.⁴ And so, where to a bill for an account of the estate of a person deceased, and to have the same applied to satisfy a debt alleged to be due from him to the plaintiff, the defendants pleaded that they were not executors or administrators of the party whose estate was sought to be charged, nor so stated by the bill, and demurred, for that the executors or the administrators were the proper parties to contest the debt, who might probably prove that it had been discharged, the Court allowed both the plea and demurrer, but gave the plaintiff leave to amend his bill as he might be advised;⁵ but to a suit concerning a specific legacy, the executor is no longer a necessary party after he has assented to the bequest; thus where a bill was filed by the reversioner against the legatee of a term, praying that the lease might be declared void, and the defendant insisted that if the lease was set aside, the plaintiff ought to pay the money expended by the testator in the improvement of the premises, the executor of the testator, who had assented to the bequest, was not considered a necessary party to the suit.⁶ And where an executor had been outlawed, and a witness *250 proved that *he had inquired after but could not find him, it was thought to be a full answer to the objection, that he was not a party to a suit which had been instituted by a creditor of the deceased testator against the residuary legatee.¹

Moreover, in some cases, where the fund, the subject of the suit, has been ascertained and appropriated, the Court has dispensed with the appearance of a personal representative to the testator, by whose will the fund has been bequeathed.² And where the estate has been dis-

² See *Storm v. Davenport*, 1 Sandf. (N. Y.) Ch. 135; *Hilliard Bank. & Ins.* 383, 384; *Moran v. Hays*, 1 John. Ch. 339; *Sells v. Hubbell*, 2 John. Ch. 394; *Springer v. Vanderpool*, 4 Edw. Ch. 362; *Botts v. Patton*, 10 B. Mon. 452.

³ *Attorney-General v. Wynne*, Mos. 126; See *ante*, p. 195; *post*, c. 6, § 4, and notes to the point, "Legatee or creditor cannot sue debtor to testator's estate."

⁴ See *Postlethwaite v. Howes*, 3 Clarke (Iowa), 365. But the heirs need not be made parties to a suit relating exclusively to the personality. *Galphin v. McKinney*, 1 McCord Ch. 280. But it is otherwise in regard to a suit respecting real estate. *Kennedy v. Kennedy*, 2 Ala. 571; *Smith v. West*, 5 Litt. 48; *Carr v. Callaghan*, 3 Litt. 365. And to a bill against an administrator, to charge the estate with an annual payment, to preserve the res-

idue, the distributees of the estate are necessary parties. *Cohcen v. Gordon*, 1 Hill Ch. 51.

⁵ *Griffith v. Bateman*, Rep. t. Finch, 334; *Rumney v. Mead*, Rep. t. Finch 303; *Attorney-General v. Twisden*, Rep. t. Finch, 336; and see *Attorney-General v. Wynne*, Mos. 126. For a case where under special circumstances the executors of the settlor of a trust fund would be necessary parties to a suit for administering it, see *Judgment of Sir J. Wigram V. C. in Gaunt v. Johnson*, 7 Hare, 154, 156; 12 Jur. 1067.

⁶ *Malpas v. Ackland*, 3 Russ. 273, 277; and see *Smith v. Brooksbank*, 7 Sim. 18, 21; *Moor v. Blagrove*, 1 Ch. Ca. 277.

¹ *Heath v. Percival*, 1 P. Wms. 683.

² *Arthur v. Hughes*, 4 Beav. 506; *Beasley v. Kenyon*, 5 Beav. 544; *Bond v. Graham*, 1 Hare, 484; 6 Jur. 620; *Story Eq. Pl.* § 214.

tributed under the decree of the Court,³ or after the issue of advertisements under the 22 & 23 Vic. c. 35, § 29,⁴ the personal representative is not a necessary party to a suit to establish a claim against the estate.

The rule which requires the executor to be before the Court in all cases relating to the personal estate of a testator, extends to an executor *durante minore ætate*, even though the actual executor has attained twenty-one, and has obtained probate thereon.⁵ It is to be observed, however, that if the actual executor has received all the testator's personal estate from the hands of the executor *durante minore ætate*, upon an account between them, the executor *durante minore ætate* is not a necessary party.

The personal representative required is one appointed in England; and where a testator appointed persons residing in India and Scotland his executors, and the will was not proved in England, but the plaintiff, a creditor, filed a bill against the agent of the executors, to whom money had been remitted, praying an account and payment of the money into Court for security, a demurrer, because no personal representative of the testator resident within the jurisdiction of the Court was a party, was allowed.⁶

And so, where an executor proved the will of his testator in India, and afterwards came to this country, where a suit was instituted against him, for an account of an unadministered part of the testator's estate, which had been remitted to him from India by his co-executor there, it was held necessary that a personal representative should be constituted in England, and made a party to the suit.⁷

* Where an administration was disputed in the Ecclesiastical *251

³ Farrell v. Smith, 2 B. & B. 337; see also Pooley v. Ray, 1 P. Wms. 355; Brooks v. Reynolds, 1 Bro. C. C. 182; 2 Dick. 603; Douglas v. Clay, 1 Dick. 393; Kenyon v. Worthington, 2 Dick. 688.

⁴ Clegg v. Rowland, L. R. 3 Eq. 368, V. C. M.

⁵ Glass v. Oxenham, 2 Atk. 121.

⁶ Lowe v. Farlie, 2 Mad. 101; see also Logan v. Fairlie, 2 S. & S. 284; Story Conf. Laws, §§ 513, 514, 514 a, and notes and numerous cases both English and American there cited; Story Eq. Pl. § 179, and cases cited in notes; Ashmead v. Colby, 26 Conn. 287.

⁷ Bond v. Graham, 1 Hare, 482; Tyler v. Bell, 2 M. & C. 89, 105; but see Anderson v. Caunter, 2 M. & K. 763, and see the observation of Lord Cottenham on this case, 2 M. & C. 110. For the method of obtaining limited or special administration where the executor is abroad, see *ante*, pp. 197, 198. Some of the American Courts have gone so far as to hold, that a foreign executor or administrator, coming here, having received assets in the foreign country, is liable to be sued here, and to account for such assets, notwithstanding he has taken out no new letters of administration here, nor has the estate been posi-

tively settled in the foreign State. Swearingen v. Pendleton, 4 Serg. & R. 389, 392; Evans v. Tatem, 9 Serg. & R. 252, 259; Bryan v. McGee, 2 Wash. C. C. 337; Campbell v. Tousey, 7 Cowen, 64; see also Dowdale's case, 6 Coke, 47; Julian v. Reynolds, 8 Ala. 680. [He is charged as a trustee who has brought the assets within the jurisdiction of the Court. *McNamara v. Dwyer*, 7 Paige, 239; *Brownlee v. Lockwood*, 5 C. E. Green, 255; *Tunstall v. Pollard*, 11 Leigh, 1; *Moore v. Hood*, 9 Rich. Eq. 317; *Allsup v. Allsup*, 10 Yerg. 283; *Patton v. Overton*, 8 Hum. 192; *Beeler v. Dunn*, 3 Head, 90; *Dillard v. Harris*, 2 Tenn. Ch. 196. The doctrine of the text is sustained by *Whart. Conf. Laws*, § 616;] *Story Conf. Laws*, § 514 b, and notes; *Boston v. Boylston*, 2 Mass. 384; *Goodwin v. Jones*, 3 Mass. 514; *Davis v. Estey*, 8 Pick. 475; *Dawes v. Head*, 3 Pick. 128; *Doolittle v. Lewis*, 7 John. Ch. 45, 47; *McRea v. McRea*, 11 Louis. 571; *Attorney-General v. Bowens*, 4 M. & W. 171. In *Campbell v. Wallace*, 10 Gray, 162, it was held, that there was no Equity jurisdiction in Massachusetts to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and no certified

Court, the Court of Chancery would entertain a suit for a receiver to protect the property till the question in the Ecclesiastical Court was decided, although an administration *pendente lite* might be obtained in the Ecclesiastical Court.¹ In such cases, the rule requiring a representative to be before the Court must be dispensed with, there being no person sustaining that character in existence.² And where a party entitled to administer refuses to take out administration himself, and prevents any one else from doing so, he will not be allowed to object to a suit being proceeded with, because a personal representative is not before the Court. Thus, in *D'Aranda v. Whittingham*,³ where the heir of an obligor demurred to a bill by an obligee, because the administrator of the obligor was not a party, the demurrer was overruled, because it appeared that he would not administer himself, and had opposed the plaintiff in taking out administration as the principal creditor; and in a case where the person entitled by law to administration did not take it out, but acted as if she had, receiving and paying away the intestate's property, an objection for want of parties, on the ground that there was no administrator before the Court, was overruled.⁴ In the case of *Creasor v. Robinson*,⁵ however, the Court declined to follow the case last referred to; and refused to make an order for an account against an administrator *de son tort*, unless a legal personal representative duly constituted was a party.

*252 *Where there are several executors or administrators, they must all be made parties, even though one of them be an infant;¹ but this rule may be dispensed with, if any of them are not amenable to the process of the Court,² or if they have stood out a process to a sequestration; and if an executor has not proved he need not be a party.³

copy of which has been filed in the Probate Court of that State. See *Campbell v. Sheldon*, 13 Pick. 8. In *Slatter v. Carroll*, 2 Sandf. Ch. 573, it was held that, in a case, where there are real assets of the estate of a deceased person within its jurisdiction, although no administration has been taken within the State, a Court of Equity will not hesitate to administer them; and the foreign executors may be made parties to the suit instituted for that purpose. See *Scruggs v. Driver*, 31 Ala. 274.

¹ *Atkinson v. Henshaw*, 2 V. & B. 85; *Ball v. Oliver*, *ib.* 96; see also *Watkins v. Brent*, 1 M. & C. 97, 102; *Whitworth v. Whyddon*, 2 M.N. & G. 52; 14 Jur. 142; *Cumming v. Fraser*, 28 Beav. 614; *Dimes v. Steinberg*, 2 Sm. & G. 75. Now, however, it is apprehended that the Court would require a special case to be made for its interference, pending proceedings in the Probate Court; that Court having power to appoint an administrator *pendente lite*, with full powers, and also to nominate him receiver of the rents of real estate. 20 & 21 Vic. c. 77, §§ 70, 71, 73; *Verey v. Duprez*, L. R. 6 Eq. 329, V. C. M.; *Tichborne v. Tichborne*, L. R. 1 P. & D. 730; *Hitchin v. Burks*, W. N. (1870) 190; 18 W. R. 1015; for an instance in Chan-

cery since this Act, see *Williams v. Attorney-General*, M. R. 8 May, 1861; *Seton*, 1003.

² *Story Eq. Pl.* § 91. The Court can, however, appoint a nominee of its own to represent the estate. 15 & 16 Vic. c. 86, § 44.

³ *Mos.* 84. See, however, *Penny v. Watts*, 2 Phil. 149.

⁴ *Cleland v. Cleland*, *Prec. Ch.* 64.

⁵ 14 Beav. 589; 15 Jur. 1049; see also *Cooke v. Gettings*, 21 Beav. 497; *Beardmore v. Gregory*, 2 H. & M. 491; 11 Jur. N. S. 363.

¹ *Scurry v. Morse*, 9 Mod. 89; *Offey v. Jenny*, 3 Ch. Rep. 92; *Hamp v. Robinson*, 3 De G., J. & S. 97.

² *Cowslad v. Cely*, *Prec. Ch.* 83; but if they are all out of the jurisdiction, an administrator *durante absentia* must be appointed. *Donald v. Bather*, 16 Beav. 26.

³ *Went. Off. Ex.* 95; *Brown v. Pitman*, *Gillb. Eq. R.* 75; 16 Vin. Ab. Party B. 251, pl. 19; *Strickland v. Strickland*, 12 Sim. 463; *Dyson v. Morris*, 1 Hare, 413, 421; 6 Jur. 297; and see 21 & 22 Vic. c. 95, § 16; but the plaintiff may make him a party, if he has acted as executor. *Vickers v. Bell*, 10 Jur. N. S. 376, L. J. L. So where a bill seeks discovery and relief only against the acts of one of the executors of an estate, it is not neces-

Thus, where there were four executors, one of whom alone proved and acted, and a bill was brought against that one, and he in his answer confessed that he had alone proved the will and acted in the executorship, and that the others never intermeddled therein, it was said to be good.⁴ In that case, however, if the executor who had proved had died, it would not have been sufficient to have brought his executor before the Court, because he would not have represented the original testator; the other executors would still have had a right to prove, even though they had renounced probate.⁵ The record, therefore, would not have been complete without a new representative of the original testator.⁶

Wherever an executor has actually administered, he must be made a party to a suit, although he has released and disclaimed.⁷ But where a plaintiff filed a bill against one of two executors, and alleged in his bill that he knew not who was the other executor, and prayed that the defendant might discover who he was and where he lived, a demurrer for want of parties was overruled.⁸ And in the case before referred to, where one of two joint executors was abroad, an account was decreed of his own receipts and payments.⁹

The cases do not seem to afford a very clear answer to the question, under what circumstances, in a suit to administer the assets of a deceased testator or intestate, the plaintiff ought to join, with the existing personal representatives, such parties as fill the position of administrators or executors of a former representative of the original estate.¹⁰ It is conceived, however, that the practice in *this *253 respect is now settled; viz., to make the personal representatives of a deceased executor parties, where he had received assets of the testator for which he has not accounted with the surviving executor, and in respect of which it is sought to charge his estate; but where this is not the case, to introduce into the bill an allegation that the deceased executor fully accounted with the survivor, and that nothing is due from his estate to the estate of the testator, and not to make his representative a party to the suit.¹ The fact of such deceased executor

sary to make the other executor a party in the first instance. But, *it seems*, a co-executor may be made a party, during the progress of the suit, if it shall prove to be expedient or necessary. Footman v. Pray, R. M. Charl. 291. See *ante*, 247, 248.

⁴ Brown v. Pitman, Gilb. Eq. 75; 16 Vin. Ab. tit. Parties, B. Pl. 19; Cramer v. Morton, 2 Moll. 108; Clifton v. Haig, 4 Desaus. 330.

[An executor cannot act, according to the decisions of several of the States, until he has qualified according to law. Monroe v. James, 4 Munf. 194; Martin v. Peck, 2 Yerg. 298; 3 Redf. Wills, 21.]

⁵ Arnold v. Blencowe, 1 Cox, 426. It may be doubted whether this is now so. See 20 & 21 Vic. c. 77, § 79; and 21 & 22 Vic. c. 95, § 16.

⁶ It has been determined, that the general order enabling a plaintiff to proceed against

one or more persons severally liable (Ord. VII. 2) does not apply to a general administration suit. Hall v. Austin, 2 Coll. 570; 10 Jur. 452.

⁷ Smithby v. Hinton, 1 Vern. 31.

⁸ Bowyer v. Covert, 1 Vern. 95; Story Eq. Pl. § 92; see Willis v. Henderson, 4 Scam. 20.

⁹ Cowslad v. Cely, Prec. in Ch. 83; Clifton v. Haig, 4 Desaus. 330.

¹⁰ Williams v. Williams, 9 Mod. 299; Phelps v. Sproule, 4 Sim. 318, 321; Holland v. Prior, 1 M. & K. 237; Masters v. Barnes, 2 Y. & C. C. C. 616; 7 Jur. 1167; Ling v. Colman, 10 Beav. 370, 374; Hall v. Austin, 2 Coll. 570; 10 Jur. 452; Clark v. Webb, 16 Sim. 161; 12 Jur. 615; Story Eq. Pl. § 170, note, § 382; Quince v. Quince, 1 Murph. 160; Hagan v. Walker, 14 How. U. S. 29.

¹ See Whittington v. Gooding, 10 Hare App. 29; Pease v. Cheesbrough, Seton, 115.

having died insolvent or without having received assets, would in all cases probably prevent his executors being proper parties.²

If a bill is filed against a married woman, who is an executrix or administratrix, her husband must also be a party, unless he has abjured the realm;³ or she has obtained a protection order, or is judicially separated.⁴ In *Taylor v. Allen*,⁵ however, Lord Hardwicke granted an injunction to restrain a wife, executrix, from getting in the assets, her husband being in the West Indies, and not amenable to the process of the Court, on the ground, that if she wasted the assets, or refused to pay, a creditor could have no remedy, inasmuch as her husband must be joined as a party to the suit against her.

Where a bill had been filed for an account of the testator's estate, and it was objected that one of the executors was not a party, he was ordered to be introduced into the decree then made, as a party, and decreed to account before the Master, without putting off the cause to add parties;⁶ but this can only be done where the person appears, and submits to be bound as if originally a party.⁷

It seems, that where a power of sale is given, by a will, to executors, and they renounce probate, they will not be considered necessary parties to the suit; thus, where a testator had devised that his executors should sell his land, and be possessed of the money arising from the sale upon certain trusts mentioned in his will, and made B. and C. his executors, who renounced; whereupon administration, with the will annexed, was granted to one of the plaintiffs, upon a bill brought *254 by the *cestui que trust* of the purchase-money, * under the will, against the heir, to compel him to join in a sale of the lands; it was objected that there wanted parties, in regard that the executors ought to have been made defendants, for notwithstanding they had renounced, yet the power of sale continued in them, and the objection was overruled, there being only a power and no estate devised to them.¹ It should be noticed, that a query has been added to the decision upon this point by the reporter, and the doubt suggested appears to be justified by the opinion expressed both by Sir Edward Sugden and Mr. Preston, *viz.*, that where a power is given to executors they may exercise it, although they renounce probate of the will.² It is to be observed, however, that in the case of *Keates v. Burton*,³ referred to by

But see *Hamp v. Robinson*, 3 De G., J. & S. 97; and see *Montgomery v. Floyd*, 18 L. T. N. S. 847, V. C. M., where the representatives of a deceased executor were held not to be necessary parties, though there was no such allegation. For form of decree, where plaintiff does not, by his bill, seek to charge a deceased co-executor's estate, see *Seton*, 115.

² See *Wills v. Dunn*, 5 Grattan, 384; *Symes v. Glynn*, *Seton*, 115.

³ *Ld. Red.* 30.

⁴ 20 & 21 Vic. c. 85, §§ 21, 25, 26; and see *Bathe v. Bank of England*, 4 K. & J. 564; 4 Jur. N. S. 505; 21 & 22 Vic. c. 108, § 7.

⁵ 2 Atk. 213.

⁶ *Pitt v. Brewster*, 1 Dick. 37. It is presumed that he appeared, and consented to this order. See *Footman v. Pray*, R. M. Charl. 271, cited in note, *ante*, 252. As to the husband of an accounting party, see *Sapte v. Ward*, 1 Coll. 24.

⁷ *Seton*, 1116.

¹ *Yates v. Compton*, 2 P. Wms. 308; see *Ferebee v. Proctor*, 2 Dev. & Bat. 439; S. C. 2 Dev. & Bat. Eq. 496; *Jackson v. Scauber*, 7 Cowen, 187; *Peck v. Henderson*, 7 Yerges, 18; *Champlin v. Parish*, 3 Edw. Ch. 581.

² *Sug. Pow.* 174 (4th ed.); 2 *Prest. on Abst.* 264.

³ 14 Ves. 434, 437.

Lord St. Leonards (which was a case of a discretionary power given by a testator over the application of the interest of a money fund to his trustees and executors, one of whom died, and the other renounced), Sir William Grant M. R. remarked, "that the power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent to them to exercise it;"⁴ and in the case of *Earl Granville v. M'Neill*,⁵ where it was held, that the two executors who had proved, could exercise a power of appointment given to their testator, his executors, administrators and assignees, although a third executor, who had renounced, was also named in the will, Sir James Wigram V. C. said, "I have referred to Sir Edward Sugden's book on Powers, but find nothing to make me doubt the sufficiency of the appointment. The question in all such cases is, whether the confidence is reposed in the individuals named, or in the persons who, *de facto*, fill the given office."⁶

The executor or the administrator of a deceased person being the person constituted by law to represent the personal property of that person, and to answer all demands upon it, it is sufficient, where the object of a suit is to charge such personal estate with a demand, to bring the executor or administrator before the Court;⁷ thus, in a bill to be relieved touching a lease for years, or other personal duty against executors, it is not necessary, though the executors be executors in trust, to make the *cestui que trusts*, or the residuary legatees, parties.⁸ And so, where a bill was filed *against an executor, to compel the trans- *255 fer of a sum of stock belonging to his testatrix, and the executor, by his answer, stated that the residuary legatees claimed the stock, an objection for want of parties was held to be untenable.¹

In like manner, where a testator gave different legacies to three persons, and they were to abate or increase according to the amount of the personal estate; to a bill against the executor by one legatee, the executor pleaded that the other legatees ought to be parties, because the account made with the plaintiff would not conclude them, and he should be put to several accounts and double proof and charge, the plea was overruled.² It seems, however, that where a person has a specific lien upon the property in dispute, he must be brought before the Court; and upon this ground, in the case of *Langley v. The Earl of Oxford*, which was a bill by the specific legatee of a mortgagee against the rep-

⁴ See 1 Wms. Exors. 156.

⁵ 7 Hare, 156; 13 Jur. 253.

⁶ See Wms. Exors. 251, 258.

⁷ Ld. Red. 165; *Micklethwaite v. Winstanley*, 13 W. R. 210, L. J.J.; see *Neale v. Hagthorpe*, 3 Bland, 551; *Wilkinson v. Perrin*, 7 Monroe, 217; *Galpin v. M'Kinney*, 1 M'Cord Ch. 294; *Story Eq. Pl. § 140*, and note; *Prichard v. Hicks*, 1 Paige, 270; *Kinlock v. Meyer*, 1 Speer, S. C. Eq. 428; *Blackwell v. Blackwell*, 33 Ala. 57.

⁸ *Anon.*, 1 Vern. 261; 1 Eq. Ca. Ab. 73, Pl. 13; *Lawson v. Barker*, 1 Bro. C. C. 303;

Love v. Jacomb, *ibid.*; *Story Eq. Pl. § 104*, and 140, in notes; *Wiser v. Blachly*, 1 John. Ch. 437; *Dandridge v. Washington*, 2 Peters, 377.

¹ *Brown v. Dowthwaite*, 1 Mad. 446; and see *Jones v. How*, 7 Hare, 267; 12 Jur. 227.

² *Haycock v. Haycock*, 2 Ch. Ca. 124; *Jennings v. Paterson*, 15 Beav. 28. There may, however, be cases where pecuniary legatees are proper parties: as where there is a question of ademption. *Marquis of Hertford v. Count de Zichi*, 9 Beav. 11, 15.

representative of the mortgagor, for foreclosure, and the defendant pleaded a settled account with the executors of the mortgagee, and a release, it was said by Lord Hardwicke, that he could not see how the private account between the executor of the mortgagee and the debtor could discharge the lien on the land; ³ however, the bill in that case was afterwards dismissed.⁴ And so where a husband had specifically disposed of his wife's paraphernalia to other persons; on a bill by the wife against the executor for a delivery of them to her, the specific legatees were considered necessary parties.⁵

The assignees of a bankrupt or insolvent debtor are also, as has been before stated, the proper parties to represent the estates vested in them under the bankruptcy or insolvency; and therefore, in all cases where claims are sought to be established against the estate of a bankrupt or an insolvent debtor, it is necessary to bring only the assignees before the Court, and the bankrupt or insolvent himself, or his creditors, are unnecessary parties.⁶ Thus it has been held, that a bankrupt is not a necessary party to a bill of foreclosure against his assignees.⁷ Where, however, fraud and collusion are charged between the bankrupt and his assignees, the bankrupt may be made a party, and he cannot
 *256 demur, although *relief be prayed against him. Thus, where a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by permission of the plaintiff, possessed part of the goods which had been taken in execution for the purpose of sale, instead of paying the produce to the plaintiff, had paid it to his assignees: a demurrer by the alleged bankrupt, because he had no interest and might be examined as a witness, was overruled.¹

³ *Langley v. Earl of Oxford*, Amb. 17; but see Serjeant Hill's note of this case, in Blunt's edition of Ambler, App. C. p. 795; Reg. Lib. B. 1747, fo. 300.

⁴ Reg. Lib. B. 1747, fo. 300.

⁵ *Northey v. Northey*, 2 Atk. 77. So, to a bill by the widow of an intestate against the administrator, to recover her share of the estate, all the distributees of the intestate should be made parties. *Chinn v. Caldwell*, 4 Bibb, 543.

⁶ *Collet v. Wollaston*, 3 Bro. C. C. 228; *Hilliard Bank. & Ins.* 383, 384; *Sells v. Hubbard*, 2 John. Ch. 394; *Springer v. Vanderpool*, 4 Edw. Ch. 362. On a bill filed by a receiver for the creditors and stockholders of a corporation, it is not necessary to make the creditors and stockholders parties. *Mann v. Bruce*, 1 Halst. Ch. (N. J.) 413.

⁷ *Adams v. Holbrooke*, Har. Ch. P. 30; *Bainbridge v. Pinhorn*, 1 Buck, 135; *Lloyd v. Lander*, 5 Mad. 282, 288.

¹ *King v. Martin*, 2 Ves. J. 641, cited *Ld. Red.* 162. [But the bankrupt is not a neces-

sary party to a bill by his assignee to set aside as fraudulent a conveyance of property made by the bankrupt. *Buffington v. Harvey*, 95 U. S. 99; *Weise v. Wardle*, L. R. 19 Eq. 171.] In a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill. *Gaylords v. Kelshaw*, 1 Wallace, U. S. 81. [But it has been held that a fraudulent grantor, or his representative or heir, is not a necessary party to a creditor's bill to set aside a fraudulent conveyance. *Taylor v. Webb*, 54 Miss. 36, citing *Smith v. Grim*, 26 Pa. St. 95; *Dockray v. Mason*, 48 Me. 178; *Merry v. Freemon*, 44 Mo. 518; *Creed v. Railway*, 22 Wis. 260. Nor, after execution sale, need he be made a party to a bill by the purchaser to have the title quieted and divested out of the fraudulent grantee. *Laughton v. Harden*, 68 Me. 208. The reason is, in both cases, that he has no further interest in the property.]

Subject to the above and certain other exceptions, the rule formerly was that all *cestui que trusts* were necessary parties to suits against their trustees, by which their rights were likely to be affected.² Thus, on a bill for redemption, where the defendant in his answer set forth that he was a trustee for A., an objection was made at the hearing, that the *cestui que trust* should have been made a party; and because it was disclosed in the answer, and the plaintiff might have amended, the bill was dismissed.³ And so in a bill against the heir of a mortgagee to redeem, the personal representative must be a party, because he is the person entitled to the mortgage money, and the heir is only a trustee of the legal estate for him.⁴

In some cases, however, where the *cestui que trusts* are very numerous, the necessity of bringing them all before the Court has *257 been dispensed with.¹ Thus, where upon a bill brought against an assignee of a lease to compel him to pay the rent, and perform the covenants, it appeared that the assignment was upon trust for such as should buy the shares, the whole being divided into 900 shares, and an objection was taken because the shareholders were not parties; the objection was overruled, as the assignees, by dividing the shares, had made it impracticable to have them all before the Court.² Formerly, the general rule, in cases where real estates were either devised or settled upon trusts for payment of debts or legacies, was, that if the persons to be benefited by the produce of the estate were either named or sufficiently indicated, then that they must be all parties to any suit affecting the estate; if, however, the bill alleged their great number as a reason for not making them all parties, and if the Court were satisfied that the absentees were sufficiently represented by those who were made parties to the record, the presence of all the persons interested

² Story Eq. Pl. §§ 192, 193, 207; Helm v. Hardin, 2 B. Mon. 232; Hewett v. Adams, 50 Maine, 271, 281; Van Doren v. Robinson, 1 C. E. Green (N. J.), 256; Clemons v. Elder, 9 Iowa, 272.

In a suit by a trustee to establish and maintain the title intrusted to him against an adverse claim, by a bill, he must make the *cestui que trust* a party. Blake v. Allman, 5 Jones Eq. (N. C.) 407.

[Upon a bill by one *cestui que trust* against the trustee, showing that the defendant holds a certain sum of money for the plaintiff and another person, and that each is entitled to an aliquot part of the fund, and the trust not denied, the other person is not a necessary party. Hubbard v. Burrell, 41 Wis. 365.]

³ Whistler v. Webb, Bunb. 53; Beals v. Cobb, 51 Maine, 349, 350; Story Eq. Pl. § 207; Davis v. Hemingway, 29 Vt. 438; see Creare v. Babcock, 10 Metcalf, 525.

Where, after a mortgage has been made of real property, the property has been conveyed in trust for the benefit of children, both those in being, and those to be born;

all children *in esse* at the time of filing a bill of foreclosure of the mortgage should be made parties. Otherwise, the decree of foreclosure does not take away their right to redeem. A decree in such a case against the trustee alone does not bind the *cestui que trusts*. Clark v. Reyburn, 8 Wallace, U. S. 318. Now, however, in England, in suits concerning real or personal property, which is vested in trustees, such trustees represent the persons beneficially interested, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it is not necessary to make the persons beneficially interested parties to the suit; 15 & 16 Vic. c. 86, § 42, r. 9; [see *ante*, 222, note 2.]

⁴ See Guthrie v. Morrell, 6 Ire. Eq. 13.

¹ See *post*, 266.

² City of London v. Richmond, 2 Vern. 421. N. B. In that case the original lessee was considered a necessary party. Story Eq. Pl. § 118.

would be dispensed with;⁸ and upon the same principle, where the trusts were for the payment of debts or legacies generally, the trustees alone were allowed to sustain the suit, either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they were trustees;⁴ and now it is conceived that the Court would, in such cases, generally allow the suit to proceed without any of the *cestui que trusts* being made parties, considering their interests to be sufficiently represented by the trustees;⁵ except where it might require some of the *cestui que trusts* to be parties, in order to secure the application of the trust money.⁶

We have already seen, that the 30th Order of August, 1841, did not apply to cases where a mortgagee sought to foreclose the equity of redemption of estates vested in trustees,⁷ but that under the rule of the late Act above referred to, where the trustees are the persons who would be in possession of funds to redeem, they may properly represent their *cestui que trusts*;⁸ though, when this is not the case, the *cestui que trusts*, or some of them, ought to be parties.⁹

Formerly, in such cases, the *cestui que trusts* were necessary parties;¹⁰ but to a suit for the execution of a trust by or against those claiming the ultimate benefit of such trust, after the satisfaction

*258 *of prior charges, it was not necessary to bring before the Court the persons claiming the benefit of such prior charges; and, therefore, to a bill for application of a surplus, after payment of debts and legacies, or other incumbrances, the creditors, legatees, or other incumbrancers, need not be made parties. And persons having demands prior to the creation of such a trust, might enforce these demands

⁸ *Holland v. Baker*, 3 Hare, 68; *Harrison v. Stewardson*, 2 Hare, 530; see *Story Eq. Pl.* § 150; *Johnson v. Candage*, 31 Maine, 28.

⁴ *Ld. Red.* 174; see *Stevenson v. Austin*, 3 Met. 474, 480. ["Under some circumstances," says *Waite C. J.*, "a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers, and subjected to such obligations, that those for whom he holds will be bound by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust: *Shaw v. Norfolk R. Co.*, 5 Gray, 171; *Bifield v. Taylor*, 1 Beat. 91; *Campbell v. R. R. Co.*, 1 Woods, 376; *Ashton v. Atlantic Bank*, 3 Allen, 220; or to one by a stranger against him to defeat it in whole or in part: *Rogers v. Rogers*, 3 Paige, 379; *Wakeman v. Grover*, 4 Paige, 34; *Winslow v. M. & P. R. Co.*, 4 Minn. 317; *Campbell v. Watson*, 8 Ohio, 500. In such cases, the trustee is in Court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."⁷

Kerrison v. Stewart, 93 U. S. 160. In that case, the trust assignment was for the benefit of creditors in the usual form, with power in the trustee, on default of payment of the debts secured, to sell for cash, or on time, and apply the proceeds *pro rata* in satisfaction of the debts, and it was held that a decree, in a suit by third persons against the trustee, setting aside the trust conveyance as fraudulent, was binding upon the creditors secured, although not parties to the suit in which the decree was rendered. And see *Pindall v. Trever*, 30 Ark. 249; *Ward v. Hollins*, 14 Md. 158. *Ante*, 220, note 1.]

⁵ 15 & 16 Vic. c. 86, § 42, r. 9; *Morley v. Morley*, 25 Beav. 253; and see *Knight v. Pockock*, 24 Beav. 436.

⁶ *Stansfield v. Hobson*, 16 Beav. 189.

⁷ See *Wilton v. Jones*, 2 Y. & C. 244.

⁸ *Hanman v. Riley*, 9 Hare App. 40; *Salé v. Kitson*, 3 De G., M. & G. 119; 17 Jur. 170.

⁹ *Goldsmid v. Stonehewer*, 17 Jur. 199; 9 Hare App. 38; *Davis v. Hemingway*, 29 Vt. 438.

¹⁰ *Osborn v. Fallows*, 1 R. & M. 741; *Calverley v. Phelps*, 6 Mad. 229; *Faithful v. Hunt*, 3 Anst. 751; *Newton v. Earl of Egmont*, 4 Sim. 574, 584; 5 Sim. 130, 135; *Coles v. Forrest*, 10 Beav. 552, 557; *Story Eq. Pl.* §§ 206, 207.

against the trustees, without bringing before the Court the persons interested under the trust, if the absolute disposition of the property was vested in the trustees. But if the trustees had no such power of disposition, as in the case of trustees to convey to certain uses, the persons claiming the benefit of the trust must also be parties. Persons having specific charges on the trust property were also necessary parties; but this would not extend to a general trust for creditors or others, whose demands were not specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who may answer a general description, might greatly embarrass a prior claim against a trust property.¹

Where, however, the demands and names of the creditors, although not actually specified at the time of the creation of the trust, were subsequently ascertained by their signing a schedule to the conveyance, they became necessary parties; thus where a plaintiff claiming an annuity charged upon an estate which had subsequently been demised to trustees for the benefit of such of the grantee's creditors as should execute the conveyance, filed a bill, against the grantor and the trustees, and one of the creditors who had executed the deed, and who had obtained a decree in an original suit, instituted by him on behalf of himself and all other the creditors under the trust deed, praying an account of what was due to him, and that the priorities of himself and the other creditors might be ascertained, and that he might redeem the securities which were prior to his own, and have the benefit of the decree as to that part of the demand for which he should not be entitled to priority over the trust deed; it was held by the V. C. of England that all the creditors who had executed the trust deed were necessary parties; and that, as it was stated in the bill that several of the creditors had executed the deed, and only one was made a party, the defect appeared sufficiently on the face of the bill to entitle the defendant to take advantage of it by demurrer.²

Where the money secured by a mortgage was subject to a trust, a mortgagor, or any person claiming under him, seeking to redeem the mortgage, must make all persons claiming an interest in the *mortgage money parties to the suit. Thus, where it appeared *259 that the parties against whom the redemption was prayed were trustees for a woman and her children, the Lord Chief Baron held, that the *cestui que trusts* were necessary parties to the suit, although under the peculiar circumstances of the case, and to avoid delay and expense, he recommended that a petition should be presented on their behalf, praying that their interests might be protected, and directed the cause to stand over for that purpose.¹ And in general it was laid

¹ Ld. Red. 175; Story Eq. Pl. § 216.

² *Newton v. Earl of Egmont*, 4 Sim. 574; *vide etiam*, 5 Sim. 130, S. C. S. P.; Story Eq. Pl. §§ 133, 149. One creditor secured in a deed of trust, cannot maintain a bill for an account of the fund without making all cred-

itors who are preferred, and all in the same class with him, parties, either as plaintiffs or defendants. *Murphy v. Jackson*, 5 Jones Eq. (N. C.) 11.

¹ *Drew v. Harman*, 5 Price, 319; Story Eq. Pl. §§ 192, 298. [Followed in *Birdsong*

down as a rule, that there could be no foreclosure nor redemption unless all the parties entitled to the mortgage money were before the Court.² Therefore, where a mortgagee had assigned the mortgage upon certain trusts for the benefit of his family, the mortgagee, the trustees, and the *cestui que trusts*, were considered necessary parties to a bill to redeem.³ And so where a mortgage term had been bequeathed to trustees, upon trust, to sell and apply the produce among the testator's twelve children and a grandchild *nominatim*; it was held, that all the *cestui que trusts*, interested in the produce of the term, were necessary parties, although they were numerous, and the property small, and although the trustees had power to give a discharge to purchasers.⁴

Now, however, it has been held, that in a redemption suit, where the mortgage money is vested in trustees, the trustees represent the *cestui que trusts* sufficiently to protect the mortgagor; but that some of the *cestui que trusts* ought also to be parties, in order to secure the due application of the trust property.⁵

It was said by Lord Hardwicke, that where a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor, or his representatives, to redeem; it is not necessary that the plaintiff should trace out all the persons who have an interest in *such trust*, to make them parties: the persons having the legal estate, however, must be before the Court, and where a mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing before the Court, at least *260 the first tenant in tail, and those having *intermediate estates.¹

It seems that where a mortgage is forfeited, and the mortgagee exercises the legal rights he has acquired by disposing of, or encumbering the estate, and the mortgagor comes for the redemption, which a Court of Equity gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts; upon this principle, Sir John Leach, in the case of *Wetherell v. Collins*,² above referred to, ordered the mortgagor to pay the costs of the trustees, and *cestui que trust*, who were necessarily brought before the Court in consequence of the assignment of the mortgagee.

v. Birdsong, 2 Head, 289; and *Saylors v. Saylors*, 3 Heisk. 533.]

² *Palmer v. Earl of Carlisle*, 1 S. & S. 423; *Story Eq. Pl.* 182, *et seq.*; *Large v. Van Doren*, 1 McCarter (N. J.), 208; *Beals v. Cobb*, 51 Maine, 348; *Osborn v. Fallows*, 1 R. & M. 741; *McCall v. Yard*, 1 Stockt. (N. J.) 358; [S. C. 3 Stockt. 58. And see *Gould v. Wheeler*, 1 Stew. Eq. 541.]

The general rule is, that all persons materially interested in the mortgage, or mortgaged estate, ought to be made parties to a bill of foreclosure. This will ordinarily include the heir, or devisee, or assignee, and personal representatives of the mortgagor, and also the tenants for life and the remain-

der-man, for they all may be interested in the right of redemption, or in taking the accounts. 4 Kent, 185.

³ *Wetherell v. Collins*, 3 Mad. 255; *Story Eq. Pl.* § 192.

⁴ *Osborn v. Fallows*, 1 R. & M. 741.

⁵ *Stansfield v. Hobson*, 16 Beav. 189; see, however, *Morley v. Morley*, 25 Beav. 253; and *Emmet v. Tottenham*, 10 Jur. N. S. 1090; S. C. *nom.* *Tottenham v. Emmet*, 13 W. R. 123, M. R., where a person interested in part of the mortgage was held not to be a necessary party.

¹ *Yates v. Hamly*, 2 Atk. 238; *Story Eq. Pl.* §§ 144-146, 194, 198.

² 3 Mad. 255.

It seems formerly to have been considered necessary, that a mortgagee, who had assigned his mortgage, should be made a party to a bill of redemption;³ but the law upon the point appears now to be otherwise;⁴ and it has been determined, that where there has been an assignment, even though it was made without the previous authority of the mortgagor, or his declaration, that so much is due, the assignee is the necessary party;⁵ for whatsoever the assignee pays without the intervention of the mortgagor, he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee.⁶ Where a mortgagor is a party to an assignment of a mortgage by the mortgagee, then it is in fact a new mortgage between the mortgagor and the assignee, and of course the original mortgagee is not a necessary party to a bill to redeem. A mortgagor, however, cannot be bound by any transaction which may take place between a mortgagee and his assignee without his privity; if, therefore, the mortgagee before assignment, has been in possession, and has received more on account of the rents and profits than the principal and interest due upon the *mortgage, and a bill is filed by the mortgagor against the *261 assignee to have an account of the overplus, he may make the mortgagee a party to the bill, because he is clearly accountable for the surplus rents and profits received by himself.¹ But upon the principles laid down by Lord Eldon, in the preceding case,² it would seem, that even in that case the assignee only would be sufficient, because, having

³ *Anon.*, in the *Duchy*, 2 Eq. Ca. Ab. 594, Pl. 3.

⁴ The assignee of a mortgage, who has parted with all his interest, and has never made himself liable for rents and profits, should not be made a party to a bill to redeem the premises, unless he is charged with fraud or collusion, or a discovery is sought from him. *Williams v. Smith*, 49 Maine, 564. But the mortgagee is a necessary party to a suit to reform a mortgage deed, brought by a purchaser at a sale by the mortgagee. *Haley v. Bagley*, 37 Mo. 363.

⁵ *Chambers v. Goldwin*, 9 Vesey, 269. Where a mortgage has been absolutely assigned, it is not necessary to make the mortgagee a party to a bill brought by the mortgagor to redeem. *Whitney v. McKinney*, 7 John. Ch. 144; *Beals v. Cobb*, 51 Maine, 348. But where the mortgagee has merely given to another a quitclaim deed of the mortgaged premises, without assigning the mortgage debt, he must be made a party to such a bill. *Beals v. Cobb*, *ubi supra*. So a mortgagee of land who has assigned his interest in the mortgage since the breach of the condition, may be included as a defendant in a bill to redeem; especially if it appears that he is interested in the taking of the account. *Doody v. Pierce*, 9 Allen, 141. [And a mortgagee who has assigned the mortgage and guaranteed the debt is a proper party in a suit to foreclose the mortgage, and a personal decree may be made against him for any deficiency. *Jarman v. Wiswall*, 9 C. E. Green,

267.] Where a mortgage was assigned to secure a loan made to the assignor, the assignor was held to be a necessary party in a suit commenced by the assignee, to foreclose the mortgage, although the assignment was absolute in terms, and expressed the payment of a full consideration. *Kettle v. Van Dyck*, 1 Sandf. (N. Y.) 76; *Brown v. Johnson*, 53 Maine, 246; *Hobart v. Andrews*, 21 Pick. 527; *ante*, 198, note. Where a mortgagor has assigned all his interest in the estate mortgaged, he is not a necessary party to a bill in Equity to redeem by the assignee. *Bailey v. Myrick*, 36 Maine, 50; *Williams v. Smith*, 49 Maine, 564; *Hilton v. Lothrop*, 46 Maine, 297. *Ante*, 214, n. 7.

⁶ *Chambers v. Goldwin*, 9 Ves. 265; see *Matthews v. Walwyn*, 4 Sumner's Ves. 118, note (a).

¹ *Beals v. Cobb*, 51 Maine, 348, 350; *Story Eq. Pl. § 390*; *Bryant v. Erskine*, 55 Maine, 153, 158. All persons who have been so connected with the mortgages of a railroad sought to be redeemed, as to render them liable for income under it, should be made parties defendant. *Kennebec and Portland R.R. Co. v. Portland and Kennebec R.R. Co.*, 54 Maine, 173; but see *Lennon v. Porter*, 2 Gray, 473, where it was held that a mesne assignee of the mortgage is not a proper party to a bill to redeem, if he has never received any rents and profits; nor, it seems, if he has.

² *Chambers v. Goldwin*, 9 Ves. 268, 269.

contracted to stand in the place of the original mortgagee, he has rendered himself liable to have the account taken from beginning to end, and must be answerable for the result. From the same case it appears, that although there may have been twenty *mesne* assignments, the person to whom the last has been made is the only necessary party to a redemption suit.³

Where, however, there are several derivative mortgages, if the mortgagor seeks to redeem the first, he must make all the subsequent mortgagees parties, because they are all interested in the account.⁴

The rules regulating the practice of the Court as to *cestui que trusts* being parties to suits relating to trust property, apply to resulting trusts as well as others. Thus, where there is a grant or devise of a real estate, either by deed or will, and the whole equitable interest is not thereby granted or devised, there will be a resulting trust for the grantor or his heir;⁵ and in such case it will be necessary, in a suit relating to that estate, to bring the grantor or his heir before the Court.

Upon this principle it has been held, that in cases of charities, where a private founder has appointed no visitor, his heir-at-law is considered a necessary party to an information for the regulation of the charity, because in such case the heir-at-law of a private founder is considered as the visitor. But in a case of this description the Court refused to dismiss the information because of his absence, and directed an inquiry for him to be made by the Master;⁶ and so in the case of a charity, wherever it is doubtful whether the heir is disinherited or not, he must be a party.⁷

*262 *Wherever a real estate is to be recovered, or a right is sought to be established, or a charge raised against real estate, it is necessary that the person or persons entitled to the inheritance should be before the Court.¹ Upon this principle it is, that in a bill by a specialty creditor, to obtain payment of his demand out of the real estate of his debtor, the heir, as well as the executor, is a necessary party.² Where, however, the arrears of an annuity, charged upon real estates, are sought to be recovered, if the arrears are such only as were

³ *Chambers v. Goldwin*, 9 Ves. 268; *Story Eq. Pl. § 189*; *Bryant v. Erskine*, 55 Maine, 153, 158; *Lennon v. Porter*, 2 Gray, 473; *Hill v. Adams*, 2 Atk. 39; *Bishop of Winchester v. Beavor*, 3 Ves. 315, 316; *ante*, 194.

⁴ *Hobart v. Abbot*, 2 P. Wms. 693; *ante*, p. 194, and notes; 210 and notes; *Kettle v. Van Dyck*, 1 Sandf. (N. Y.) 76; *Story Eq. Pl. § 191*; *Stone v. Bartlett*, 46 Maine, 438.

⁵ *Ripley v. Waterworth*, 7 Sumner's Ves. 425, Perkins's note (c), and cases cited; 2 *Story Eq. Jur. § 1196 et seq.*, and notes; *Scott v. Fenhoulett*, 1 Bro. C. C. (Perkins's ed.) 70, note (a).

⁶ *Attorney-General v. Gaunt*, 3 Swan. 148, n.

⁷ *Attorney-General v. Green*, 2 Bro. C. C. 495; see *ante*, p. 229; *Order XXXI. August, 1841*; see *Story Eq. Pl. § 180*.

¹ See *New England, &c., Bank v. Newport Steam Factory*, 6 R. I. 154.

² But where the bill is filed by the creditors for the purpose of making their debts out of real estate specifically charged by the testator with the payment of them, the heirs-at-law are not necessary parties. *Smith v. Wycoff*, 11 Paige, 49. But in such a case, all the creditors, whose debts are charged upon the land, should be made parties if they are named in the will, and whose debts are still due. *Ibid.*

due in the lifetime of the ancestor, it will be sufficient to make his personal representative a party, but for any arrears after his death, the heir must be a party.³

The same rule applies to all cases where the jurisdiction is drawn from the Courts of Common Law, in order to establish a right against a person having a limited estate in land or other hereditaments; and it is in such cases always held necessary to have the owner of the inheritance before the Court. Thus, where a bill was filed to establish a custom whereby the owners and occupiers of certain lands were obliged to keep a bull and a boar for the use of the inhabitants of the parish, it was held that a custom which binds the inheritance of lands can never be established in a Court of Equity unless the owners of the inheritance are parties, and that the master and fellows of Queen's College, who were the owners, ought to have been there.⁴ And so, where a man prefers a bill to establish a modus against a lessee of an impropiator, he must make the owner of the impropriation a party.⁵ Upon the same principle, where a bill was filed to establish a modus against an ecclesiastical rector or a dean and chapter, as impropiators, the ordinary and patron were considered necessary parties.⁶

It is to be observed, that, to render the owner of the inheritance necessary, the object of the suit must be to bind the inheritance; if that is not the case, and the relief sought is merely against the present incumbent, the owner of the inheritance, if made a party, may demur.⁷

In the case of *Penn v. Lord Baltimore*,⁸ which was a suit for a *specific performance of an agreement respecting the bounda- *263
ries of two provinces in America, it was considered unnecessary to make the planters, tenants, or inhabitants within the districts, parties to the suit. The objection taken was upon the ground that their privileges, and the tenure and law by which they held, might not be altered without their consent; but Lord Hardwicke overruled the objection, saying, "Consider to what this objection goes; in lower instances, in the case of manors and honors in England which have different customs and by-laws frequently; yet, though different, the boundaries of these manors may be settled in suit between the lords of these manors without making the tenants parties, or may be settled by agreement, which this Court will decree, without making the tenants parties; though in case of fraud, collusion, or prejudice to the tenants, they will not be bound."

³ *Weston v. Bowes*, 9 Mod. 309; *Story* Eq. Pl. § 181.

⁴ *Spendler v. Potter*, Bunb. 181.

⁵ *Glanvil v. Trelawney*, Bunb. 70.

⁶ *Gordon v. Simpkinson*, 11 Ves. 509;

Cook v. Butt, 6 Mad. 53; *Hales v. Pomfret*,

Dan. 142; *De Whelpdale v. Milburn*, 5 Pri.

485.

⁷ *Williamson v. Lord Lonsdale*, *Dan. Ex.*

171; *Markham v. Smith*, 11 Pri. 126; and see further, as to suits relating to tithes, *Day v. Drake*, 3 Sim. 64, 82; *Petch v. Dalton*, 8 Pri. 9; *Leathes v. Newit*, 8 Pri. 562; *Bennett v. Skeffington*, 4 Pri. 143; *Tooth v. The Dean and Chapter of Canterbury*, 3 Sim. 49; *Cuthbert v. Westwood*, *Gillb. Eq. Rep.* 230; *16 Vin. Ab. Party*, B. 255, Pl. 58.

⁸ 1 Ves. Sen. 444, 449.

And in general, it may be stated as a rule, that occupying tenants under leases, or other persons claiming under the possession of a party whose title to real property is disputed, are not deemed necessary parties; though if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a Court of Equity in their absence; and though, if his title was equitable merely, they may be affected by a decision against that title. Sometimes, however, if the existence of such rights is suggested at the hearing, the decree is expressly made without prejudice to those rights, or otherwise qualified according to circumstances. If, therefore, it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it; and where the right is of a higher nature, as a mortgage, the person claiming, as we have seen, is usually made a party.¹ And where a tenant in common had demised his undivided share for a long term of years, the lessee was held a necessary party to a bill for a partition, because he must join in the conveyance, and his lessor was ordered to pay his costs.²

The same principle which renders it necessary that the owner of the inheritance should be before the Court, in all cases in which a right is to be established against the inheritance, requires that, in cases where there is a dispute as to whether land in the occupation of a defendant is freehold or copyhold, the lord of the manor should be a party. Thus, where a plaintiff, by his bill, pretended a title to certain lands as freehold, which lands the defendant claimed to hold by copy of Court roll to him and his heirs, and prayed in aid the lord of the manor, *264 but nevertheless, the plaintiff *served the defendant with process to rejoin, without making the lord of the manor a party; it was ordered, that the plaintiff should proceed no more against the defendant before he should have called the lord in process.¹

For a similar reason it is held, that where a bill is brought for the surrender of a copyhold for lives, the lord must be made a party; because, when the surrender is made, the estate is in the lord, and he is under no obligation to regrant it; but it is otherwise in the case of copyholders of inheritance, there the lord need not be a party.

It may be observed in this place, that the same rule which has been before laid down,² with regard to the persons to be made parties as being interested in the inheritance of an estate, prevails equally in the case of adverse interests, as in that of concurrent interests with the plaintiffs. This rule is, that wherever the inheritance to a real estate is the subject-matter of the suit, the first person in being who is entitled to an estate of inheritance in the property, and all others having intermediate interests must be defendants. Thus it is held necessary,

¹ *Ld. Red.* 175.

² *Cornish v. Gest*, 2 *Cox*, 27. A landlord cannot maintain a bill in Equity to suppress a nuisance caused to his property before he demised it, and continued afterwards, with-

out joining his tenant as a co-plaintiff. *Ingraham v. Dunnell*, 5 *Met.* 118.

¹ Cited in *Lucas v. Arnold*, *Cary*, Rep. 81; 16 *Vin. Ab.* tit. *Party*. B. 253: Pl. 46.

² *Ante*, pp. 219, 220, and cases cited.

in order to obtain a complete decree of foreclosure, in cases where the equity of redemption is the subject of an entail, that the first tenant in tail of the equity of redemption should be before the Court.³

It appears to have been hekl formerly, that a decree of foreclosure against a tenant for life would bar a remainder-man,⁴ but it is now settled, that not only the tenant for life, but the person having the next vested estate of inheritance, must be parties;⁵ and the same rule applies to all cases where a right is to be established, or a charge raised against real estates which are the subject of settlement.

A plaintiff, however, has no right to bring persons in the situation of remainder-men before the Court in order to bind their rights, upon a discussion whether a prior remainder-man, under whom he claims, had a title or not, merely to clear his own title as between him and a purchaser. This was decided in *Pelham v. Gregory*,⁶ before Lord Northington; in which case the question arose on the title to certain leasehold estates, which were limited in remainder, after limitations to the Duke of Newcastle and his sons, to the first and other sons of Mr. Henry Pelham in tail, and *to which the plaintiff, Lady *265 Catherine Pelham, claimed to be absolutely entitled on the death of the Duke, as administratrix to Thomas Pelham, the son of Mr. Henry Pelham, the first tenant in tail who had come into being. The plaintiff, in order to have this question decided against Lord Vane and Lord Darlington, who were subsequent remainder-men in tail, contracted to sell the estate, subject to the Duke's life-estate, and to the contingency of his having sons, to the defendant Gregory, and brought a bill against him for a specific performance, to which she made Lord Vane and Lord Darlington parties; but Lord Northington dismissed the bill with respect to Lord Vane and Lord Darlington, and the reason his Lordship gave for dismissing the bill against the two latter, as expressed in his decree, was, "that they being remainder-men after the death of the Duke of Newcastle, if he should die without issue, their claims were not within his cognizance to determine, and the plaintiff had no right to bring them into discussion in a Court of Equity." From this decree there was an appeal to the House of Lords, and although they decreed Gregory to perform his contract, they affirmed the dismissal against Lord Vane and Lord Darlington.¹ In *Devonsher v. Newenham*,² Lord Redesdale, after stating the above case and decision, says, "I take this to be a decisive authority, and if the books were searched, I have no doubt many other cases might be found where bills have been dismissed on this ground."

³ *Reynoldson v. Perkins*, Amb. 564; Story Eq. Pl. §§ 144, 198; and see *Pendleton v. Rooth*, 1 Giff. 35; 5 Jur. N. S. 840.

⁴ *Roscarrick v. Barton*, 1 Ch. Ca. 217; but it may be doubted whether, in this case, it was intended to lay down such rule.

⁵ *Sutton v. Stone*, 2 Atk. 101. If the mortgage consists of a reversion or remain-

der, subject to an estate for life, it may be foreclosed; but the estate of the tenant for life would not be affected, and he would have no interest in the foreclosure. *Penniman v. Hollis*, 13 Mass. 429.

⁶ 1 Eden, 518; 5 Bro. P. C. 435, S. C.

¹ 3 Bro. P. C. ed. Toml. 204.

² 2 Sch. & Lef. 210.

The owner of the first estate of inheritance, however, is sufficient to support the estate, not only of himself, but of everybody in remainder behind him;³ therefore, where a tenant in tail is before the Court, all subsequent remainder-men are considered unnecessary parties. This is by analogy to the rule at Law, according to which there is no doubt that a recovery in which a remainder-man in tail was vouched, might bar all remainders behind.⁴

But although where there is a clear tenancy in tail, there is no occasion for a subsequent remainder-man being a party to a bill of foreclosure, yet where it is doubtful whether a particular party has an estate tail or not, the person who has the first undoubted vested estate of inheritance ought to be a party;⁵ and so, where the first tenant in tail was a lunatic, the remainder-man was held to be a proper party.⁶

It is necessary, however, in cases of this sort, not only that

*266 he, *who has the first estate of inheritance should be before the Court, but that the intermediate remainder-men for life should be parties.¹ The same rule will, as we have seen before, apply, where the intermediate estate is contingent or executory, provided the person to take is ascertained; although where the person to take is not ascertained, it is sufficient to have before the Court the trustees to support the contingent remainders, and the person *in esse* entitled to the first vested estate of inheritance.² Executory devises to persons not in being may, in like manner, be bound by a decree against a vested estate of inheritance; but a person claiming under limitations by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be a party to a bill affecting his right;³ and in general, where a person is seised in fee of an estate, having that seisin liable to be defeated by a shifting use, conditional limitation, or executory devise, the inheritance is not represented in Equity merely by the person who has the fee liable to be defeated, but the persons claiming in contingency upon the defeat of the estate in fee are necessary parties.⁴

If after a cause has proceeded a certain length, an intermediate remainder-man comes into *esse*, he must be brought before the Court by supplemental bill;⁵ and so, if first tenant in tail, who is made a party to a suit, dies without issue before the termination of the suit, accord-

³ Reynoldson v. Perkins, Amb. 564; but this rule does not apply to a Scotch entail; Fordyce v. Bridges, 2 Phil. 497, 506; 2 C. P. Coop. t. Cott. 326, 334; and as to the effect of a decree against an infant tenant in tail, see S. C. in the Court below. 10 Beav. 101; 10 Jur. 1020.

⁴ Per Lord Eldon, in Lloyd v. Johnes, 9 Ves. 64; see also Gifford v. Hort, 1 Sch. & Lef 386; Story Eq. Pl. §§ 144, 145. [*Ante*, 228, n. 1.]

⁵ Powell Mort. 975 a.

⁶ Singleton v. Hopkins, 1 Jur. N. S. 1199, V. C. S.

¹ Per Lord Eldon, in Gore v. Stacpoole, 1

Dow, 18, 32; 4 Kent, 186; Penniman v. Hollis, 13 Mass. 429.

² Lord Cholmondeley v. Lord Clinton, 2 J. & W. 7, and 133; Hopkins v. Hopkins, 1 Atk. 590.

³ Ld. Red. 174.

⁴ Goodess v. Williams, 2 Y. & C. 598; 7 Jur. 1123; [Pells v. Browne, 1 Eq. Cas. Abr. 187, pl. 4; Sherrit v. Birch, 3 Bro. C. C. 229; Willman v. Holmes, 4 Rich. Eq. 476; Jackson v. Edwards, 7 Paige, 399; Ferriss v. Lewis, 2 Tenn. Ch. 293. And see *ante*, 228, note 1, where the remainder is vested.]

⁵ Ld. Red. 174; Per Lord Eldon, in Lloyd v. Johnes, 9 Ves. 59; 15 & 16 Vic. c. 86,

ing to the constant practice of the Court, the suit is proceeded with against the next tenant in tail, as if he had been originally a party; and this is done by means of a supplemental bill or order.⁶ It seems also clear, that if a tenant in tail is plaintiff in a suit, and dies without issue, the next remainder-man in tail, although he claim by new limitation, and not through the first plaintiff as his issue, is entitled to continue the suit of the former tenant in tail by supplemental bill, and to have the benefit of the evidence and proceedings in the former suit.⁷

The general rule requiring all persons interested in resisting the plaintiff's demands to be brought before the Court as defendants, in order to give them an opportunity of litigating the claim set up, formerly rendered it imperative, wherever more than one person was liable to contribute to the satisfaction of the plaintiff's claim, *that they should all have been made parties to the suit.¹ This *267 application, however, of the general rule has been materially modified by the 32d Order of August, 1841,² which provides that, in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

It will, however, be necessary shortly to state what was the practice previous to this Order, inasmuch as it will still apply to all cases not brought precisely within its terms. In the case of *Madox v. Jackson*,³ Lord Hardwicke said: "The general rule of the Court to be sure is, where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other in taking the account. Another reason is, that the debtors are entitled to a contribution, where one pays more than his share of the debt:⁴ a further reason is, if there are different funds, as where the debt is a specialty, and he might at Law sue either the heir or executor for satisfaction, he must make both parties, as he may come in the last place upon the real assets;⁵ but there are exceptions to this, and the exception to the first rule is, that if some of the obligors are only sureties, there is no pretence for the principal in the bond to say, that the creditor ought to bring the surety before the Court, unless he has paid the debt."⁶ It may here be observed, that by the terms of the Order,

§ 52; *Fullerton v. Martin*, 1 Drew. 238; *Pickford v. Brown*, 1 K. & J. 643; *Jebb v. Tugwell*, 20 Beav. 461; [*Egremont v. Thompson*, L. R. 4 Ch. App. 448; *Williams v. Llanelly Railway & Dock Co.*, L. R. 10 Eq. 401].

⁶ *Cresswell v. Bateman*, 6 W. R. 220, V. C. K.

⁷ *Lloyd v. Johnes*, 9 Ves. 59; *Story Eq. Pl. §§ 144, 146*, and notes; *Dendy v. Dendy*, 5 W. R. 221, V. C. W.; *Williams v. Williams*, 9 W. R. 296, V. C. K.; *Ward v. Shakeshaft*, 7 Jur. N. S. 1227; 10 W. R. 6, V. C. K.; see, however, *Lowe v. Watson*, 1

Sm. & G. 123; *Jackson v. Ward*, 1 Giff. 30; 5 Jur. N. S. 782.

¹ *Jackson v. Rawlins*, 2 Vern. 195; *Erickson v. Nesmith*, 46 N. H. 371; *Hadley v. Russell*, 40 N. H. 109; see *Ferrer v. Barrett*, 4 Jones Eq. (N. C.) 455; *Hart v. Coffee*, 4 Jones Eq. (N. C.) 321; *Young v. Lyons*, 8 Gill, 162.

² Gen. Ord. VII. 2.

³ 3 Atk. 106; *Bland v. Winter*, 1 S. & S. 246; *Collins v. Griffith*, 2 P. Wms. 313.

⁴ *Erickson v. Nesmith*, 46 N. H. 371.

⁵ *Story Eq. Pl. § 169*.

⁶ *Ibid*.

no distinction is made between principals and sureties, so that it would appear as if the plaintiff might file his bill against one or more of the sureties, without making the principal a party to the suit. In *Allen v. Houlden*,⁷ however, where one of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of fraud, and prayed an account of the payments made in respect of the bond; Lord Langdale M. R. held, that notwithstanding the order, the principal debtor and co-surety were necessary parties. And so, in *Pinkus v. Peters*,⁸ where the plaintiff alleged that he had accepted bills of exchange without consideration, and that he had been sued upon them, and by his bill prayed relief against the drawer and the holder,

without making a person to whom the drawer had indorsed
 *268 *the bill a party, Lord Langdale held, that as there was an allegation that the holder of the bills was a trustee as well for the drawer as also for the indorsee, such intervening indorsee was a necessary party to the suit.

Before this order it was held that all trustees implicated in a breach of trust were necessary parties to a suit complaining of the breach or trust;¹ but since the Order it has been held, that where a breach of trust has been committed by several trustees, the *cestui que trusts* may proceed against one trustee, in the absence of the others.² But it must not be supposed that, in every case in which a breach of trust has been committed, the *cestui que trusts* can arbitrarily select any one trustee, and charge him as for a breach of trust, whatever the nature of the complaint may be. "Take for example," said Sir James Wigram V. C. in the case of *Shipton v. Rawlins*,³ "the case of one of two trustees acting alone, and receiving the whole trust moneys, and investing them in his own name; that might be a breach of trust *per se*; for the *cestui que trusts* had a right to require each trustee to have a hold upon the trust fund; and, if a loss resulted, the non-acting trustee might be liable for it. But if the fund were safe, though irregularly standing in the name of the trustee only, I cannot think this Order would entitle the plaintiff to sue the trustee who had not acted, separately from the other. The case of *Walker v. Symonds*,⁴ as explained in *Munch v. Cockerell*,⁵ shows that all the trustees are, *primâ facie*, necessary parties to a suit complaining of a breach of trust, although execution might be taken out against one only." There is no clear principle laid down in the cases determining where all the trustees are necessary parties, and where one

⁷ 6 Beav. 148; and see also *Lloyd v. Smith*, 13 Sim. 457; 7 Jur. 460; *Pierson v. Barclay*, 2 De G. & S. 746. But it seems that one of the makers of a joint and several promissory note may be sued without the others. *McIntyre v. Connell*, 1 Sim. N. S. 225, 241.

⁸ 5 Beav. 253, 260.

¹ *Walker v. Symonds*, 3 Swanst. 75; C. P. Coop. 509-512, 574; *Munch v. Cockerell*, 8

Sim. 219, 231; C. P. Coop. 78, n. (d); *Perry v. Knott*, 4 Beav. 179, 181.

² *Perry v. Knott*, 5 Beav. 293; *Kellaway v. Johnson*, 5 Beav. 319; 6 Jur. 751; *Attorney-General v. Corp. of Leicester*, 7 Beav. 176; *Strong v. Strong*, 18 Beav. 408; *Attorney-General v. Pearson*, 2 Coll. 581; 10 Jur. 651; *Norris v. Wright*, 14 Beav. 310.

³ 4 Hare, 623

⁴ 3 Swanst. 75.

⁵ 8 Sim. 219, 231.

may be proceeded against without the others. The Court appears rather to have exercised a discretion, and to have allowed the Order to apply or not as, under the circumstances, the justice of the case required.⁶

It is to be observed, however, that the Order does not apply to cases where the general administration of the estate is sought;⁷ nor where accounts of the trust fund have to be taken;⁸ and it *has *269 been held, that where one trustee files a bill against a co-trustee who has been guilty of a breach of trust, in which some of the *cestui que trusts* have concurred, they are necessary parties notwithstanding the Order.¹ So, also, in a suit for the recovery of a partnership debt, against the executors of a deceased partner, the surviving partner is a necessary party.² And it is also to be observed, that where the plaintiff has made several persons jointly liable parties, he cannot afterwards waive the relief against some, and take a decree at the hearing against others.³

The Order does not apply to any case where the demand is not joint and several; and, therefore, where there is only a joint demand, the old practice continues, and all the persons liable must be made parties. Thus, if there be a demand against a partnership firm, all the persons constituting that firm must be before the Court; and if any of them are dead, the representatives of the deceased partners must be likewise made parties.⁴ And where a bill was filed by the captain of a ship, against the personal representative of the survivor of two partners, who were joint owners of the ship, for an account and satisfaction of his demand, it was held that the suit was defective, because the representatives of the other partner, who might be interested in the account, were not before the Court; although, as the demand would have survived at Law, the case there might have been different.⁵

⁶ For cases in which all the trustees were required to be parties, see *Shipton v. Rawlins*, 4 Hare, 619; *Fowler v. Reynal*, 2 De G. & S. 749; 13 Jur. 650, n.; and see Reporter's note, 24 Beav. 99; *Lewin v. Allen*, 8 W. R. 603, V. C. W.

⁷ *Hall v. Austin*, 2 Coll. 570; 10 Jur. 452; *Biggs v. Penn*, 4 Hare, 469; 9 Jur. 368; *Chancellor v. Morecraft*, 11 Beav. 262; *Penny v. Penny*, 9 Hare, 39; 15 Jur. 445.

⁸ *Devaynes v. Robinson*, 24 Beav. 86; 3 Jur. N. S. 707; *Coppard v. Allen*, 10 Jur. N. S. 622; 12 W. R. 943, L. J.J.; 2 De G., J. & S. 173; and see *Fletcher v. Gibbon*, 23 Beav. 212.

¹ *Jesse v. Bennett*, 6 De G., M'N. & G. 609; 2 Jur. N. S. 1125; *Williams v. Allen*, 29 Beav. 292; *Roberts v. Tunstall*, 4 Hare, 261.

² *Hills v. M'Rae*, 9 Hare, 297.

³ *Fussell v. Elwin*, 7 Hare, 29; 13 Jur. 333; *The London Gaslight Company v. Spottiswoode*, 14 Beav. 264.

⁴ *Story Eq. Pl. § 166-168*; *Moffat v. Farquharson*, 2 Bro. C. C. (Perkins's ed.) 338, and notes; *Story Partn. § 449*; 1 *Story Eq. Jur. § 466*; *Cox v. Stephens*, 9 Jur. N. S.

1144; 11 W. R. 929, V. C. K.; and see *Atkinson v. Mackreth*, L. R. 2 Eq. 571, M. R., where a defaulting partner had absconded. [But see *Plumer v. Gregory*, L. R. 18 Eq. 621, where it is considered as settled, if the liability be joint and several, that any of the parties may be sued without joining the others, and *Atkinson v. Mackreth* is held to have proceeded on its special circumstances.] In case of a dormant partner, the plaintiff has his election to make him defendant or not. *Hawley v. Cramer*, 4 Cowen, 717; *Goble v. Gale*, 7 Black. 218; *Collyer, Partn.* (Perkins's ed.) § 391 in note. Where the sole design of the bill is to have the individual property of one partner, alleged to have been fraudulently conveyed away by him, applied in satisfaction of a judgment against the firm, another partner from whom no discovery is sought, and against whom no relief is prayed, is neither a necessary nor a proper party. *Randolph v. Daly*, 1 C. E. Green (N. J.), 313.

⁵ *Pierson v. Robinson*, 3 Swan. 139, n.; *Scholefield v. Henfield*, 7 Sm. 667; *Story Eq. Pl. § 194*; *Wells v. Strange*, 5 Geo. 22. So where a bill is brought to recover a debt

Although, even before the 32d Order of August, 1841,⁶ it was not generally necessary, in a suit against the principal, to make the surety a party, yet, where a person had executed a conveyance, or created a charge upon his own estate, as a collateral security for another, he became a necessary party to a suit against the principal. This *270 appears to have been the result of the determination *in *Stokes v. Clendon*,¹ which was the case of a mortgage by a principal of one estate, and by the surety of another, as a collateral security; and Lord Alvanley M. R. determined, that a bill of foreclosure against the principal could not be sustained without making the other mortgagor a party; because the other had a right to redeem and be present at the account, to prevent the burden ultimately falling upon his own estate, or at least falling upon it to a larger amount than the other estate might be deficient to satisfy.

In *Stokes v. Clendon*, it is to be observed, that the surety had conveyed his own estate by way of security to the mortgagee. Where, however, he merely enters into a personal covenant as surety for the principal, but does not convey any estate or interest to the mortgagee, he will not be considered as a necessary party, unless the surety has paid part of the debt;² and where A., having a general power of appointment over an estate, in the event of surviving his father, joined with two other persons as his sureties, in a covenant to pay an annuity to the plaintiff, and also covenanted, that he would create a term in the estate if he survived his father, and upon the death of his father a bill was filed by the plaintiff against A. and other parties interested in the estate, to have the arrears of his annuity raised and paid; it was held upon demurrer, that the sureties were not necessary parties.³

In a bill by one surety against another, to make him contribute, it was held, that the executor of a third surety who was dead ought to be a party, though he died insolvent.⁴ In that case, the principal had given a counter-bond of indemnity to the plaintiff, who had taken him in execution upon it, and he had been discharged by an Insolvent Act;

against the estate of a deceased partner, the other partners are proper and necessary parties. *Vose v. Philbrook*, 3 Story, 335. So to a bill seeking relief from the estate of a deceased stockholder, all the living stockholders and representatives of deceased stockholders, liable to the debt, must, as interested in the account to be taken, be made parties defendant. *New England, &c. Bank v. Newport Steam Factory*, 6 R. I. 154.

⁶ This order has been adopted in the Equity Rules of the United States Supreme Court. Equity Rule, 51; see Genl. Ord. VII. r. 2.

¹ Cited 2 Bro. C. C. 275, *notis*, edit. Belt, 3 Swanst. 150, n.; see also *Payne v. Compton*, 2 Y. & C. Ex. 457, 461; *Gedge v. Matson*, 25 Beav. 310.

² *Gedge v. Matson*, 25 Beav. 310.

³ *Newton v. Earl of Egmont*, 4 Sim. 574, 581.

⁴ *Hole v. Harrison*, Finch, 15. So the principal debtor must be made a party. *Trescott v. Smith*, 1 McCord Ch. 301. All persons interested should be made parties in such a case. *Moore v. Moberly*, 7 B. Mon. 295. Those, however, need not be made parties who have removed beyond the jurisdiction of the Court. *McKenna v. George*, 2 Rich. Eq. 15; *ante*, 191, 245, and note. Where a surety seeks to have his debt paid to the creditor out of some specified fund, or by some party other than himself, such creditor is a necessary party to the bill. But the creditor is not a necessary party, where the surety has paid the debt, and is seeking to be reimbursed by the principal or co-surety. *Murphy v. Jackson*, 5 Jones Eq. (N. C.) 11.

and though he appears not to have been made a party, yet no objection was taken;⁵ and it seems from this circumstance, and also from the case of *Lawson v. Wright*,⁶ that if the principal is clearly insolvent, and can be proved to be so (as by his having taken advantage of an Act for the Relief of Insolvent Debtors) he need not be a party to the suit.⁷

It will, however, be necessary, if the principal be not a *party. *271 that the fact of his insolvency should be proved: whereas, if he be a party to the suit, such proof will be unnecessary. In *Hole v. Harrison*,¹ the insolvency of the principal was apparent from the fact of his having taken advantage of the Insolvent Act; but it is presumed that the insolvency of the co-security was not so capable of proof, and that it was upon that ground held necessary to have his personal representative before the Court, in order to take an account of his estate. Where the fact of the insolvency of one of the sureties was clear, and admitted by the answers, Lord Hardwicke held, that there was no necessity to bring his representatives before the Court.² It seems, however, that the plaintiff has his election, whether he will bring the insolvent co-obligor or his representative before the Court or not.³ And in all cases coming under the 32d Order,⁴ the plaintiff has the option to sue all the persons jointly and severally liable, if he shall think fit. Independently of this order, a plaintiff is allowed, in a case where there are several persons who are each liable to account for his own receipts, to file a bill against one or more of them for an account of their own receipts and payments, without bringing the other parties to the suit. Thus, where a residuary legatee brought his bill against one of two executors, without his co-executor, who was abroad, to have an account of his own receipts and payments, the Lord Chancellor said, "The cause shall go on, and if upon the account any thing appear difficult, the Court will take care of it; the reason is the same here as in the case of joint factors, and the issuing out of process in this case is purely matter of form."⁵

The same rule will, it appears, be adopted, where there are joint factors, and one of them is out of the jurisdiction. And in the case of

⁵ *Hole v. Harrison*, Finch, 15.

⁶ 1 Cox. 276.

⁷ Story Eq. Pl. § 169; see 1 Story Eq. Jur. §§ 494, 496; Long v. Dupuy, 1 Dana, 104; Young v. Lyons, 8 Gill, 162; Montague v. Turpin, 8 Grattan, 453; Watts v. Gayle, 20 Ala. 817. It is not sufficient in such a case merely to allege the insolvency of the principal. Roane v. Pickett, 2 Eng. 510. Where one of several judgment debtors is wholly irresponsible and destitute of property, he need not be made a party to a judgment creditor's bill. Williams v. Hubbard, 1 Mann. (Mich.) 446. Where a bill in Equity is brought against any of the stockholders of a corporation to compel them to pay a debt of the corporation for which they are individually liable, the general rule is, that all persons liable to contribute should be made parties to the bill. But this is a

rule of convenience, and not of necessity; and where certain of the stockholders within the jurisdiction are insolvent, the plaintiff may have his decree against such as are solvent for his whole debt, each paying such proportion of the whole debt as his stock bears to the whole amount of stock owned by the solvent stockholders, over whom the Court has acquired jurisdiction. Erickson v. Nesmith, 46 N. H. 371.

¹ Rep. t. Finch, 15.

² Madox v. Jackson, 3 Atk. 406.

³ Haywood v. Ovey, 6 Mad. 113; see Clagett v. Worthington, 3 Gill, 83.

⁴ Genl. Ord. VII. r. 2.

⁵ Cowslad v. Cely, Prec. in Ch. 83; 1 Eq. Ca. Ab. 73, Pl. 18; 2 Eq. Ca. Ab. 165, Pl. 3, S. C.; but see Devaynes v. Robinson, 24 Beav. 98; 3 Jur. N. S. 707.

Lady Selyard v. The Executors of Harris,⁶ above referred to, where it did not appear that the parties were out of the jurisdiction, the

*272 Court permitted the representatives of one of several * trustees, who were dead, to be sued for an account of the receipts and disbursements of his testator, who alone managed the trust, without bringing the representatives of the other trustees before the Court; and now, under the 32d Order of August, 1841,¹ it is not necessary to make all the persons committing a breach of trust parties to a suit instituted for redress of the wrong.²

The rule, that all the parties liable to a demand should be before the Court, was a rule of convenience, to prevent further suits for a contribution, and not a rule of necessity; and therefore might be dispensed with, especially where the parties were many, and the delays might be multiplied and continued.³ Thus, where there were a great number of obligors, and many of them were dead, some leaving assets and others leaving none, the Court proceeded to a decree, though all of them were not before it.⁴

The general rule, requiring the presence of all parties interested in resisting the plaintiff's demand, has also been dispensed with in a variety of cases, where the parties were numerous, and the ends of justice could be answered by a sufficient number being before the Court to represent the rights of all.⁵ Thus, where A. agreed with B. and C. to pave the streets of a parish, and B. and C., on behalf of themselves and the rest of the parish, agreed to pay A., and the agreement was lodged in the hands of B., it was held, that A. should have his remedy against B. and C. and that they must resort to the rest of the parish.⁶ And so in *Cullen v. The Duke of Queensberry*, where a bill was filed by a tradesman against the committee of a voluntary society called "The Ladies' Club," for money expended and work done under a contract entered into by the defendants, on behalf of themselves and the other subscribers, and it was objected that all the members who had subscribed should be parties, the objection was overruled, and a decree made for the plaintiff.⁷

⁶ 1 Eq. Ca. Ab. 74, Pl. 20.

¹ Genl. Ord. VII. r. 2.

² *Kellaway v. Johnson*, 5 Beav. 319; *Perry v. Knott*, 5 Beav. 293; and see *Shipton v. Rawlins*, 4 Hare, 622; *Hall v. Austin*, 2 Coll. 570; 10 Jur. 452.

³ *Darwent v. Walton*, 2 Atk. 510; *Anon.*, 2 Eq. Ca. Ab. 166, Pl. 27; *Story Eq. Jur.* §§ 78, 82; *Erickson v. Nesmith*, 46 N. H. 371, 374-377; *Stimson v. Lewis*, 36 Vt. 91, 93.

⁴ *Lady Cranbourne v. Crispe*, Finch, 105; 1 Eq. Ca. Ab. 70; see 48th Equity Rule of United States Supreme Court.

⁵ The like doctrine applies to cases where there are many persons defendants, belonging to voluntary associations, against whom the suit is brought, as to cases where the bill is brought by some proprietors as plaintiffs on behalf of all. *Story Eq. Pl.* 116 *et seq.*; *Wood v. Dummer*, 3 Mason, 315-319, 321,

322; *Stimson v. Lewis*, 36 Vt. 91, 94; *Gorman v. Russell*, 14 Cal. 531; see *Whitney v. Mayo*, 15 Ill. 251. So where the creditors of an insolvent debtor, who has assigned his property for the payment of his debts, are numerous, and some of them not within the Commonwealth, it is not necessary that they should be made parties to a bill in Equity which concerns his assets; he and his assignees only need be made parties. *Stevenson v. Austin*, 3 Met. 474; *Wakeman v. Grover*, 4 Paige, 23; see *Dias v. Bouchand*, 10 Paige, 445; *Johnson v. Candage*, 31 Maine, 28; *Duval v. Speed*, 1 M. Ch. Dec. 229.

⁶ *Meriel v. Wymondsold*, Hard. 205; see also *Anon.*, 2 Eq. Ca. Ab. 166, Pl. 7.

⁷ *Cullen v. Duke of Queensberry*, 1 Bro. C. C. 101 (Perkins's ed.), and notes; 1 Bro. P. C. 396, S. C. on appeal.

The same rule was acted upon by Sir Thomas Plumer M. R., * in a bill for the specific performance of an agreement for a lease, *273 against the treasurer and directors of a Joint-Stock Company established by Act of Parliament, who had purchased the fee of the premises from the party who had entered into the agreement, although the rest of the proprietors, whose concurrence in the conveyance would be necessary, were not before the Court.¹ The Master of the Rolls, on that occasion, came to the conclusion, that although the bill required an act to be done by parties who were absent, yet, as they were so numerous that they could not be brought before the Court, he would go as far as he could to bind their right, and made a decree declaring the plaintiffs entitled to a specific performance, and restraining the treasurer of the company from bringing any action to disturb the plaintiffs in their possession.²

From the case of *Horsley v. Bell*,³ cited in the above case of the Ladies' Club, it appears that, in cases of this description, the acting members of the committee are all liable, though some of them may not have been present at all the meetings which have taken place respecting the contract. In that case, the defendants were all the acting commissioners, under a Navigation Act, and the plaintiff had been employed on their behalf, and it appeared that the orders had been given at different meetings by such of the defendants as were present at these meetings; but none of the defendants were present at all the meetings, or joined in all the orders, but every one of them were present at some of the meetings, and joined in making some of the orders; and one of the questions in the cause was, whether all the acting commissioners were liable on account of all the orders, or only as to those which they had respectively signed. Upon this point the Court was of opinion that all the acting commissioners were liable *in toto*. Every one who comes in afterwards approves the former acts; and if any one of the commissioners who had acted before disapproved the subsequent acts, he might have gone to a future meeting and protested against them.

In the preceding cases, the decision was made upon the ground * that, if the plaintiff succeeded in his demands against the indi- *274 viduals sued, they would not be injured, as they had a remedy over against the others for a contribution, which, under their own regu-

¹ *Meux v. Maltby*, 2 Swans. 277; *Parsons v. Spooner*, 5 Hare, 102; 10 Jur. 423; and see *Douglass v. Horsfall*, 2 S. & S. 184. The following cases illustrate the mode of pleading in actions by and against Joint-Stock Companies, and will be useful in framing suits in Equity. *Stewart v. Dunn*, 12 M. & W. 655; *Davidson v. Cooper*, 11 M. & W. 778; *Smith v. Goldsworthy*, 4 Q. B. 430. In a bill against an unincorporated banking company, the members of which are numerous, and, in part, unknown, it is not necessary to bring all the stockholders before the

Court, before a decree can be made. *Mandeville v. Riggs*, 2 Peters, 482; see *Van Vechten v. Terry*, 2 John. Ch. 197; *Shaw v. Norfolk County R. R. Co.*, 5 Gray, 170, 171; *Erickson v. Nesmith*, 4 Allen, 233; *Hadley v. Russell*, 40 N. H. 109.

² 2 Swans. 286; and see *ib.* 287, and the cases there cited; *Thornton v. Hightower*, 17 Geo. 1; but see *McBride v. Lindsay*, 11 Eng. Law and Eq. 249.

³ See *Amb. 770*, and 1 Bro. C. C. 101, n., where the case is more fully reported; and see *Attorney-General v. Brown*, 1 Swan. 265.

lations, they might enforce, although the enforcement of it, on the part of the plaintiffs against so numerous a body, would be nearly impossible.¹ There are, however, other cases in which suits are permitted to proceed against a few, of many individuals of a certain class, without bringing the rest before the Court, although their interests may in some degree be affected by the decision, as in the case of bills of peace brought to establish a general legal right against a great many distinct individuals:² Thus, for instance, a bill may be brought by a person having a right at Law to demand service from the individuals of a large district to his mill, for the purpose of establishing that right. And the corporation of London has been allowed to exhibit a bill for the purpose of establishing their right to a duty, and to bring only a few persons before the Court, who dealt in those things on which the duty was claimed.³ And so bills are frequently entertained by lords of manors against some of the tenants, on a question of common affecting them all; and a parson may maintain a bill for tithes against a few of the occupiers within the parish although they set up a modus to which the whole are jointly liable.⁴

The principle upon which the Courts have acted in those cases has been very clearly laid down by Lord Eldon in *Adair v. The New River Company*.⁵ In that case, a bill was filed by a person entitled, under the Crown, to a rent reserved out of a moiety of the profits of the New River Company, to which moiety the Crown was entitled under the original charter of that company, but had subsequently granted it to Sir John Middleton, the original projector, reserving the rent in question. By a variety of *mesne* assignments, the King's moiety of the profits had become vested in a hundred persons, or upwards; and the bill was filed against the company and eight of those persons for an account, and it charged, that there was not any tangible or corporeal property upon which the plaintiff could distrain, and that the parties were so numerous, and thus liable to so many fluctuations, that it was impossible, if the plaintiff could discover them, to bring them all before the Court, and that these impediments were not occasioned by the plaintiff or those under whom he claimed, but by the defendants. To this bill an objection was taken for want of parties,

¹ See 48th Equity Rule of United States Supreme Court.

² It is not a sufficient objection to a bill by creditors against a corporation and its debtors to compel the collection by the corporation of what is due to it, and the payment of the debt it owes, that all the creditors or stockholders are not joined. If necessary, the Court may, at the suggestion of either party that the corporation is insolvent, administer its assets by a receiver, and thus collect all the subscriptions or debts to the corporation. *Ogilvie v. Knox Ins. Co.*, 22 How. U. S. 389; S. C. 2 Black, U. S. 539. And the stockholders who are called upon by such

bill to pay the balances due on their several subscriptions to the stock of the company, cannot be allowed to defend themselves by an allegation that their subscriptions were obtained by fraud and misrepresentation of the agent of the company. *Ogilvie v. Knox Ins. Co.*, 22 How. U. S. 389; [*Upton v. Tribilcock*, 91 U. S. 45.]

³ *City of London v. Perkins*, 4 Bro. P. C. 158; [*Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. App. 8.]

⁴ *Hardcastle v. Smithson*, 3 Atk. 246.

⁵ 11 Ves. 429; see *Story Eq. Pl.* § 116 et seq.; *ante*, 272, 273, note.

because all the persons interested in the King's share were not before the Court; but Lord Eldon said, that there was no doubt that it is generally the rule that wherever a rent charge is granted, all persons who have to litigate any title with regard to that rent charge, or with each other, as being liable to pay the whole or to contribute amongst themselves, must be brought before the Court;¹ but that it was a very different consideration whether it was possible to hold, that the rule should be applied to an extent destroying the very purpose for which it was established, *viz.*, that it should prevail where it is actually impracticable to bring all the parties, or where it is attended with inconvenience almost amounting to that, as well as where it can be brought without inconvenience. It must depend upon the circumstances of each case. His Lordship also said, that there were authorities to show that, where it is impracticable, the rule shall not be pressed; and in such a case as the one before him, the King's share being split into such a number that it was impracticable to go on with a record attempting to bring all parties having interest in the subject to be charged, he should hesitate to determine, that a person having a demand upon the whole or every part of the moiety, does not do enough if he brings all whom he can bring. His Lordship then goes on to say, "There is one class of cases very important upon this subject, *viz.*, where a person having at Law a general right to demand service from the individuals of a large district, to his mill for instance, may sue thus in Equity: his demand is upon every individual not to grind corn for their own subsistence, except at his mill; to bring actions against any individual for subtracting that service is regarded as perfectly impracticable; therefore, a bill is filed to establish that right, and it is not necessary to bring all the individuals. Why? Not that it is inexpedient, but that it is impracticable to bring them all.² The Court, therefore, has required so many that it can be justly said they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff; and when the legal right is so established at Law, the remedy in Equity is very simple: merely a bill stating that the right has been established in such a proceeding; and upon that ground, a Court of Equity will give the plaintiff relief against the defendants in the second suit, only represented *by those in the first. I feel a strong *276 inclination that a decree of the same nature may be made in this case."¹

In the above case of *Adair v. The New River Company*, Lord Eldon laid down as a rule, that wherever a rent-charge is granted, all persons whose estates are liable must be brought before the Court.² This rule,

¹ See 1 Eq. Ca. Ab. 72.

² See 48th Equity Rule of the United States Supreme Court.

¹ See *acc. Biscoe v. The Undertakers of the Land Bank*, cited in *Cuthbert v. Westwood*, Vin. Ab. tit. Party, B. 255, Pl. 58; see *Story Eq. Pl. § 116 et seq.*

² All persons, who are affected by a common charge or burden, must be made parties, not only for the purpose of ascertaining and contesting the right or title to it, but also for the purpose, if it should be established, of a contribution towards its discharge among themselves. *Story Eq. Pl. §§ 133, 162; Cole-*

however, is liable to an exception in the case of charities, which are considered entitled to greater indulgence in matters of pleading and practice than ordinary parties.³ Thus, in *Attorney-General v. Shelly*,⁴ it was held, that in the case of a charity it is not necessary that all the *terre-tenants* should be brought before the Court, because every part of the land was liable, and the charity ought not to be put to this difficulty. The same exception to the general rule was admitted to the case of *Attorney-General v. Wyburgh*.⁵

It is to be observed, that the rule laid down by Lord Eldon, in *Adair v. The New River Company*, applies only to cases where there is one general right in all the parties concerned; ⁶ that is, where the character of all the parties, so far as the right is concerned, is homogeneous, as in the case in suits to establish a modus, or a right of suit to a mill; and that, notwithstanding the inconvenience arising from numerous parties, there are some cases in which they cannot be dispensed with, as in the case of a bill filed to have the benefit of a charge on an estate, in which case all persons must be made parties who claim an interest in such estate. Thus, where estates had been conveyed to trustees, in trust for such creditors of the grantor as should execute the conveyance, and one incumbrancer, some of whose incumbrances were prior and some subsequent to the trust deed, filed a bill praying that his rights and interests under his securities might be established, and the priorities of himself and the other incumbrancers declared; and alleging that the deed was executed by thirty creditors of the grantor, and amongst others by two individuals who were named as defendants, and charging that such creditors were too numerous to be all made parties to the suit, and that he was ignorant of the priorities and interests of such parties and of their residences, and whether they were living or

dead, save as to the two who were named; a plea by some of the *277 defendants, setting out the names *and residences of the persons who had executed the deed, and alleging that they were living, and necessary parties to the suit, was allowed.¹

With reference to this decision it may be observed, that it is the general and most universal practice of the Court, in suits for establishing charges upon estates, to make all persons entitled to incumbrances subsequent to the plaintiff's charge, parties to the suit. Thus, in the case of a bill to foreclose a mortgage, all persons, who have incumbrances upon the estate which are posterior in point of time to the plaintiff's mortgage, must be made defendants; ² for although, if there

man v. Barnes, 5 Allen, 874; Skeel v. Spraker, 8 Paige, 182; Myers v. United Guaranty, &c. Co., 7 De G., M. & G. 112.

³ *Attorney-General v. Jackson*, 11 Ves. 367.

⁴ 1 Salk. 163.

⁵ 1 P. Wms. 599; and see *Attorney-General v. Jackson*, 11 Ves. 365; Story Eq. Pl. § 93; [*Attorney-General v. Naylor*, 1 H. & M. 809].

⁶ See Story Eq. Pl. §§ 120, 130 *et seq.*

¹ *Newton v. Earl Egmont*, 5 Sim. 130; and see *Harrison v. Stewardson*, 2 Hare, 530; and *Holland v. Baker*, 3 Hare, 68; Story Eq. Pl. § 130 *et seq.*

² But see *Smith v. Chapman*, 4 Conn. 344; *Wilson v. Hayward*, 6 Florida, 171. [See *ante*, 214, n. 5 & 7. But to a bill to foreclose, an adverse claimant is not a necessary party, and the bill which should make him a party would be open to the objection of mul-

are many incumbrancers, some of whom are not made parties to a bill of foreclosure, the plaintiff may, notwithstanding, foreclose such of the defendants as he has brought before the Court;³ yet such decree will not bind the other incumbrancers who are not parties, even though the mortgagee at the time of foreclosure had no notice of the existence of such incumbrancers.⁴ This rule may at first appear inconsistent with the usual principles of a Court of Equity, but the justice of it is very clearly shown in the report of Lord Nottingham's judgment in *Sherman v. Cox*.⁵ His Lordship says, "Although there be a great mischief on one hand that a mortgagee, after a decree against the mortgagor to foreclose him of his equity of redemption, shall never know when to be at rest, for if there be any other incumbrances, he is still liable to an account, yet the inconvenience is far greater on the other side; for if a mortgagee that is a stranger to this decree should be concluded, he would be absolutely without remedy, and lose his whole money, when, perhaps, a decree may be huddled up purposely to cheat him, and in the mean time (he being paid his interest) may be lulled asleep and think nothing of it; whereas, on the other hand, there is no prejudice but being liable to the trouble of an account, and if so be that were stated *bonâ fide* between the mortgagor and mortgagee in the suit wherein the decree was obtained, that shall be no more ravelled into, but for so long shall stand untouched."⁶

*Upon the same ground it was that Lord Alvanley M. R. in *278 the *Bishop of Winchester v. Beavor*,¹ ordered a bill of foreclosure to stand over for the purpose of making a judgment creditor a party. From the marginal note to that case, a doubt appears to arise as to whether the Master of the Rolls intended to adopt the general rule, that all incumbrancers must be parties to a bill of foreclosure; but the decision rests upon the rule of practice, which has been stated, and it cannot, after that decision, be doubted that all incumbrancers whose liens appear upon the answer, must be made parties, and if that answer be a sufficient one and true, it must, according to the practice in drawing bills before stated,² appear upon the answer who such incumbrancers are. At all events, it is evident, from the cases of *Lomax v. Hide*,

tifariousness and misjoinder. *Dial v. Reynolds*, 96 U. S. 340; *Corning v. Smith*, 6 N. Y. 82; *Lange v. Jones*, 5 Leigh, 192. *Infra*, 339, n. 2. Neither adverse claimants, nor remainder-men who have not joined in the mortgage, are necessary parties to a bill to foreclose. *Wilkins v. Kirkbride*, 12 C. E. Green, 93.]

³ *Draper v. Lord Clarendon*, 2 Vern. 518.

⁴ *Lomax v. Hide*, 2 Vern. 185; *Godfrey v. Chadwell*, *ib.* 601; 1 Eq. Ca. Ab. 318; Pl. 7, S. C.; *Morret v. Westerne*, 2 Vern. 663; 1 Eq. Ca. Ab. 164, Pl. 7, S. C.; *Haines v. Beach*, 3 John. Ch. 459; *Lyon v. Sandford*, 5 Conn. 544; *Renwick v. Maccomb*, 1 Hopk. 277.

⁵ 3 Ch. Rep. 83 [46]; *S. C. Cockes v. Sherman*, 2 Freem. 14.

⁶ What is here said by the Lord Chancellor on the subject of the account, as well as the case of *Needler v. Deeble*, 1 Cha. Ca. 299, appears to be at variance with the decision in *Morret v. Westerne*, *supra*. It seems to be in consequence of the rule above laid down, that the practice prevails of introducing an interrogatory into a bill of foreclosure, inquiring whether there are any and what incumbrances affecting the estate besides that of the plaintiff, in order that, if the answer states any, the owners of such incumbrances be made parties. Story Eq. Pl. § 193, note. [See *ante*, 214, notes 5 and 7.]

¹ 3 Ves. 314.

² See note 6, on p. 277.

Godfrey v. Chadwell, Morrett v. Westerne, just referred to, that if a mortgagee wishes to obtain an undisputed right to an estate by foreclosure, he must make all incumbrancers upon the estate, of whose liens he has notice (whether appearing upon the answer or not), parties to his suit.³

The rule which requires all incumbrancers upon the equity of redemption to be brought before the Court in cases of foreclosure extends to cases in which the subject of the litigation has been sold, or charged subsequently to the date of the plaintiff's claim, whether such sale or charge has been by legal instrument, or only by agreement, or whether it extends to the whole or only partial interests. Therefore, where an estate had been sold in lots subject to an equitable charge in favor of the plaintiff, it was held that all the purchasers were necessary parties to a bill by him to realize his security.⁴ And where a bill was filed by a lessee to compel a landlord to give his license to the assignment of a lease to a purchaser, on the ground that he had by certain acts waived the right to withhold it, which had been reserved to him by the original lease, the purchaser was held to be a necessary party.⁵ And so if a man contracts with another for the purchase of an estate, and afterwards, before conveyance, enters into a covenant with a third person, that the vendor shall convey the estate to such third person, the vendor, if he have notice of the subsequent contract, cannot with safety convey the estate to the vendee without the concurrence of the third person, who in that case will be a necessary party to a bill by the purchaser against the vendor for a specific performance; but if A. contracts with B. to convey to him an estate, and B. enters into a sub-contract with C., that he, B., will convey to him the same estate, then if B. files a bill against A., C. will not be a necessary party,

*279 because A. is in that case in no manner *affected by the sub-contract, which his conveyance to B. would rather promote than injure.¹ And where a bill was filed by creditors to set aside a purchase on the ground of fraud, and it appeared that the purchaser had, since his purchase, executed a mortgage of the estate, the mortgaged was considered a necessary party.² But where, since his purchase, judg-

³ Rolleston v. Morton, 1 Dr. & W. 171.

⁴ Peto v. Hammond, 29 Beav. 91. [So, if a sub-vendee die, his personal representative and heirs should be made parties to a bill by the original vendor to enforce his lien for the purchase-money. *Lewis v. Hawkins*, 23 Wall. 119. See *ante*, 214, n. 7.]

⁵ *Mauler v. Duke of Beaufort*, 1 Russ. 349.

¹ — *v. Walford*, 4 Russ. 372. see also *Alexander v. Cana*, 1 De G. & S. 415; *Chadwick v. Maden*, 9 Hare, 188; *Hacker v. Mid Kent Railway Company*, 11 Jur. N. S. 634, V. C. S. Where the owner of land agrees in writing to convey it to another, and afterwards conveys it to a different person, with notice of the prior agreement, the latter will hold the title as trustee of the first purchaser; and in a bill by such first purchaser to enforce specific performance, the second pur-

chaser is a necessary party. *Stone v. Buckner*, 12 Sm. & M. 72. [So if the first purchaser's interest be sold at execution sale, such first purchaser is a necessary party to a bill by the buyer under the execution against the original vendor for specific performance. *Alexander v. Hoffman*, 70 Ill. 114.]

² *Copis v. Middleton*, 2 Mad. 410. [So, if sales have been made, the purchasers should be made parties. *Free v. Buckingham*, 57 N. H. 95; *Hopkins v. Roseclare Land Co.*, 72 Ill. 373. If the bill be to set aside a judicial sale, the persons at whose instance the sale was made are necessary parties. *Wilson v. Bellows*, 3 Stew. Eq. 282.] So where, in such a case, it appears that the debtor charged with the fraudulent conveyance is dead, his administrator should be made a party. *Coates v. Day*, 9 Missou. 315.

ments had been entered up against the purchaser, the judgment creditors were held to be unnecessary parties to a bill for specific performance.³

The rule which requires all subsequent incumbrancers to be parties, extends only to cases in which the subsequent charges or incumbrances are specific; and we have before seen, that in most cases where estates have been conveyed to trustees to pay debts or legacies, the trustees may sustain suits respecting the trust property, without those claiming under the trust being parties to it.⁴ It is also unnecessary that persons having prior mortgages or incumbrances should be parties, because they will have the same lien upon the estate after a decree as they had before;⁵ for this reason it has been held, that in a bill for a partition, a mortgagee upon the whole estate is not a necessary party, though a mortgagee of one of the undivided portions would be.⁶ And so, where a bill was brought by a mortgagor against a mortgagee, praying a sale of the mortgaged estate, persons who had annuities prior to the mortgage were held unnecessary parties, and notwithstanding they appeared at the hearing and consented to a sale, Lord Kenyon M. R. dismissed the bill as to them with costs, and said that the estate must be sold subject to their annuities.⁷ It must have been upon the same principle, that the case of Lord Hollis,⁸ wherein it was held that a third mortgagee buying in the first, need not make a second mortgagee a party, was decided; otherwise it is not easy to reconcile that case with the other principles which have been laid down. It cannot be supposed that it was meant to be decided that a third mortgagee buying in the first mortgage, could by that *process acquire the right to foreclose the *280 second, without bringing him before the Court, and giving him an opportunity to redeem.

It is right to remark here, that in all cases where a mortgagee is made a party to a suit by the mortgagor or those claiming under him, he is entitled to be redeemed;¹ and that, therefore, unless a second mortgagee or other incumbrancer is prepared to redeem him, he will be an improper party to a suit by such mortgagee or incumbrancer, where the object is merely to foreclose the equity of redemption.²

It is also to be observed, that a second incumbrancer may file a bill

Whether the debtor himself, if living, should be made a party, see *Wright v. Cornelius*, 10 Missou. 174.

³ *Petre v. Duncombe*, 7 Hare, 24.

⁴ *Ld. Red.* 175.

⁵ *Rose v. Page*, 2 Sim. 471; *Hogan v. Walker*, 14 How. U. S. 37; *Wilson v. Biscoe*, 6 Eng. 41.

⁶ *Swan v. Swan*, 8 Pri. 518; *Whitton v. Whitton*, 38 N. H. 134, 135. But in *Harwood v. Kirby*, 1 Paige, 469, it was held, that an incumbrancer, upon the share of one tenant in common, cannot be made a party to a bill for partition, and the partition does not affect his rights; but his incumbrance continues upon the share set off to the party who

created the lien; see *Sebring v. Mersereau*, 1 Hopk. 501. [*Hall v. Morris*, 13 Bush, 322. And the fact that one tenant in common has mortgaged his interest to the other will not prevent a partition, no entry or foreclosure having taken place. *Green v. Arnold*, 11 R. I. 364. The holder of a judgment against one tenant in common should be made a party. *Metcalf v. Hoopingardner*, 45 Iowa, 510.]

⁷ *Delabere v. Norwood*, 3 Swan. 144, n.; *Hogan v. Walker*, 14 How. U. S. 37.

⁸ Cited 3 Ch. Rep. 86.

¹ *Drew v. O'Hara*, 2 B. & B. 562, n.; *Cholmley v. Countess of Oxford*, 2 Atk. 267.

² See *Story Eq. Pl.* § 186 *et seq.*

to redeem the first, without making a subsequent incumbrancer a party; and that if he brings him before the Court for the mere purpose of having his incumbrance postponed, and not to foreclose him, the bill will be dismissed against him with costs.³ But a bill for redemption cannot be sustained by a party having a partial interest in the equity of redemption, in the absence of the other parties interested in it.⁴

With respect to incumbrancers or purchasers becoming such *after* a bill has been filed and served,⁵ and registered as a *lis pendens*,⁶ they will be bound by the decree, and need not be made parties to the suit,

whether the plaintiff have notice of them or not; for an alien-

*281 ation pending a suit is void, or rather voidable.⁷ * If, therefore, after a bill filed by the first mortgagee to foreclose, the mortgagor

³ *Shepherd v. Gwinnett*, 3 Swan. 151, n.; see *Story Eq. Pl.* § 193, and notes.

⁴ *Henley v. Stone*, 3 Beav. 355; see *Chappell v. Rees*, 1 De G., M. & G. 393. Offer to redeem not necessary in bill by judgment creditor against trustees and mortgagees to establish his charge, and for payment out of rents. *Jefferys v. Dickson*, L. R. 1 Ch. Ap. 183.

⁵ *Powell v. Wright*, 7 Beav. 444; *Humble v. Shore*, 3 Hare, 119; see, however, *Drew v. Earl of Norbury*, 3 Jo. & Lat. 267; *Sugd. V. & P.* 758.

⁶ 2 Vic. c. 11, § 7.

⁷ *Walker v. Sualwood*, Amb. 676; *Gaskill v. Durdin*, 3 B. & B. 167; *Moore v. McNamara*, 1 B. & B. 309; *Gentle v. Ward*, 2 Atk. 175; *Metcalfe v. Pulvertoft*, 2 V. & B. 207; and see *Massy v. Batwell*, 4 Dr. & War. 68; *Long v. Bowring*, 10 Jur. N. S. 668; 12 W. R. 972, M. R. Generally speaking, an assignee under a voluntary assignment, *pendente lite*, need not be made a party to a bill, or be brought before the Court; for every person purchasing *pendente lite*, is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in privacy. *Story Eq. Pl.* §§ 156, 351; 1 *Story Eq. Jur.* § 406; *Sedgwick v. Cleveland*, 7 Paige, 287; *Van Hook v. Throckmorton*, 8 Paige, 33; *Cook v. Mancius*, 5 John. Ch. 93; *Murray v. Ballou*, 1 John. Ch. 577, 581; *Murray v. Lylburn*, 2 John. Ch. 441, 445; 2 *Story Eq. Jur.* § 908; *Hoxie v. Carr*, 1 Sumner, 173; *Branden v. Cabiness*, 10 Ala. 155; *Lawrence v. Lane*, 4 Gilman, 354; *Kern v. Harbrigg*, 11 Ind. 443; *Boulden v. Lanahan*, 29 Md. 200. It is, however, otherwise where the assignment is by operation of law, as in cases of bankruptcy, or assignments under the insolvent acts. *Sedgwick v. Cleveland*, 7 Paige, 288; *Deas v. Thorne*, 3 John. 543; *Story Eq. Pl.* § 342, note, § 351, note; *Storm v. Davenport*, 1 Sandf. Ch. 135; [*Williams v. Winans*, 5 C. E. Green, 394]. And an assignee under a voluntary assignment may be made a party, when desirable, at the election of the plaintiff. *Story Eq. Pl.* 156, and cases in note; see *Longworth v. Taylor*, 1 McLean, 395.

[See, as to the general doctrine of *lis pendens*, among recent cases, *Bellamy v. Sabine*, 1 De G. & J. 566; *Tyler v. Thomas*, 25 Beav.

47; *Nortcliffe v. Warburton*, 4 De G., F. & J. 449; *Edwards v. Banks*, 35 Ga. 213; *Dudley v. Witter*, 46 Ala. 664; *Wickliffe v. Breckenridge*, 1 Bush, 427. The *lis pendens* commences with the service of process after bill filed. *Anonymous*, 1 Vern. 319; *Hayden v. Bucklin*, 9 Paige, 512; *Watlington v. Howley*, 1 Des. 170, note; *Haughwort v. Murphy*, 7 C. E. Green, 531; *Allen v. Poole*, 54 Miss. 323. In *Harmon v. Byram*, 11 W. Va. 511, 521, where the process was served before the filing of the bill, the *lis pendens* was held to begin from, or relate back to, the service of the subpoena. It does not extend beyond the territorial limits of the State in which the suit is pending: *Shelton v. Johnson*, 4 Sneed, 672; and requires for its operation that the property be distinctly identified, and necessarily involved in the litigation: *Lewis v. Mew*, 1 Strob. Eq. 180; *Leitch v. Wells*, 48 N. Y. 585; *Cockrill v. Maney*, 2 Tenn. Ch. 49; *Allen v. Poole*, 54 Miss. 323. It does not apply to negotiable securities. *County of Warren v. Marcy*, 97 U. S. 96.

The alienation of property pending the litigation will, ordinarily, have no effect on the litigation. *Kino v. Rudkin*, 6 Ch. Div. 160; *Baird v. Baird*, Phil. Eq. (N. C.) 317; *Sumner v. Waugh*, 56 Ill. 531; *Truitt v. Truitt*, 38 Ind. 16; *Sheridan v. Andrews*, 49 N. Y. 478. An assignment by the defendant of his interest in the subject-matter of a pending suit does not defeat the suit, nor in any way affect it, the assignee being bound by what is done against his assignor. *Williams v. Winans*, 5 C. E. Green, 392. So, of an assignment by the complainant. *Gheen v. Osborne*, 11 Heisk. 61; *Wills v. Whitmore*, 1 Leg. Rep. 222. So, where a railroad company consolidates pending litigation with a defendant company. *Pullan v. Cinn., & C. R. Co.*, 4 Biss. 35. So, where the creditor of a litigant acquires a lien by attachment pending the litigation. *Dodge v. Fuller*, 1 Stew. Eq. 578. The assignee may either come in by supplemental bill and assume the burden of litigation in his own name, or act in the name of his assignor. *Ex parte Railroad Co.*, 95 U. S. 221; *Tilton v. Cofield*, 93 U. S. 163. His rights, as distinct from those of his assignor will date from the filing of his bill. *Trabue v. Bankhead*, 2 Tenn. Ch. 412; *Glenn*

confesses a judgment, executes a second mortgage, or assigns the equity of redemption, the plaintiff need not make the incumbrancer, mortgagee, or assignee parties, for they will be bound by the suit; and can only have the benefit of a title so gained, by filing an original bill in the nature of a cross-bill, to redeem the mortgaged property;¹ and where a purchaser took an exception to a title, because two mortgagees, who became such after the bill was filed, were no parties to the foreclosure, the exception was overruled with costs;² and it has been held, that where one of several plaintiffs assigned his equitable interest, *pendente lite*, the suit might be heard as if there had been no such assignment;³ where, however, a sole plaintiff assigned all his equitable interest absolutely,⁴ and where all the adult plaintiffs assigned their equitable interest by way of mortgage,⁵ the assignees were held necessary parties. But in cases where a change in the ownership of the legal estate takes place pending the suit, by alienation or otherwise, the new owner must be brought before the Court in some shape or other, in order that he may execute a conveyance of the legal estate.⁶

If a person, *pendente lite*, takes an assignment of the interest of one of the parties to the suit, he may if he pleases make himself a party to the suit by supplemental bill;⁷ but he cannot by petition pray to be admitted to take a part as a party defendant;⁸ all that the Court will do is to make an order that the assignor shall not take the property out of Court without notice.⁹

We now come to the consideration of those cases in which it is necessary to make persons defendants to a suit, not because their rights may be directly affected by the decree, if obtained, but because, in the event of the plaintiff succeeding in his object against the principal defendant, that defendant will thereby acquire *a right to *282

v. Doyle, 3 Tenn. Ch. 324. And see *infra*, 400, n. 2; 1516, n. 4.

A purchaser of land by metes and bounds from a party to a partition suit cannot intervene in that suit. Griffin v. Wilson, 39 Tex. 213.]

¹ Story Eq. Pl. § 351; Mitford Eq. Pl. 73; Lambert v. Lambert, 52 Maine, 544.

² Bishop of Winchester v. Paine, 11 Ves. 199.

³ Eades v. Harris, 1 Y. & C. 230; Story Eq. Jur. § 156; *ante*, 199, and note, and cases cited to this point of assignments *pendente lite*; 2 Story Eq. Jur. § 908.

⁴ Johnson v. Thomas, 11 Beav. 501.

⁵ Solomon v. Solomon, 13 Sim. 516.

⁶ Daly v. Kelly, 4 Dow, 435; Bishop of Winchester v. Paine, *supra*; Story Eq. Pl. § 351.

⁷ Story Eq. Pl. § 351; Mitford Eq. Pl. 73; see Steele v. Taylor, 1 Min. 274.

⁸ See Lawrence v. Lane, 4 Gilman, 354; Cook v. Mancius, 5 John. Ch. 89; Carow v. Mowatt, 1 Ed. Ch. 9; Steele v. Taylor, 1 Min. 274. But it seems he may be made a

party by the express consent of the plaintiff. Steele v. Taylor, *supra*. [A person who has acquired, pending a suit to enforce liens, one or more of those liens, may be heard, on motion or petition, to ask an application of surplus moneys to his claim, provided his title is not disputed, otherwise a bill may be necessary. Thornton v. Fairfax, 29 Gratt. 669. See, more fully on this point, *infra*, 287, n. 2, and 1516, n. 4.]

⁹ Foster v. Deacon, 6 Mad. 59; Story Eq. Pl. § 342, and notes, § 348; Sedgwick v. Cleveland, 7 Paige, 290; Deas v. Thorne, 3 John. 544; see, however, Brandon v. Brandon, 3 N. R. 287, V. C. K., where a supplemental order was made to bring before the Court mortgagees of shares after decree; and Toosey v. Burchell, Jac. 159, where, on petition, the Court ordered that the purchaser should be at liberty to attend inquiries in the Master's office, and have notice of all proceedings, on paying the incidental costs. The Court will usually now, on summons, give the purchaser liberty to attend the proceedings at his own expense.

call upon him either to reimburse him the whole or part of the plaintiff's demand, or to do some act towards reinstating the defendant in the situation he would have been in but for the success of the plaintiff's claim. In such cases the Court, in order to avoid a multiplicity of suits, requires that the parties so consequentially liable to be affected by the decree, shall be before the Court in the first instance, in order that their liabilities may be adjudicated upon and settled by one proceeding.¹ Thus, where a defendant in his answer insisted that he was entitled to be reimbursed by A. what he might be decreed to pay to the plaintiff, and therefore that A. was a necessary party, the Court, at the hearing, directed the cause to stand over, with liberty to the plaintiff to amend by adding parties.² And so, where an heir-at-law brought a bill against a widow, to compel her to abide by her election, and to take a legacy in lieu of dower, it was held that the personal representative was a necessary party; because, in the event of the plaintiff's succeeding, she was entitled to satisfaction for her legacy out of the personal estate; and the plaintiff had leave to amend, by making the executor a party.³

Upon the same principle it is, that in suits by specialty creditors for satisfaction of their demands out of the real estate of a person deceased, it is required that the personal as well as the real representative should be brought before the Court;⁴ because the personal estate, being the primary fund for the payment of debts, ought to go in ease of the land,⁵ and the heir has a right to insist that it shall be exhausted for that purpose before the realty is charged; so that, if a decree were to be made in the first instance against the heir, he would be entitled to file a bill against the personal representative to reimburse himself.⁶ The Court, therefore, in order to avoid a multiplicity of suits, requires both the executor and heir to be before it, in order that it may, in the first instance, do complete justice, by decreeing the executor to pay the debt, as far as the personal assets will extend; the rest to be made good by the heir out of the real assets.⁷ Upon this principle it was,

that where a man covenanted for himself and his heirs that a
 * 283 * jointure house should remain to the uses in a settlement, and the jointress brought a bill against the heir to compel him to rebuild and finish the jointure house, and to make satisfaction for the

¹ Story Eq. Pl. § 173 *et seq.*, § 180; Wiser v. Blachly, 1 John. Ch. 437. Erickson v. Nesmith, 46 N. H. 371, 374; Hadley v. Russell, 49 N. H. 109; New England, &c. Bank v. Newport Steam Factory, 6 R. I. 154; see Shotwell v. Taliaferro, 25 Miss. 105. In a suit against the representatives of a deceased partner to recover a partnership debt, in which the insolvency of the surviving partner is stated, he is, nevertheless, a proper party as to the other defendants, who cannot demur to the bill for misjoinder, on account of the joinder of such survivor. Butts v. Genung, 5 Paige, 254. [*Ante*, 269, n. 5.]

² Greenwood v. Atkinson, 5 Sim. 419; see also the case of Green v. Poole, 5 Bro. P. C. 504.

³ Lesquire v. Lesquire, Rep. t. Finch, 134; see also Wilkinson v. Fowkes, 9 Hare, 193.

⁴ Madox v. Jackson, 3 Atk. 406.

⁵ Galton v. Hancock, 2 Atk. 434.

⁶ Knight v. Knight, 3 P. Wms. 333.

⁷ Knight v. Knight, 3 P. Wms. 333; Story Eq. Pl. § 173 *et seq.*; see Cosby v. Wickliffe, 7 B. Mon. 120; Galton v. Hancock, 2 Atk. 434.

damage which she had sustained for want of the use thereof, Lord Talbot allowed a demurrer, on the ground that the executor ought to be a party; because the Court would not, in the first instance, decree against the heir to perform his covenant, and then put the heir upon another bill against the personal representative to reimburse himself out of the personal assets.¹

A bill of discovery of real assets might, however, be brought against the heir, in order to preserve a debt, without making the administrator a party, where it is suggested that the representation is contested in the Ecclesiastical Court;² and where the heir of an obligor would not himself administer, and had opposed the plaintiff, who was a principal creditor, in taking out administration, a demurrer by him, because the administrator was not a party, was overruled.³

Where the nature of the relief prayed is such that the heir-at-law has no remedy over against the personal estate, the personal representative is an unnecessary party; thus, in the case of a bill filed by a mortgagee against the heir of a mortgagor to foreclose, the executor of the mortgagor is an unnecessary party, because in such a case the mortgagee has a right to the land pledged, and is not in any ways bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it.⁴ And it makes no difference if the mortgage be by demise for a term of years, provided the mortgagor was seized in fee: in such case the executor is an unnecessary party, and if made one, the bill against him will be dismissed with costs.⁵ And where a term of 1000 years had been granted, but conditioned to sink and be extinguished upon payment of an annuity for forty-two years, and at the expiration of the time a bill was brought by the heir of the grantor for a surrender of the residue of the term, it was held that the personal representative of the grantor need not be a party.⁶

Where, however, the mortgagee mixes together his character of *mortgagee and general creditor, and seeks relief beyond *284 that to which his position of mortgagee by itself would strictly entitle him, then it would appear that the personal representative of the mortgage must be a party to the bill, and there must be an account of the personal estate. It may here be observed, that the doubt which formerly existed whether, when the mortgaged estate is insufficient to satisfy the amount charged upon it, and the personalty is also inad-

¹ Knight v. Knight, 3 P. Wms. 333; and see Bressenden v. Deereets, 2 Ch. Ca. 197.

² Plunket v. Penon, 2 Atk. 51; Story Eq. Pl. § 91.

³ D'Aranda v. Whittingham, Mos. 84.

⁴ Duncombe v. Hansley, 3 P. Wms. 333, notes; Fell v. Brown, 2 Bro. C. C. 279; Story Eq. Pl. §§ 196, 200. [Gary v. May, 16 Ohio, 66; High v. Batte, 10 Yerg. 188; Edwards v. Edwards, 5 Heisk. 123; Harris v. Vaughn, 2 Tenn. Ch. 484.]

⁵ Bradshaw v. Outram, 13 Ves. 234. If the mortgage was of a chattel interest, of course the executor, and not the heir, would be the proper party; and if freehold and leasehold estates are both comprised in the same mortgage, both the heir and the executor will be necessary parties to a bill of foreclosure. Robins v. Hodgson, Rells, 15 Feb., 1794.

⁶ Bampfild v. Vaughan, Rept. t. Finch, 104.

equate to pay all the debts, the mortgagee was entitled to prove against the personality for the whole of his debt, or only for the residue, after deducting what he has received from his security,¹ has now been removed by the decision of Lord Cottenham, in the case of *Mason v. Bogg*,² where it was determined, that a mortgagee may prove for the whole debt, and then realize his security, and afterwards take a dividend on the whole debt; provided, of course, that the amount of the dividend is not more than the unpaid balance.³ In suits of this description, the Court will decree, not a foreclosure, but a sale of the estate,⁴ a decree

to which a mortgagee is not ordinarily entitled upon a bill filed *285 by him, without *reference to his rights as a general creditor.¹

Where the bill is filed to redeem a mortgage against the heir of a mortgagee, the personal representative must also, as the party entitled

¹ *Mason v. Bogg*, 2 M. & C. 443; *Greenwood v. Taylor*, 1 R. & M. 185; *Greenwood v. Firth*, 2 Hare, 241, n.; *Tipping v. Power*, 1 Hare, 405; *Marshall v. Macartney*, 3 Dr. & W. 232; *Dexter v. Arnold*, 1 Sumner, 109; *Marshall v. McAravey*, 3 Dr. & War. 232. A mortgagee, who has entered for condition broken, may have an action on the bond, and he will recover the difference between the value of the land and the amount of the principal and interest on the bond. *Amory v. Fairbanks*, 3 Mass. 562; *Newall v. Wright*, 3 Mass. 150; 4 Kent (11th ed.), 184; *Tooke v. Hartley*, 2 Bro. C. C. (Perkins's ed.) 126, 127, and notes; *Perry v. Barker*, 8 Sumner's Ves. 527, Perkins's note (a), and cases cited; *Hatch v. White*, 2 Gall. 152; *Globe Ins. Co. v. Lansing*, 5 Cowen, 380; *Omaly v. Owen*, 3 Mass. 474; *Lansing v. Goelt*, 9 Cowen, 346; *Lowell v. Leland*, 3 Vt. 581; *Callum v. Emanuel*, 1 Ala. N. S. 23. The value of the land may be ascertained either by a sale, or by estimate, and proof of the value of the property mortgaged. See 4 Kent (11th ed.), 182; *Tooke v. Hartley*, 2 Bro. C. C. (Perkins's ed.) 126, 127, and notes; *Hodge v. Holmes*, 10 Pick. 380, 381; *Amory v. Fairbanks*, 3 Mass. 562; *Newall v. Wright*, 3 Mass. 150; *Briggs v. Richmond*, 10 Pick. 396; *West v. Chamberlain*, 8 Pick. 336; *Hart v. Ten Eyck*, 2 John. Ch. 62; *Wiley v. Angel*, 1 Clarke, 217; *Suffern v. Johnson*, 1 Paige, 450; *Downing v. Palmateer*, 1 Monroe, 66; *M'Gee v. Davie*, 4 J. J. Marsh. 70; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38.

² 2 M. & C. 443; 1 Jur. 330; *Armstrong v. Storer*, 14 Beav. 535, 538; *Tuckley v. Thompson*, 1 J. & H. 126, 130; *Rhodes v. Moxhay*, 10 W. R. 103, V. C. S.; *Dighton v. Withers*, 31 Beav. 423.

³ The rule is settled otherwise in Massachusetts, where it is held that the mortgagee could not prove for his whole debt and yet retain his mortgage, and that if he does prove his whole debt, and accept a dividend on his whole debt, he thereby waives his mortgage. *Amory v. Francis*, 16 Mass. 308; *Hooker v. Olmstead*, 6 Pick. 481; *Towle v. Bannister*, 16 Pick. 255; *Middlesex Bank v. Minot*, 4 Met. 325; *Farnum v. Boutelle*, 13 Met. 159. If the mortgagee elects to retain

his security, its value must be ascertained and deducted, and he can only prove the remainder. *Haverhill Loan Fund Association v. Cronin*, 4 Allen, 141, 144. [So in Tennessee, the mortgagee is entitled to his security and to a *pro rata* division with other creditors for the balance of debt. *Fields v. Wheatley*, 1 Sneed, 351.]

⁴ *Daniell v. Skipwith*, 2 Bro. C. C. 155; see also *Christopher v. Sparke*, 2 J. & W. 229; *King v. Smith*, 2 Hare, 239, 242; 7 Jur. 694; *Seton*, 289 *et seq.*; 2 Story Eq. Jur. §§ 1025, 1026, 1027. It is not a matter of course, on a bill for foreclosure and sale, to order the whole of the mortgaged premises to be sold. Under certain circumstances no more will be sold than enough to pay the debt and costs. *Delabigarre v. Bush*, 2 John. 490; *Suffern v. Johnson*, 1 Paige, 450; *Brinkerhoff v. Thalhimer*, 2 John. Ch. 486. [And see, as to sale when the debt is payable by instalments, or only the interest in arrears, *Howell v. Western R. Co.*, 94 U. S. 466; *Codwise v. Taylor*, 4 Sneed, 346; *Grattan v. Wiggins*, 23 Cal. 16; *Mott v. Shreve*, 10 C. E. Green, 438; *Cox v. Wheeler*, 7 Paige, 248; *Huffard v. Gottberg*, 54 Mo. 271; *Olcott v. Bynum*, 17 Wall. 45; *McLean v. Presley*, 56 Ala. 211.] The premises may be sold, either together or in parcels, as will be best calculated to produce the highest sum. *Suffern v. Johnson*, 1 Paige, 450; *Campbell v. Macomb*, 4 John. Ch. 534.

¹ The cases in which a mortgagee may have a sale instead of a foreclosure, are,—1, where the estate is deficient to pay the incumbrance; 2, where the mortgage is of a dry reversion; 3, where the mortgagee dies and the equity of redemption descends upon an infant; 4, where the mortgage is of an advowson; 5, where the mortgagor becomes a bankrupt; and 6, where a mortgage is of an estate in Ireland. See 2 Story Eq. Jur. § 1026. It is now enacted by 15 & 16 Vic. c. 86, § 48, that "it shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale (see *Hurst*

to the money, be made a party to the suit,² because although the mortgagee upon paying the principal money and interest has a right to a reconveyance from the heir, yet the heir is not entitled to receive the money; and, if it were paid to him, the personal representative would have a right to sue him for it.³

Where a man contracts for the purchase of an estate, and dies intestate as to the estate contracted for, before the completion of the contract, the vendor has a right to file a bill against his personal representative for payment of the purchase-money; but if he does, he must make the heir-at-law a party, because the heir is the person entitled to the estate. And, for the same reason, where the vendee, after the cause was at issue, died, having devised the estate which was the subject of the suit to infant children, and the plaintiff revived against the personal representatives only; it was held, that the infant devisees were necessary parties, and the suit was ordered to stand over, in order that they might be brought before the Court.⁴

Upon the same principle, if a vendor were to file a bill against the heir, the heir would have a right to insist upon the personal representative being brought before the Court, because the purchase-money is, in the first instance, payable out of the personal estate.⁵ But where a bill stated that an estate, purchased in the defendant's name, was so purchased in trust for the plaintiff's ancestor, who paid the purchase-money, and prayed a reconveyance, *a demurrer, on *286 the ground that the executor of the ancestor was not a party, was overruled; because the purchase-money having been paid, it was quite clear, that no decree could have been made against the personal representative.¹

Upon the same principle formerly, the Courts in the case of sureties, and of joint obligors in a bond, compelled all who were bound, or their representatives, to be before the Court, in order to avoid the multiplicity of suits which would be occasioned if one or more were to be sued without the others, and left to seek contribution from their co-sureties, or co-obligors in other proceedings; but we have seen that, in this respect, the 32d Order of August, 1841, has altered the practice.²

v. Hurst, 16 Beav. 372; *Wayn v. Lewis*, 1 Dru. 487 of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and if the Court should so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem.⁷⁷

² *Dexter v. Arnold*, 1 Sumner, 109; *Hilton v. Lothrop*, 46 Maine, 297, 299.

³ *Ante*, 193.

⁴ *Townsend v. Champenowne*, 9 Pri. 130; see *Cox v. Sprode*, 2 Bibb, 376; *Fisher v. Kay*, 2 Bibb, 434; *Huston v. M'Clarty*, 3 Litt. 274; *Morgan v. Morgan*, 2 Wheat. 90; *Story Eq. Pl. §§ 160, 177*; *Champion v.*

Brown, 6 John. Ch. 402. To a bill to enforce specific performance of a contract for the sale of land made by a person who has deceased, all the heirs of such deceased person should be made parties. *Duncan v. Wickliffe*, 4 Scam. 452; see *House v. Dexter*, 9 Mich. 246.

⁵ See *Story Eq. Pl. § 177*; *Coeke v. Evans*, 9 Yerger, 287. Upon a bill for the rescission of a contract for land, for defect of title in the vendor, the heirs of the vendee must be made parties. *Huston v. Noble*, 4 J. J. Marsh. 136; see *Harding v. Handy*, 11 Wheat. 104.

¹ *Astley v. Fountain*, Rep. t. Finch, 4.

² See *ante*, p. 267; Genl. Ord. VII. 2.

SECTION III. — *Of Objections for want of Parties.*

Having endeavored in the preceding sections of this chapter, to point out the parties who ought to be brought before the Court by the plaintiff, in order that complete justice may be done in the suit; the next step is to show in what manner an objection, arising from the omission of any of these parties in a bill, is to be taken advantage of by the defendant, and how the defect arising from such omission is to be obviated or remedied by the plaintiff.³

And here it is necessary to remark, in the first instance, that no persons are considered as parties to a suit, except the plaintiffs and persons against whom the bill prays either the writ of subpœna, or that upon being served with a copy of the bill they may be bound by the proceedings in the cause;⁴ but the mere naming a person as a defendant does not make him a party.⁵

*287 * A defect of parties in a suit may be taken advantage of either by demurrer, plea, answer,¹ or at the hearing.²

³ See *ante*, 280, note 4.

⁴ Story Eq. Pl. § 44; Walker v. Hallett, 1 Ala. (N. S.) 379; Lucas v. Bank of Darien, 2 Stewart, 280; Lyle v. Bradford, 7 Monroe, 113; Huston v. McCarty, 3 Litt. 274; De Wolf v. Mallett, 3 Dana, 214; Taylor v. Bate, 4 Monroe, 267. In New York parties may be treated as defendants, by a clear statement in the bill to that effect, without praying the *subpœna*. The reason given is that, in that State, the *subpœna* is issued of course, and that a formal prayer is unnecessary to entitle the plaintiff to process. Brasher v. Cortlandt, 2 John. Ch. 245; Elmendorf v. Delancy, 1 Hopk. 555; Verplanck v. Mercant. Ins. Co., 2 Paige, 438. But unless the plaintiff, either in the prayer for process or by allegation in the bill, designates those who are made defendants, the omission is fatal; Elmendorf v. Delancy, 1 Hopk. 555; and they only are parties defendant against whom process is prayed, or who are specifically named and described as defendants. Talmage v. Pell, 9 Paige, 410; Lucas v. Bank of Darien, 2 Stewart, 280; Green v. McKenney, 6 J. J. Marsh. 193; Moore v. Anderson, 1 Ired. Ch. 411; Harris v. Carter, 3 Stewart, 233. Where a minor, a necessary party, was not named in the bill, he cannot be considered a defendant, although an answer is filed for him by his guardian *ad litem*. Dixon v. Donaldson, 6 J. J. Marsh. 575.

⁵ Windsor v. Windsor, 2 Dick. 707; Carey v. Hillhouse, 5 Geo. 251; Cassidy v. McDaniel, 8 B. Mon. 519. To make him such, process must be issued and served upon him. Bond v. Hendricks, 1 A. K. Marsh. 594; White v. Park, 5 J. J. Marsh. 603; Estill v. Clay, 2 A. K. Marsh. 497; Huston v. McCarty, 3 Litt. 274; Archibald v. Means, 5 Ired. Eq. 250. [Nor is a person made a party by the

bill asking that he be made a defendant in a future contingency. Doherty v. Stevenson, 1 Tenn. Ch. 518. *Infra*, 390, n. 3.]

¹ See Clark v. Long, 4 Rand. 451; Story Eq. Pl. § 236. Where the defect of want of parties is formal, or technical merely, the objection must be made by demurrer, plea, or answer. Postlethwaite v. Howes, 3 Clarke (Iowa), 365; Story v. Livingston, 13 Peters, 359; Sayles v. Tibbitts, 5 R. I. 79; Kean v. Johnson, 1 Stockt. (N. J.) 401; Smith v. Mitchell, 6 Geo. 458. So where a party omits to object, either by demurrer, plea, or answer, for want of parties who are only necessary to protect himself, the Court may refuse to sustain the objection at the hearing. Dias v. Bouchard, 10 Paige, 445; Lorillard v. Coster, 5 Paige, 172; Lainhart v. Reilly, 3 Desaus. 570; Gilbert v. Sutliff, 3 Ohio (N. S.), 129; Cutler v. Tuttle, 4 C. E. Green (N. J.), 549, 556.

² When it is manifest that a decree will have the effect of depriving third parties of their legal rights, it is incumbent on the Court to notice the fact at the hearing, and cause them to be brought in; and the proper course, in such case, is to order the cause to stand over to enable the plaintiff to bring such necessary parties before the Court. Shaver v. Brainard, 29 Barb. (N. Y.) 25; Clark v. Long, 4 Rand. 451; Hussey v. Dole, 24 Maine, 20; Cannon v. Norton, 14 Vt. 178; Miller v. M'Crea, 7 Paige, 452; Felch v. Hooper, 20 Maine, 159; Nash v. Smith, 6 Conn. 421; Bugbee v. Sargent, 23 Maine, 269; Lord v. Underdunk, 1 Sandf. Ch. 146; Postlethwaite v. Howes, 3 Clarke (Iowa), 365; Prentice v. Kimball, 19 Ill. 320; Morse v. Machias Water Power Co., 42 Maine, 119; Per Wayne J. in Lewis v. Darling, 16 How. U. S. 1, 8, 9; Winnipiseogee Lake Company v. Worster, 29 N. H. 433; Miller v. Whittier, 33 Maine, 521; Davis

Whenever the deficiency of parties appears on the face of a bill, the want of proper parties is a cause of demurrer.³ There appears to be some doubt whether a demurrer of this nature can be partial, and whether it must not extend to the whole bill. And in the case of *The East India Company v. Coles*,⁴ Lord Thurlow was inclined to think, that there could not be a partial demurrer *for want of parties; but *288 upon Mr. Mitford mentioning some cases,¹ wherein such partial demurrers had been allowed, the case was ordered to stand over to the next day of demurrers; in the mean time, however, the plaintiff's counsel, thinking it better for his client, amended the bill.

It is to be observed, that if a sufficient reason for not bringing a necessary party before the Court is suggested by the bill,² as, if the bill

v. Rogers, 33 Maine, 222; *Webber v. Taylor*, 5 Jones Eq. (N. C.) 36; *Hoe v. Wilson*, 9 Wallace U. S. 501; *Woodward v. Wood*, 19 Ala. 213. [See *Simms v. Richardson*, 32 Ark. 297.]

This course will be adopted where it is found that an effectual decree cannot be made, binding upon all persons in interest, for want of proper parties, although the objection has not been raised by either party. *O'Brien v. Heeney*, 2 Edw. Ch. 242; *Herrington v. Hubbard*, 1 Scam. 569; *McMaken v. McMaken*, 18 Ala. 576; *Goodman v. Barbour*, 16 Ala. 625; *Booraem v. Wells*, 4 C. E. Green (N. J.), 87, 95; *Brown v. Johnson*, 53 Maine, 251; *Beals v. Cobb*, 51 Maine, 348, 351; *Pierce v. Faunce*, 47 Maine, 507, 513; *Hoe v. Wilson*, *ubi supra*. A bill should not be dismissed for want of necessary parties, as they can either come in voluntarily, or may be summoned in. *Potter v. Holden*, 31 Conn. 385; *Thomas v. Adams*, 30 Ill. 37. But if after objection is made for want of necessary parties, the plaintiff neglects or refuses to bring them before the Court, the bill will be dismissed. *Singleton v. Gayle*, 8 Porter, 270; *Hunt v. Wickliffe*, 2 Porter, 201; *Bailey v. Myrick*, 36 Maine, 50, 54; see *St. Mass.* 1862, c. 218, § 9. But such dismissal should be without prejudice. *Huston v. McClarty*, 3 Litt. 274; *Royce v. Tarrant*, 6 J. J. Marsh. 567; *Caldwell v. Hawkins*, 1 Litt. 212; *Hackwith v. Damron*, 1 Monroe, 239; *Van Epps v. Van Deusen*, 4 Paige, 64; *Payne v. Richardson*, 7 J. J. Marsh. 240; *Harris v. Carter*, 3 Stewart, 233. So a bill must be dismissed, when persons, who are necessary parties, refuse to appear, and the Court has no power to reach them by its process, and compel them to become parties; *Picquet v. Swan*, 5 Mason, 561; but without prejudice. *Ibid.* [Ante, 149 n. 1.]

A motion to be admitted as a defendant to a suit is irregular. *Harrison v. Morton*, 4 Hen. & M. 483; *Morris v. Barclay*, 2 J. J. Marsh. 374; *Smith v. Britton*, 2 P. & H. (Va.) 124; *Phillips v. Wesson*, 16 Geo. 137.

[No such practice is known in Equity as making a person a defendant to a suit upon his own application, over the objection of the complainant. *Shields v. Barrow*, 17 How. 145; *Coleman v. Martin*, 6 Blatchf. 119; *Drake v. Goodridge*, 6 Blatchf. 151; *Stretch*

v. Stretch, 2 Tenn. Ch. 140; *Carow v. Mowatt*, 1 Edw. Ch. 9; *Searles v. Jacksonville R. Co.*, 2 Woods, 621; *Anderson v. Jacksonville R. Co.*, 2 Woods, 628. But a person may be made a party defendant by express consent of the plaintiff. *Steele v. Taylor*, 1 Min. 274; *Hergel v. Laitenberger*, 2 Tenn. Ch. 251. It has been done where no objection was made. *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 464; *Banks v. Banks*, 2 Coldw. 548; *Wilson v. Eifer*, 7 Coldw. 33; *Myers v. Fenn*, 5 Wall. 205. And it has been suggested that where a corporation will not resist a legal demand, the stockholders may be permitted to come in and defend by answer; but, it is added, "the remedy is an extreme one, and should be admitted by the Court with hesitation and caution." *Branson v. La Crosse R. Co.*, 2 Wall. 302. Where the bill is filed by some of a class for themselves and all others of that class, it is of course to allow the latter to intervene by petition: *Ogilvie v. Knox Ins. Co.*, 2 Black, 539; *S. C.* 22 How. 380; but with proper restrictions: *Forbes v. Memphis, &c. R. Co.*, 2 Woods, 323. And when they are thus made parties, they have the right of appeal. *Ex parte Jordan*, 94 U. S. 248. In New Jersey, by statute, a person may be made defendant in certain cases by petition. *Rev. Ch.* § 41; *Conrad v. Mullison*, 9 C. E. Green, 65; *Hewitt v. Montclair*, 10 C. E. Green, 100; *S. C.* 12 C. E. Green, 479; *Dodge v. Fuller*, 1 Stew. Eq. 578. See *ante*, 281, n. 8, and *infra*, 1516, n. 4. See also *ante*, 259, n. 1, as to trustees and beneficiaries.]

³ *Mitchell v. Lenox*, 2 Paige, 281; *Robinson v. Smith*, 3 Paige, 222; *Crane v. Deming*, 7 Conn. 387; *Story Eq. Pl.* § 541; *White v. Curtis*, 2 Gray, 472; *Neely v. Anderson*, 2 Strobb. Eq. 262. And in such case, if the defect is merely formal the objection should be taken by demurrer. *Chapman v. Hamilton*, 19 Ala. 121; *Allen v. Turner*, 11 Gray, 436; *Schworer v. Boylston Market Association*, 99 Mass. 295.

⁴ 3 Swan. 142, n.; see also *Lumsden v. Fraser*, 1 M. & C. 589, 602.

¹ *Astley v. Fountain, Finch*, 4; *Attwood v. Hawkins, Finch*, 113; *Bressenden v. Deereets*, 2 Ch. Ca. 197.

² In *White v. Curtis*, 2 Gray, 467, it was held that the omission to join, as a defendant

seeks a discovery of the persons interested in the matter in question, for the purpose of making them parties, and charges that they are unknown to the plaintiff, a demurrer for want of the necessary parties will not hold.³ Upon the same principle, where it was stated in a bill that the defendant, who was next of kin of an intestate, had refused to take out letters of administration, and that the plaintiff had applied to the Prerogative Court for administration, but having been opposed by the defendant, was denied administration, because he could not prove that the intestate had left *bona notabilia*; and that he had afterwards applied to the Consistory Court of Bath and Wells, where he likewise failed, because he could not prove that the intestate had died in the diocese; and that the defendant had refused to discover where the intestate had died; a demurrer for want of proper parties, because the personal representative of the intestate was not before the Court, was overruled.⁴

A demurrer for want of parties must show who are the proper parties; not indeed by name, for that might be impossible; ⁵ but in such a manner as to point out to the plaintiff the objection to his bill, so as to enable him to amend by adding the necessary persons.⁶ Some doubt has been thrown upon the correctness of this rule, in consequence of an observation by Lord Eldon in *Pyle v. Price*.⁷ His Lordship is there *289 reported to have said, "that * beside the objection which had been mentioned at the bar, to the rule which required the party to be stated, it might appear that the plaintiff knows the party," and then to have observed, "perhaps there is not a general rule either way." It is submitted however, that this observation of Lord Eldon does not at all shake the rule which has been laid down, as to the necessity of pointing out who the necessary party is, but merely refers to the observation made at the bar, that there was no rule requiring a demurrer to state the parties, that is, *by name*, as it might be out of the power of the defendant to do so; and that it does not refer to the necessity of calling the plaintiff's attention to the description or character of the party required, in order to enable him to amend his bill,

in a bill, the administrator of one whose death is alleged in the bill, cannot be taken advantage of by demurrer, when it does not appear by the bill that there is any such administrator. It does not appear to have been regarded, in this case, as necessary, that any reason should be stated why the administrator was not appointed. But the Court stated that the necessity or propriety of introducing the administrator was not apparent from the averments in the bill.

³ *Ld. Red.* 180; *Towle v. Pierce*, 12 Met. 328; see *Gilman v. Cairnes*, 1 Breese, 124; *Coe v. Beckwith*, 31 Barb. (N. Y.) 339; *Davis v. Hooper*, 33 Miss. (4 George) 173; *De Wolf v. De Wolf*, 4 R. I. 450; *Bailey v. Morgan*, 13 Texas, 342.

⁴ *D'Aranda v. Whittingham*, Mos. 84.

⁵ *Tourton v. Flower*, 3 P. Wms. 369; [*Chambers v. Wright*, 52 Ala. 444.]

⁶ *Ld. Red.* 181; *Attorney-General v. Jackson*, 11 Ves. 369; *Lund v. Blanshard*, 4 Hare, 23; and see *Pratt v. Keith*, 10 Jur. N. S. 305; 12 W. R. 394, V. C. K., where the defendant was allowed, by demurrer *ore tenus*, to specify the parties. *Story Eq. Pl.* § 541 and notes; *McElwain v. Wilis*, 3 Paige, 505; *Lindley v. Cravens*, 2 Blackf. 426; *Jameson v. Deshields*, 3 Grattan, 4; *Chapman v. Hamilton*, 19 Ala. 121; *Hightower v. Mustian*, 8 Geo. 506; *Neely v. Anderson*, 2 Strobb. Eq. 262; see *Harrison v. Rowan*, 4 Wash. C. C. 202; *Arundell v. Blackwell*, Dev. Eq. 354; *Greenleaf v. Queen*, 1 Peters, 138.

⁷ 6 Ves. 781; and see *Attorney-General v. Corporation of Poole*, 4 M. & C. 17, 32; 2 Jur. 934, 1080.

without putting him to the expense of bringing his demurrer on for argument, which he might otherwise be obliged to do, in order to ascertain who the party required by the defendant is.

Where a demurrer for want of parties is allowed, the cause is not considered so much out of Court but that the plaintiff may afterwards have leave to amend, by bringing the necessary parties before the Court.¹ And where the addition of the party would render the bill multifarious, the plaintiff will be allowed to amend generally.² And where the demurrer has been *ore tenus*, such leave will be granted to him without his paying the costs of the demurrer; though, if he seeks, under such circumstances, to amend more extensively than by merely adding parties, he must pay the defendant the cost of the demurrer.³

Upon the allowance, however, of a demurrer for want of parties, the plaintiff is not entitled as of course to an order for leave to amend. When it is said that a bill is never dismissed for want of parties,⁴ nothing more is meant than that a plaintiff, who would be entitled to relief if proper parties were before the Court, shall not have his bill dismissed for want of them, but shall have an opportunity afforded of bringing them before the Court;⁵ but if, at the hearing, the Court sees that the plaintiff can have no relief under any circumstances, it is not bound to let the cause stand over that the plaintiff may add parties to such a record.⁶

* If the defect of parties is not apparent upon the face of the bill, the defect may be brought before the Court by plea, which must aver the matter necessary to show it.¹ A plea for want of proper parties is a plea in bar, and goes to the whole bill, as well to the discovery as to the relief, where relief is prayed;² though the want of parties is no objection to a bill for discovery merely.³

Where a sufficient reason to excuse the defect is suggested by the bill,⁴ as where a personal representative is a necessary party, and the bill states that the representation is in contest in the Ecclesiastical Court;⁵ or where the party is resident out of the jurisdiction of the

¹ Bressenden v. Deereets, 2 Ch. Ca. 197; see also Lloyd v. Loaring, 6 Ves. 773; Story Eq. Pl. § 543 and note, in which is a form of demurrer for want of necessary parties. Allen v. Turner, 11 Gray, 436.

² Lumsden v. Fraser, 1 M. & C. 589, 602; Attorney-General v. Merchant Tailors' Co., 1 M. & K. 189, 194.

³ Newton v. Lord Egmont, 4 Sim. 585.

⁴ But see *ante*, 287, note, to this point, and Nash v. Smith, 6 Conn. 422. The bill is sometimes dismissed for want of proper parties, but without prejudice to the plaintiff's right to bring a new suit. Miller v. McCrea, 7 Paige, 452; Huston v. McClarty, 3 Litt. 274; Steele v. Lewis, 1 Monroe, 49; Royse v. Terrant, 6 J. J. Marsh 567; Story Eq. Pl. § 541; *post*, 293-295, note; *ante*, note to p. 287.

⁵ See Potter v. Holden, 31 Conn. 385;

Thomas v. Adams, 30 Ill. 37; *ante*, 287, note.

⁶ Tyler v. Bell, 2 M. & C. 110; see Story Eq. Pl. § 541, and note; Russell v. Clarke, 7 Cranch, 69, 90; Lund v. Blanshard, 4 Hare, 9, 23; 1 C. P. Coop. t. Cott. 39; Lister v. Meadowcroft, *ib.* 372.

¹ Ld. Red, 280; Hamm v. Stevens, 1 Vern. 110; 2 Atk. 51; Robinson v. Smith, 3 Paige, 222; Story Eq. Pl. § 236; Gamble v. Johnson, 9 Missou. 605.

² Plunkett v. Penson, 2 Atk. 51; Hamm v. Stevens, 1 Vern. 110.

³ Sangosa v. East India Company, 2 Eq. Ca. Ab. 170, Pl. 28.

⁴ Gilman v. Cairns, Breese, 124.

⁵ Plunkett v. Penson, 2 Atk. 51; Carey v. Hoxey, 11 Geo. 645. But in order to make the pendency of litigation, touching the representation of a deceased party, a good excuse,

Court, and the bill charges that fact;⁶ or where the bill seeks a discovery of the necessary parties,⁷ a plea for want of parties will not, any more than a demurrer for the same cause, be allowed, unless the defendant controverts the excuse made by the bill, by pleading matter to show it false.⁸ Thus, in the first instance above put, if before the filing of the bill the contest in the Ecclesiastical Court had been determined, and administration granted, and the defendant had showed this by his plea, the objection for want of parties would not in strictness have been good.

Upon arguing a plea of this kind, the Court, instead of allowing it, generally gives the plaintiff leave to amend the bill, upon payment of costs; a liberty which he may also obtain after allowance of the plea, according to the common course of the Court, for the suit is not determined by the allowance of a plea.⁹

The defendant may also by his answer object that the bill is defective for want of parties, in which case the plaintiff is now, under the *291 39th Order,¹⁰ of August, 1841, within fourteen days after * answer filed, at liberty to set down the cause for argument upon that objection alone. If he does so, the objection is argued, the plaintiff commencing. After the argument, the Court makes an order, declaring its opinion upon the record as it then stands; but the objection cannot finally be disposed of until the hearing, because it is impossible at the beginning of a cause to declare who will be necessary parties at the end.¹ If, on the other hand, the plaintiff does not set down the

the Court must be fully advised of the nature and condition of the litigation, by the allegations in the bill or by proofs. *Carey v. Hoxey*, *supra*; see *Martin v. McBryde*, 3 Ired. Ch. 531.

⁶ *Cowslad v. Cely*, Prec. Ch. 83; *Darwent v. Walton*, 2 Atk. 510; *Milligan v. Milledge*, 3 Cranch, 220; *Martin v. McBryde*, 3 Ired. Ch. 531; *Parkman v. Aicardi*, 34 Ala. 393; *Mallow v. Hinde*, 12 Wheat. 193; *Spivey v. Jenkins*, 1 Ired. Ch. 126; *Ashmead v. Colby*, 26 Conn. 287; *Carey v. Hoxey*, 11 Geo. 645; *West v. Smith*, 8 How. U. S. 409; *Erickson v. Nesmith*, 46 N. H. 371; *Story Eq. Pl. § 78*; *Adams v. Stevens*, 49 Maine, 362; see *Moodie v. Bannister*, 19 Eng. Law & Eq. 81. But the Court will not proceed to take an account in the absence of a necessary party, though he is out of the jurisdiction. *Hogan v. Walker*, 14 How. U. S. 46; *Wilson v. City Bank*, 3 Sumner, 422; *Greene v. Sisson*, 2 Curtis C. C. 176, 177; see *Shields v. Barrow*, 17 How. U. S. 130; *Story Eq. Pl. § 78*; *Towle v. Pierce*, 12 Met. 332; *ante*, 150, 151, 216, 217, note; 266, note; *Lawrence v. Rokes*, 53 Maine, 110; *Mudgett v. Gager*, 52 Maine, 541.

⁷ *Bowyer v. Covert*, 1 Vern. 95.

⁸ *Ld. Red. 281*.

⁹ *Ld. Red. 281*; *ante*, 287, note; *Harrison v. Rowan*, 4 Wash. C. C. 202; *Story Eq. Pl. §§ 885, 886*, and note, in which is inserted the rules of the Supreme Court of the United States on the subject of amendments, adopted January Term, 1842.

¹⁰ This 39th Order is now abolished in England by the 15 & 16 Vic. c. 86, § 43, whereby the practice in existence before 1841 is restored: see *Moodie v. Bannister*, 17 Jur. 520, V. C. K. No costs are given where the defect arises from an event occurring after the cause is at issue; see *Fussell v. Elwin*, 7 Hare, 29; 13 Jur. 333. For form of order on cause standing over with leave to amend on payment of costs of the day, see *Seton*, 1113, No. 1. Under the present practice of the Court in England, objections for want of parties are of comparatively rare occurrence; in the first place, because in many cases persons who were formerly necessary parties are now no longer so; and secondly, because the Court is now enabled to make a decree between the parties before it, although there are other parties not before it who are interested in the question to be determined. 15 & 16 Vic. c. 86, § 51; see also Order XXIII. 11; and see *Meddewcroft v. Campbell*, 13 Beav. 184; see also *May v. Selby*, 1 Y. & C. C. 235, 238; 6 Jur. 52; *Faulkner v. Daniel*, 3 Hare, 199, 213; *Daubuz v. Peel*, 1 C. P. Coop. t. Cott. 365; *Maybery v. Brooking*, 7 De G., M. & G. 673; 2 Jur. N. S. 76; *Feltham v. Clark*, 1 De G. & S. 207. Assignees of a bankrupt were directed to be served with a copy of a decree made in their absence. *Dorsett v. Dorsett*, 8 Jur. N. S. 146, 147.

¹ *Bradstock v. Whatley*, 6 Beav. 451.

cause upon the objection for want of parties, he subjects himself to the penalty, that he will not at the hearing be entitled, as of course, to an order to amend by adding parties: he would still, however, be at liberty to make out a special case for the exercise of the discretion of the Court in his favor, and the Court would then have to decide whether his bill should be dismissed for want of parties, or retained with liberty either to amend,² or to file a supplemental bill for the purpose of bringing the proper parties before the Court. It is to be observed, that the Order only allows fourteen days after answer for the plaintiff to set down his cause upon the objection for want of parties, but the V. C. of England has decided, that this only means that the cause may be set down within this period as a matter of course, but that afterwards the leave of the Court may be obtained.³ Previously to the Orders of 1841, when an objection for want of parties was taken at the hearing, the rule with respect to costs was, that if the objection for want of parties had been taken by the defendant's answer, or if it arose upon a statement of the bill, then the liberty to amend or file a supplemental bill, was not given to the plaintiff, except upon the terms of his paying to the defendant the costs of the day; but if the objection depended upon a fact within the defendant's knowledge, and was not raised by his answer, the order would be made without payment of costs of the day.⁴

* The recent Orders do not appear directly to have affected *292 this rule concerning costs in such cases, but the 40th Order, of August, 1841, provides, that if the defendant shall at the hearing of a cause object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court, if it shall think fit, may make a decree saving the rights of the absent parties.¹

The discretion given to the Court by this Order will only be exercised in cases where the rights of the absent party can be protected by the decree as if he were present; or at all events where the rights cannot be prejudiced by a decree made in their absence.² Consequently, in a suit for the execution of a trust created for the benefit of cred-

² 39th Order, Aug., 1841, and S. C.; *Haskell v. Hilton*, 30 Maine, 421.

³ *Cockburn v. Thompson*, 13 Sim. 188.

⁴ *Mitchell v. Bailey*, 3 Mad. 61; *Furze v. Sharwood*, 5 M. & C. 96; *Attorney-General v. Hill*, 3 M. & C. 247; *Mason v. Franklin*, 1 Y. & C. 242; *Kirwan v. Daniel*, 7 Hare, 347, 351; *Perkin v. Bradley*, 1 Hare, 219, where notice of disclaimer had been given to the objecting defendant; as to the amount of costs, see 35th Ord. 1828; Genl. Ord. XL. 22; *Seton*, 1117; see *Colt v. Lasnier*, 3 Cowen, 320; *Story Eq. Pl.* § 541. When the objection is taken by demurrer, and sustained, the defendant will be entitled to his costs; but

when it is taken at the hearing only, the defendant is usually not entitled to his costs. *Story Eq. Pl.* § 541.

¹ *Story Eq. Pl.* § 236, note. The same rule has been adopted by the Supreme Court of the United States, 53d Equity Rule of S. C. of U. States, January Term, 1842. See *Clymer v. James*, Halst. Dig. 168; *post*, 294, 295, note; *Greene v. Sisson*, 2 Curtis C. C. 171, 177.

² See *Greene v. Sisson*, 2 Curtis C. C. 171, 177; *Wilson v. City Bank*, 3 Sumner, 422; *Hogan v. Walker*, 14 How. U. S. 36; *McCall v. Yard*, 1 Stockt. (N. J.) 358.

itors, against the trustees, Sir James Wigram V. C. refused to make a decree in the absence of the person who created the trust, or his personal representative.³

The Court will not, at the hearing, give leave to the plaintiff to amend by adding parties, if by so doing the nature of the case made by the bill will be changed;⁴ an order was however made at the hearing, that the plaintiffs should be at liberty to amend their bill by adding parties, as they should be advised, or by showing why they were unable to bring the proper parties before the Court.⁵

The proper time for taking an objection for want of parties is upon opening the pleadings, and before the merits are discussed;⁶ but it frequently happens that after a cause has been heard, the Court has felt itself compelled to let it stand over for the purpose of amendment.⁷

*293 *The objection for want of parties ought to proceed from a defendant; for it has been decided that the plaintiff bringing his cause to a hearing without proper parties, cannot put it off without the consent of the defendant.¹ Cases of exception may occur, where, for instance, the plaintiff was not aware of the existence of persons whose claims could touch the interests of those who were upon the record; but that ought to be clearly established; and the plaintiff ought to apply as soon as he has obtained that knowledge.²

A plaintiff may at the hearing obviate an objection for want of a particular party, by waiving the relief he is entitled to against such party;³ and where the evident consequence of the establishment of the rights asserted by the bill, might be the giving to the plaintiff a claim

³ *Kimber v. Ensworth*, 1 Hare, 293, 295; 6 Jur. 165; see also *May v. Selby*, 1 Y. & C. 237; and *Faulkner v. Daniel*, 3 Hare, 199.

⁴ *Deniston v. Little*, 2 Sch. & Lef. 11, n.; and see *Watts v. Hyde*, 2 Phil. 406, 411; 11 Jur. 979; *Bellamy v. Sabine*, 2 Phil. 425, 427.

⁵ *Milligan v. Mitchell*, 1 M. & C. 511.

⁶ *Jones v. Jones*, 3 Atk. 111; *Alderson v. Harris*, 12 Ala. 580; *Van Doren v. Robinson*, 1 C. E. Green (N. J.), 256.

⁷ *Jones v. Jones*, 3 Atk. 111; *ante*, 287, note. An objection for want of parties may be taken on the hearing of an appeal. *Holdsworth v. Holdsworth*, 2 Dick. 799; and see *Magdalen College v. Sibthorp*, 1 Russ. 154; see *Felch v. Hooper*, 20 Maine, 163, 164; *Hussey v. Dale*, 24 Maine, 20; *New London Bank v. Lee*, 11 Conn. 112; *Winnipegosee Lake Co. v. Worcester*, 29 N. H. 433; *Clark v. Long*, 4 Rand. 451; *Miller v. M'Can*, 7 Paige, 452; *Cabeen v. Gordon*, 1 Hill Ch. 53; *R. Owing's case*, 1 Bland, 292; *Robinson v. Smith*, 3 Paige, 222; *Mitchell v. Lennox*, 2 Paige, 281; *Evans v. Chism*, 18 Maine, 223; *Clifton v. Haig*, 4 Desaus. 331. But in *Ferguson v. Fisk*, 28 Conn. 511, it was held, that no objection for want of parties could be made after a hearing on the merits, either be-

fore the Court or its Committee. See *Chipman v. City of Hartford*, 21 Conn. 489; *New London Bank v. Lee*, 11 Conn. 120. The ordinary course in Chancery, where a want of proper parties appears at the hearing, is for the cause to stand over in order that they may be added. *Colt v. Lasnier*, 3 Cowen, 320. [When the objection is only made at the hearing, it will not avail, unless the Court is unable to proceed to a decree between the parties. *Swan v. Clark*, 36 Iowa, 560; *Wallace v. Homes*, 5 Fish. Pat. Cas. 15; *Freight Money of Monadnock*, 5 Ben. 357; *Smith v. Bartholomew*, 42 Vt. 355; *Vaiden v. Stubblefield*, 28 Gratt. 153.]

¹ *Innes v. Jackson*, 16 Ves. 356; for the circumstances under which the defendant must support his objection by evidence, see *Campbell v. Dickens*, 4 Y. & C. 17, Ex. R.; *Barker v. Railton*, 11 L. J. N. S. 372. The objection of misjoinder of parties, as defendants in a bill, is a mere personal privilege, and consequently those only can demur for that cause who are improperly joined. *Gartland v. Nunn*, 6 Eng. 720. [*Infra*, 302, n. 4.]

² *Innes v. Jackson*, *supra*; see *Thompson v. Peeble*, 6 Dana, 392.

³ *Pawlet v. The Bishop of Lincoln*, 2 Atk. 296.

against persons who are not parties, the plaintiff by waiving that claim may avoid the necessity of making those persons parties.⁴ This, however, cannot be done to the prejudice of others.⁵

In some cases, the defect of parties has been cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the absent party could have claimed; those rights being such as could not affect the interest of the defendants. Thus, where a bill was filed to set aside a release which had been executed in pursuance of a family arrangement, in consequence of which a sum of stock was invested in the names of trustees for the benefit of the plaintiff's wife and unborn children, which benefit would be lost if the release was set aside, Sir John Leach M. R. held, that the trustees of the settlement were necessary parties, in order to assert the right of the children; but upon the plaintiff's counsel undertaking that all the moneys to be recovered * by the suit should be settled upon the same trusts for *294 the benefit of the plaintiff's wife and children, his Honor permitted the cause to proceed without the trustees, and ultimately, upon the undertaking of the plaintiff, declared that the plaintiffs were not bound by the release.¹

As a decree made in the absence of proper parties may be reversed, and at all events will not bind those who are absent, or those claiming under them;² great care should be taken to have the necessary parties before the Court at the hearing,³ because, as we have seen before, the plaintiff cannot then apply for leave to add parties without the consent of the defendant.

The most usual way of adding parties is by amendment of the original bill, though sometimes it is done by supplemental bill, or order, and the Court will suffer the plaintiff to amend his bill by adding parties at any time before the hearing, but if the amendment is made after the expira-

⁴ Ld. Red. 179; Story Eq. Pl. §§ 127, 129, 213, 214, 228. So, in some cases, when all the parties are not before the Court, the merits, as between those parties who are before the Court, may be decided at their request. See *Wickliffe v. Clay*, 1 Dana, 103. If the Court can make a decree, at the hearing, which will do entire justice to all the parties, and not prejudice their rights, notwithstanding the nonjoinder or misjoinder of some, an objection on that account will not be allowed to prevail. *White v. Delschneider*, 1 Oregon, 254.

⁵ Ld. Red. 180; *Dart v. Palmer*, 1 Barb. Ch. 92. If the case made by the bill entitles the plaintiff to particular relief against the defendant, and would also entitle him to further relief were the necessary parties before the Court, and the prayer of the bill specifically asks for the more extended relief, to which the plaintiff is not entitled in consequence of the defect of parties, the defendant may demur to the whole bill for want of parties. *Dart v. Palmer*, 1 Barb. Ch. 92.

A Court can make no decree in an Equity suit, in which the interests of a person not a party are so involved, that complete justice cannot be done between the parties to the suit, without affecting the rights of the person, not a party, whose interests are so involved. *Shields v. Barrow*, 17 How. U. S. 130; *ante*, 149, n. 1.

¹ *Harvey v. Cooke*, 4 Russ. 35; and see *Walker v. Jefferies*, 1 Hare, 296, and 341, 356; Story Eq. Pl. § 220.

² Prac. Reg. 299; Story Eq. Pl. § 236; *Whiting v. Bank of U. S.*, 13 Peters, 14; *Spring v. Jenkins*, 1 Ired. Eq. 128; *Shields v. Barrow*, 17 How. U. S. 130; Stat. U. S. Feb. 28, 1839, 5 Stats. at Large, 321; 47th Equity Rule of the Supreme Court of the United States. [See *ante*, 191, note, and 149, n. 1. See also Revised Statutes of the U. S. § 737 *et. seq.*]

³ For cases in which the defect of parties has been remedied by the voluntary appearance at the hearing, see *ante*, 153; *Joy v. Wirtz*, 1 Wash. C. C. 517.

tion of the time for giving notice for the cross-examination of witnesses, the evidence cannot be read against the new parties.⁴

*295 * An order to amend by adding parties allows of the introduction of apt words to charge them; but it seems that the plaintiff, if it is necessary, should apply for liberty to add allegations applicable to the case of the proposed new parties, as this is not included in the liberty to amend by adding parties; ¹ and under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both.² A plaintiff is not obliged, in adding parties by amendment, to make them defendants; he may, if he pleases, apply for leave to make

⁴ *Goodwin v. Goodwin*, 3 Atk. 370; *Pratt v. Barker*, 1 Sim. 1. A person in interest, who has never appeared, or been cited to appear, may, upon motion, and without a supplemental bill, at the hearing upon bill, answer, and proof, be summoned in and made a party. *Miller v. Whittier*, 32 Maine, 521. Where new parties are added in a case after the testimony is taken, the cause should be heard on bill and answer as to such new defendants. *Smith v. Baldwin*, 4 Har. & J. 331.

Courts of Equity will not dismiss bills absolutely, for want of proper parties, the plaintiff showing enough to give color to his claim for relief against the parties not before the Court. In such case the Court may properly give the plaintiff leave to amend, and make the proper parties. *Allen v. Smith*, 1 Leigh, 331; *Hutchinson v. Reed*, 1 Hoff. Ch. 316; *Hayden v. Marmaduke*, 19 Mis. (Bennett) 403; *Franklin v. Franklin*, 2 Swan (Tenn.), 521; *Potter v. Holden*, 31 Conn. 385; *Thomas v. Adams*, 30 Ill. 37. If the objection of the want of the proper parties is taken by plea or demurrer, it is a matter of course to dismiss the plaintiff's bill upon the allowance of a plea or demurrer, unless the plaintiff takes issue on the plea, or obtains leave to amend on the usual terms. *Van Epps v. Van Deusen*, 4 Paige, 64, 76. If the defendant makes no objection for want of proper parties, either by plea, answer, or demurrer, and raises that objection for the first time at the hearing, the bill should not be dismissed, where the defect can be remedied by an amendment or a supplemental bill, provided the plaintiff elects to bring the proper parties before the Court within a reasonable time. *Ib.* p. 76; *Harder v. Harder*, 2 Sandf. Ch. 17; *Peterson v. Poignard*, 6 B. Mon. 570. The only exception to the rule arises where it appears that the necessary parties have been left out of the bill by the fraud or bad faith of the plaintiff. See *Rowland v. Garman*, 1 J. J. Marsh. 76; *Parberry v. Gorum*, 3 Bibb, 108; *Cabeen v. Gordon*, 1 Hill (S. C.), Ch. 53; *Hutchinson v. Reed*, 1 Hoff. Ch. 320; *Clifton v. Haig*, 4 Desaus. 331; *New London Bank v. Lee*, 11 Conn. 112; *Malin v. Malin*, 2 John. Ch. 338; *Nash v. Smith*, 6 Conn. 422; *Rogers v. Rogers*, 1 Hopk. 515; S. C. 1 Paige, 188; S. C. 2 Paige, 467; *Bland v. Wyatt*, 1 Hen. & M. 43; *Sears v. Powell*, 5 John. Ch. 259; *Bowen v. Idley*, 6 Paige, 46; *Ensworth v. Lambert*, 4 John. Ch. 605; *Smith v. Turrentine*, 8 Ired. Eq. 185.

If the bill is dismissed for want of the proper parties, it should not, where it has equity, be dismissed absolutely, but *without prejudice* to the right of the plaintiff in any future litigation. See *Craig v. Barbour*, 2 J. J. Marsh. 220; *Thompson v. Clay*, 3 Monroe, 361; *Van Epps v. Van Deusen*, 4 Paige, 76; *Miller v. McCan*, 7 Paige, 452; *Huston v. McClarty*, 3 Litt. 274; *Steele v. Lewis*, 1 Monroe, 49; *Story Eq. Pl. § 236*; *West v. Randall*, 2 Mason, 181; *Mechanics' Bank of Alexandria v. Setons*, 1 Peters, 306; *Hunt v. Wickliffe*, 8 Peters, 215; *Patrick v. White*, 6 B. Mon. 330; *ante*, 287, note; *Jameson v. Deshields*, 3 Grattan, 4; *Kirkpatrick v. Buford*, 21 Ark. 268. But if the plaintiff shows no right to relief against the parties before the Court, and his bill is dismissed, the Appellate Court will not reverse the decree to enable him to introduce new parties, and thereby make a new case upon the merits. *Jameson v. Deshields*, 3 Grattan, 4. Under the present English practice, limiting the number of parties necessary to a decree, Rule 7 provides, that in the cases falling within the regulations of the six preceding rules, "the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order, in any particular case, as it may deem just for placing the defendant on the record on the same footing, in regard to costs, as other parties having a common interest with him in the matters in question."

¹ *Hand. 77*; *Palk v. Lord Clinton*, 12 Ves. 48; *Mason v. Franklin*, 1 Y. & C. 239, 242; *Gibson v. Ingo*, 5 Hare, 156; *Bateman v. Margerison*, 6 Hare, 502; and cases referred to, 1 C. P. Coop. t. Cott. 35, 36, 37; *Barlow v. Murray*, L. R. 2 Eq. 420. When the plaintiff is allowed to amend on account of the want of proper parties, he possesses the incidental right to amend by charging all such matters, as constitute the equity of his case, against the new party. *Stephens v. Frost*, 2 Y. & C. 297. If a necessary party be added to a bill, it is to him as an original bill, and he is entitled to the same time to plead, answer, &c., as an original defendant. *Hoxey v. Carey*, 12 Geo. 534; *Van Leonard v. Stocks*, 12 Geo. 546; see *McDougald v. Dougherty*, 14 Geo. 674.

² *Minn v. Stant*, 15 Beav. 129.

them co-plaintiffs, and he has been permitted to do so by special motion after the defendants have answered the original bill.³ It is to be observed, however, that after answer, the addition of a co-plaintiff is not a matter of course; and that, in such case, the granting or refusing of an order to amend by adding parties as plaintiffs, is in the discretion of the Court.⁴

SECTION IV. — *Of the Joinder of Parties who have no Interest in the Suit.*

It has been before stated, that no one should be made a party to a suit against whom, if brought to a hearing, there can be no decree;⁵ thus, an agent for the purchase of an estate, is not a * necessary *296 party to a bill¹ against his employer for a specific performance, although he signed the memorandum for the purchase in his own name;² and so a residuary legatee need not be made a party to a bill against an executor for a debt or legacy; and for the same reason in a bill brought by or against the assignees of a bankrupt or insolvent in respect of the property vested in them, under the bankruptcy or insolvency, the bankrupt or insolvent should not be a party;³ and in a suit to ascertain the property in a certain share in a banking company litigated between two claimants, the company is not a necessary party.⁴ Upon the same principle, persons who are mere witnesses, and may be examined as such, ought not to be made defendants;⁵ even though the object of the

³ *Hichens v. Congreve*, 1 Sim. 500; see *Milligan v. Mitchell*, 1 M. & C. 433, 442, 443; *Miller v. M'Can*, 7 Paige, 451.

⁴ The practice relating to the addition of parties by amendment is treated of in the chapter concerning "The Amending of Bills."

⁵ *De Golls v. Ward*, 3 P. Wms. 311, n. 1; *Todd v. Sterrett*, 6 J. J. Marsh. 432. It is a good ground of demurrer to the whole bill, that a person who has no interest in the suit, and has no equity against the defendant, is improperly joined as a party plaintiff. *Clarkson v. De Peyster*, 3 Paige, 336; *Little v. Buie*, 5 Jones Eq. (N. C.) 10; *King v. Gallo-way*, 5 Jones Eq. (N. C.) 128; see *Wright v. Santa Clara Mining Association of Baltimore*, 12 Md. 443; *Westfall v. Scott*, 20 Geo. 233. A bill for contribution by one stockholder of a manufacturing corporation, who has paid debts of the corporation under legal process, is open to a demurrer, by a defendant who did not appear ever to have been a stockholder in the corporation. *Heath v. Ellis*, 12 Cush. 601, 604. One defendant cannot object that another defendant, having no interest in the subject-matter of the suit, is improperly made a party. *Cherry v. Monro*, 2 Barb. Ch. 618. [*Inf.* 302, n. 4.]

¹ *Garr v. Bright*, 1 Barb. Ch. 157; *Lyon v. Tevis*, 8 Clarke (Iowa), 79; *Ayers v. Wright*, 8 Ired. Eq. 229; see *Allin v. Hall*, 1 A. K. Marsh. 527; *Orkey v. Bend*, 3 Edw. Ch. 482; *Jones v. Hart*, 1 Hen. & M. 470;

Davis v. Simpson, 5 Har. & J. 147. If an agent, selling land, binds himself individually, he should be a party to a suit touching the sale. *Alexander v. Lee*, 3 A. K. Marsh. 484.

[A private agent, or a public officer having process in his hands which is sought to be enjoined, or a ministerial officer, such as a clerk of Court, ought not to be made a defendant, and if so made may demur, and no decree can be taken against him even for costs. *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Holmes v. Chester*, 11 C. E. Green, 79; *Lackey v. Curtis*, 6 Ired. Eq. 199; *Hext v. Walker*, 5 Rich. Eq. 5; *Blanton v. Hall*, 2 Heisk. 423; *Montgomery v. Whitworth*, 1 Tenn. Ch. 174; *Bloomstein v. Brien*, 2 Tenn. Ch. 778. It is otherwise where the officer, a clerk, has the legal title to the note in controversy. *Rice v. Hunt*, 12 Heisk. 344. Or where the officer, a sheriff, has by levy acquired title to the personal property in dispute. *Buckner v. Abrahams*, 3 Tenn. Ch. 346; *Oil Run Co. v. Gale*, 6 W. Va. 525.]

² *Kingley v. Young*, Coop. Tr. Pl. 42.

³ See *ante*, 256, n. 1.

⁴ *Scawin v. Scawin*, 1 Y. & C. 68.

⁵ *Plummer v. May*, 1 Ves. 426; *How v. Best*, 5 Mad. 19; *Footman v. Pray*, R. M. Charl. 291; *Felton v. Hughes*, 7 Sumner's Ves. 287, Perkins's note (a) and cases cited; *Newman v. Godfrey*, 2 Bro. C. C. (Perkins's ed.) 332; *Reeves v. Adams*, 2 Dev. Ch. 192; *Yates v. Monroe*, 13 Ill. 212.

bill is to obtain a discovery in aid of an action at Law in which their discovery would be more effectual than their examination.⁶

This rule is, however, liable to exceptions; thus, in cases where, under certain circumstances, a discovery upon oath is desirable from individual members of a corporation aggregate, or from the officers of a corporation, such members or officers may be made defendants.⁷ With respect to this exception from the general rule, it has been observed by Lord Eldon, that "the principle upon which the rule has been adopted is very singular: it originated with Lord Talbot,⁸ who reasoned thus upon it: that you cannot have a satisfactory answer from a cor-
*297 poration, therefore, you *make the secretary a party, and get from him the discovery you cannot be sure of having from them; and it is added, that the answer of the secretary may enable you to get better information." "The first of these principles," continues his Lordship, "is extremely questionable, if it were now to be considered for the first time; and as to the latter, it is very singular to make a person a defendant in order to enable yourself to deal better, and with more success, with those whom you have a right to put upon the record; but this practice has so universally obtained without objection, that it must be considered established."¹

Other persons are mentioned by Lord Eldon as affording exceptions to the rule before laid down, that mere witnesses cannot be made parties to a suit, *viz.*, agents to sell, auctioneers, &c., who have been made defendants without objection:² his Lordship, however, appears to have thought that the practice of making such persons parties arose originally from their having some interest, such as holding deposits, which might entitle the plaintiff to relief against them; and it has been since held, that an agent who bids at an auction for an estate, and signs the memorandum in his own name for the purchase, need not be made a co-defendant with his employer to a bill for the specific performance of such agreement.³ In *Dummer v. The Corporation of Chippenham*,⁴ Lord Eldon also mentions, as cases of exception to the general rule above referred to, those of arbitrators and attorneys. With respect to arbitra-

⁶ *Fenton v. Hughes*, 7 Ves. 288; see next preceding note, and *ante*, 145, note.

⁷ See *ante*, 145; *Fenton v. Hughes*, 7 Sumner's Ves. 287, Perkins's note (a) and cases cited to this point: *Kennebec and Portland R.R. Co. v. Portland and Kennebec R.R. Co.*, 54 Maine, 184. A suit, to restrain the misappropriation of a fund held by a corporation in trust, cannot be maintained against the trustees appointed by the corporation to hold and manage the fund, without making the corporation a party. *Tibballs v. Bidwell*, 1 Gray, 399. To obtain the specific performance of a contract with a corporation for the sale of real estate, the trustee who holds the legal title to the corporation lands should be made a co-defendant with the corporation. *Morrow v. Lawrence*, 7 Wis. 574.

⁸ *Wyck v. Meal*, 3 P. Wins. 210; see *United States of America v. Wagner*, L. R.

2 Ch. Ap. 582, 587; S. C. L. R. 3 Eq. 724; *Pringle v. United States and Andrew Johnson*, L. R. 2 Eq. 659.

¹ 7 Ves. 289.

² *Ibid.*; *Gartland v. Nunn*, 6 Eng. 720. Where one of two partners, after a dissolution, consigned property to an agent for sale, the proceeds to be applied to the payment of a partnership debt, in a bill against the agent by the other partner, the partner by whom the consignment was made, having become insolvent, he and his assignee were properly made defendants. *Bartlett v. Parks*, 1 Cush. 82. *Wilde J.* said that the insolvent partner, "if not interested, may well be made a party for the purpose of discovery, as to all acts done by him before his insolvency, and the assignment of his property," p. 86.

³ *Coop. Tr. Pl.* 42.

⁴ 14 Ves. 252.

tors, however, it is a rule, that in general an arbitrator cannot be made a party to a bill for the purpose of impeaching an award, and that, if he is, he may demur to the bill, as well to the discovery as to the relief.⁵ In some cases, nevertheless, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the Court has gone so far as to order them to pay the costs.⁶ In such cases, Lord Redesdale considers it probable that a demurrer to the bill would not have been allowed;⁷ and in *Lord Lonsdale v. Littledale*,⁸ a demurrer by an arbitrator to a bill of this nature was in fact overruled; though not expressly upon the ground of the impropriety of making an arbitrator a party, but because the bill charged certain *specific acts which showed combination *298 or collusion between him and one of the parties, and made him the agent for such party, and which the Court therefore thought required an answer.¹ But although arbitrators may be made parties to a bill to set aside their award, they are not bound to answer as to their motives in making the award, and they may plead to that part of the bill in bar of such discovery;² but it is incumbent upon them, if they are charged with corruption and partiality, to support their plea by showing themselves incorrupt and impartial, or otherwise the Court will give a remedy against them by making them pay costs.³

From the preceding cases it may be collected, that arbitrators can only be made parties to a suit where it is intended to fix them with the payment of costs in consequence of their corrupt or fraudulent behavior, and in such cases it is apprehended that the bill ought specifically to pray that relief against them.

The same rule also applies to the other case of exception before alluded to, as having been mentioned by Lord Eldon, namely, that of attorneys; who can only be made parties to a suit in cases where they have so involved themselves in fraud, that a Court of Equity, although it can give no other relief against them, will order them to pay the costs.⁴ Thus, where a solicitor assisted his client in obtaining a fraudulent release from another, he was held to be properly made a party, and liable to costs if his principal was not solvent.⁵

The same rule applies to any other person acting in the capacity of agent in a fraudulent transaction, as well as to an attorney or solicitor;⁶

⁵ *Steward v. E. I. Company*, 2 Vern. 380; *Ld. Red.* 162; *Story Eq. Pl.* § 231.

⁶ *Chicot v. Lequesne*, 2 Ves. 315; *Lingood v. Croucher*, 2 Atk. 395, 950; see *Hamilton v. Bankin*, 3 De G. & S. 782; *Story Eq. Pl.* § 232 and notes.

⁷ *Ld. Red.* 162.

⁸ 2 Ves. J. 451.

¹ 2 *Story Eq. Jur.* § 1500, and cases cited.

² *Anon.*, 3 Atk. 644. [*Padley v. Linton Waterworks Co.*, 2 McN. & G. 68; *Ponsford v. Swaine*, 1 J. & H. 433.]

³ *Lingood v. Croucher*, *supra*.

⁴ *Story Eq. Pl.* § 232; *Lyon v. Tevis*, 8 *Clarke (Iowa)*, 99; [*Rice v. Hunt*, 12 *Heisk.* 345.]

⁵ *Bowles v. Stewart*, 1 Sch. & Lef. 227. A solicitor who had intermeddled with a trust was held a proper party. *Hardy v. Caley*, 33 *Beav.* 365.

⁶ *Bulkley v. Dunbar*, 1 *Anst.* 37; *Story Eq. Pl.* § 838; *Gartland v. Nunn*, 6 *Eng.* 720. But where a judgment debtor seeks relief against the judgment, in Equity, the attorneys of the plaintiff in the judgment ought not to be made parties, no fraud being charged upon them, or relief sought as to

and it was said by Sir James Wigram V. C., in *Marshall v. Sladdon*,⁷ that, "as far as his researches had gone, the Court had never made a decree against a mere agent except upon the ground of fraud."

It is to be observed that, in such cases, if an attorney or agent is made a party, the bill must pray that he may pay the costs, and must distinctly allege the circumstances constituting the fraud, and that the defendant was a party concerned, and had a knowledge of the fraudulent intention;⁸ otherwise a demurrer will lie.

*299 * In *Texier v. The Margravine of Anspach*,¹ one of the questions before the Court was, whether a married woman could be made a party to a suit on the allegation, that in certain contracts which were the subject of litigation she had acted as the agent of her husband, and that she had vouchers in her possession the discovery of which might assist the plaintiff in his case. The bill which did not pray any relief against the wife, had been demurred to; and Lord Eldon allowed the demurrer on the ground that she was merely made a defendant for the purpose of discovery, and that no relief was prayed against her. His Lordship said: "I give no judgment as to what would have been the effect if the bill had prayed a delivery to the plaintiff of those vouchers which are charged to be in the hands of the wife; it is, however, simply as far as relief goes, a bill against the husband only, and against the wife a bill for discovery only. The consequence is that, independent of her character as wife, the case must be considered as one of those in which the Court does sometimes allow persons to be made parties against whom no relief is prayed, and the only case of that kind is that of the agent of a corporation."

With respect to the propriety of making an attorney or agent a party, merely because he has deeds or other documents in his possession, Lord Eldon, in *Fenwick v. Reed*,² observed that, generally speaking and *primâ facie*, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title deeds, merely because he has them in his custody;³ because the possession of the attorney is the possession of his client; but cases may arise to render such a proceeding advisable, as if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them.⁴

them. *Kenan v. Miller*, 2 Kelly, 325. In a case, however, where a person is charged with fraudulently procuring the execution of a will in favor of an infant, such person is a proper party to a bill filed for the purpose of setting aside such will, although he has no interest; and he may be liable to costs. *Brady v. McCosker*, 1 Comst. 214.

⁷ 7 Hare, 428, 442; 14 Jur. 106; *Reynell v. Sprye*, 8 Hare, 222, 271; *Innes v. Mitchell*, 4 Drew. 57; 3 Jur. N. S. 756.

⁸ *Kelly v. Rogers*, 1 Jur. N. S. 514, V. C. W.; *Gilbert v. Lewis*, 1 De G., J. & S. 39, 49, 50; 9 Jur. N. S. 187; and see *Att-*

wood v. Small, 6 Cl. & Fin. 352; *Sugd. Law Prop.* 630, 632.

¹ 15 Ves. 164.

² 1 Mer. 123.

³ *Wakeman v. Bailey*, 3 Barb. Ch. 482.

⁴ 1 Smith, Ch. Fr. (2d Am. ed.) 677, 678. Where the plaintiff wishes to obtain the custody of books and papers in possession of a third person, the proper course is to make such third person a party defendant. *Morley v. Green*, 11 Paige, 240. [So, if the principal be beyond the jurisdiction of the Court, and no discovery can be compelled from him. *Ballin v. Ferst*, 55 Ga. 546.]

Where a person who has no interest in the subject-matter of the suit, and against whom no relief is prayed, is made a party to a suit for the mere purpose of discovery; the proper course for him to adopt, if he wishes to avoid the discovery, is to *demur*.⁵ If, however, the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, will not of course hold, though the defendant has no interest, and he can then only avoid answering the bill by plea or disclaimer.⁶

*The question whether a party who is a mere witness can by *300 *answer* protect himself from the discovery required, appears to have given rise to some difference of opinion. In *Cookson v. Ellison*,¹ the plaintiff made a person defendant who was merely a witness, and might have been examined as such, and therefore should have demurred to the bill. Instead of demurring, however, the defendant put in an answer, which, not having satisfied the plaintiff as to one interrogatory, an exception was taken, and the Master reported the answer sufficient; but upon the case coming before Lord Thurlow, upon exception to the Master's report, his Lordship held, that as the defendant had submitted to answer, he was bound to answer fully. In a subsequent case of *Newman v. Godfrey*,² however, Lord Kenyon M. R. appears to have entertained a different opinion. In that case the defendant, who was a mere clerk, was alleged in the bill to be a party interested in the property in litigation, and in support of such allegation various statements were made, showing in what manner his interest arose; he put in an answer denying all the statements upon which the allegation of his being interested was founded, and disclaiming all personal interest in the subject-matter; and to this answer exceptions were taken by the plaintiff, because the defendant had not answered the subsequent parts of the bill, which exceptions were disallowed by the Master; and upon the question coming on before Lord Kenyon, upon exceptions to the Master's reports, he thought the Master was right in disallowing the exceptions; because the defendant had reduced himself to a mere witness, by denying his interest and disclaiming; so that, even supposing he had an interest, he could not, having disclaimed, have availed himself of it. These contradictory decisions have been remarked upon by Lord Eldon in two subsequent cases;³ and his Lordship's observations in those cases have been considered, as approving of Lord Thurlow's decisions in *Cookson v. Ellison*.⁴ Nothing, however, can be collected from what Lord Eldon has said in either of these cases, as indicating an opinion either one way or the other; and, at the period when they were before him, the doctrine that a party answering must answer fully does

⁵ *Ld. Red.* 189.

⁶ *Ibid.*; *Plummer v. May*, 1 *Ves.* 426. Where a suit becomes useless against a particular defendant, it is a laudable course for the plaintiff to dismiss the bill against him, and he may incur censure if he brings the

suit to a hearing without doing this. *Wright v. Barlow*, 8 *Eng. Law & Eq.* 125.

¹ 2 *Bro. C. C.* 252.

² 2 *Bro. C. C.* 332.

³ *Fenton v. Hughes*, 7 *Ves.* 288; *Baker v. Mellish*, 11 *Ves.* 75, 76.

⁴ 2 *Bro. C. C.* 252.

not appear to have been so strictly adhered to as it has been subsequently; ⁵ but that doctrine is now well established, and, it is conceived, includes the case above discussed. ⁶

*301 *When a plaintiff finds that he has made unnecessary parties to his bill, he may either dismiss his bill as against them, or apply to the Court for leave to amend his bill by striking out their names; in either case, however, the order will, if the defendants have appeared, only be made on payment of their costs; ¹ because, by striking them out as defendants, the plaintiff deprives them of the opportunity of applying for their costs at the hearing. ²

The preceding observations, with regard to the joinder in the suit of persons who have no interest, beneficial or otherwise, in the subject-matter, refer to cases where they are made parties defendants. The rule, however, that persons who have no interest in the litigation, cannot be joined in a suit with those who have, applies equally to prevent their being joined as co-plaintiffs. ³

But although persons having no interest in the subject-matter of a suit, cannot, as we have seen, be joined as co-plaintiffs, yet where persons having at the time a joint interest file an original bill, and afterwards one of the co-plaintiffs parts with his interest, such co-plaintiff may afterwards join in a supplemental bill filed for the purpose of bringing additional matter before the Court; because, although he may have parted with his interest in the subject-matter, he is still interested in the suit in respect of his liability to costs. Thus, where a bill was filed in the Exchequer by certain persons on behalf of themselves and other members of a Joint-Stock Company, to which an answer was put in and a decree made, setting aside certain contracts between the plaintiffs and the defendant, and directing various accounts and inquiries, and afterwards a supplemental bill was filed in the name of the same plaintiffs against the same defendant, seeking amongst other things a lien on a part of the purchase-money, which had been paid to the defendant, to which a plea was put in by the defendant on the ground that one of the plaintiffs in the supplemental bill had, previously to the filing of it, parted with all his interest in the partnership, &c., Lord Lyndhurst,

⁵ See *Dolder v. Lord Huntingfield*, 11 Ves. 283; *Faulder v. Stuart*, *ib.* 296; *Shaw v. Ching*, *ib.* 303, and *post*, Answer; see a discussion of this subject in *Wigram Discovery*, Pl. 148, 149, &c. p. 86, 87, *et seq.*

⁶ *Lancaster v. Evors*, 1 Phil. 349; 8 Jur. 133; *Swinborne v. Nelson*, 16 Beav. 416; *Great Luxemburg Railway Company v. Mag-nay*, 23 Beav. 646; 4 Jur. N. S. 839; *Reade v. Woodroffe*, 24 Beav. 421. [See *Elmer v. Creasy*, L. R. 9 Ch. App. 69; *Saul v. Browne*, L. R. 9 Ch. App. 364; *Great Western Col-liery Co. v. Tucker*, L. R. 9 Ch. App. 376, qualifying while purporting to follow the rule. But see *French v. Rainey*, 2 Tenn. Ch. 640, where the authorities, *pro* and *con*, are cited and reviewed. *Infra*, 720.]

¹ *Covenhoven v. Shaler*, 2 Paige, 122; see *Wright v. Barlow*, 8 Eng. Law & Eq. 125; *Manning v. Gloucester*, 6 Pick. 6, 17, 18; *Dana v. Valentine*, 5 Met. 12, 13.

² *Wilkinson v. Belsher*, 2 Bro. C. C. 272.

³ *Mayor and Aldermen of Colchester v. —*, 1 P. Wms. 595; *Troughton v. Get-tey*, 1 Dick. 382; *Cuff v. Platell*, 4 Russ. 242; *Makepeace v. Haythorne*, 4 Russ. 244; *King of Spain v. Machado*, 4 Russ. 225; *Page v. Townsend*, 5 Sim. 395; *Glyn v. Soares*, 3 M. & K. 450, 463; *Griggs v. Staplee*, 2 De G. & S. 572; 13 Jur. 29; *Griffith v. Vanhey-thuysen*, 9 Hare, 85; 15 Jur. 421; *Story Eq. Pl.* §§ 390, 509, 544, 551; *Clarkson v. De Peyster*, 3 Paige, 336; *Clason v. Lawrence*, 2 Ed. Ch. 48.

C. B. overruled the plea, being of opinion that the supplemental bill was nothing more than a continuation of the original bill, and his Lordship's decision was afterwards confirmed by Lord Abinger C. B. upon a rehearing.⁴

It is to be observed, that the common case of joining an auctioneer and the vendor in a bill against a purchaser, is no exception * to the rule above referred to, because the auctioneer has an in- *302 terest in the contract, and may bring an action upon it; he is also interested in being protected from the legal liability which he has incurred in an action by the purchaser to recover the deposit.¹ Nor does the circumstance of the assignor and the assignee of a *chose in action* being capable of suing together constitute an exception, because, although the assignor has parted with his beneficial interest in the subject-matter, he still is interested as the owner of the legal estate.²

If the fact of one of the plaintiffs having no interest in the suit, appears on the bill, advantage must be taken of it by demurrer.³ If the fact does not appear upon the bill it may be brought forward by plea,⁴ and where, at the hearing, the claim of one of two co-plaintiffs failed entirely whilst that of the other succeeded, the V. C. of England dismissed the bill as against both plaintiffs, but without prejudice to the right of the one who had succeeded to file a new bill.⁵

Upon a similar principle, in cases where all the plaintiffs have an

⁴ *Small v. Attwood*, 1 Y. & C. 39.

¹ But in a suit in Equity by a purchaser for relief against a sale at auction, in which the auctioneer used fraud to enhance the price, it was held that it was not necessary to make the auctioneer a party. *Veazie v. Williams*, 8 How. U. S. 134. But if the auctioneer is made a party he cannot demur, in such a case, on the ground that he is a mere witness. *Schmidt v. Ditericht*, 1 Edw. Ch. 119.

² *Ryan v. Anderson*, 3 Mad. 174; see *Story Eq. Pl.* § 153 and notes; *ante*, 198, *et seq.*, and notes.

³ *Cuff v. Platell*, 4 Russ. 242; *King of Spain v. Machado*, 4 Russ. 225; *Page v. Townsend*, 5 Sim. 395; *Delondre v. Shaw*, 2 Sim. 237; *Story Eq. Pl.* §§ 541-544; *Bowie v. Minter*, 2 Ala. (N. S.) 406; *Talmage v. Pell*, 9 Paige, 410; *Gossett v. Kent*, 19 Ark. 602.

⁴ *Makepeace v. Haythorne*, 4 Russ. 244; *Doyle v. Muntz*, 5 Hare, 509; 10 Jur. 914. In *Watertown v. Cowen*, 4 Paige, 510, it was held too late to take a mere formal objection of this kind for the first time at the hearing. See *Dickinson v. Davis*, 2 Leigh, 401; *Sheppard v. Starke*, 3 Munf. 29; *Mayo v. Murchie*, *ib.* 358; *Story Eq. Pl.* §§ 232, 236, 509, 544; *Harder v. Harder*, 2 Sandf. Ch. 17; *Bowman v. Burnley*, 2 McLean, 376; *Story v. Livingston*, 13 Peters, 359; *Bowie v. Minter*, 2 Ala. 406; *Schwoerer v. Boylston Market Association*, 99 Mass. 295, 297. If the misjoinder is of parties plaintiffs, all the defendants may demur; such a misjoinder is a proper ground of objection. *Cammeyer v. United German Lutheran Churches*, 2 Sandf.

Ch. 186; [*Christian v. Crocker*, 25 Ark. 327.] If the misjoinder is of parties as defendants, those only can demur who are improperly joined. *Toulmin v. Hamilton*, 7 Ala. 362. [*Cherry v. Monro*, 2 Barb. Ch. 618; *Great Western Compound Co. v. Etna Ins. Co.*, 40 Wis. 373; *Christian v. Crocker*, 25 Ark. 327; *Payne v. Berry*, 3 Tenn. Ch. 154; *Gartland v. Nunn*, 6 Eng. 720; *Miller v. Jamison*, 9 C. E. Green, 41; *Warthen v. Brantley*, 34 Miss. 571. *Infra*, 337, n. 3.] But if a person is improperly joined as a defendant, who is without the jurisdiction, and is therefore a party only by virtue of the usual prayer of process, such misjoinder will not affect the cause; for until he has appeared and acted, no decree can be had against him. And in cases of misjoinder of plaintiffs, the objection ought to be taken by demurrer; for if not so taken, and the Court proceeds to a hearing on the merits, it will be disregarded, at least if it does not materially affect the propriety of the decree. *Story Eq. Pl.* § 544, and notes.

⁵ *Cowley v. Cowley*, 9 Sim. 229; *Padwick v. Platt*, 11 Beav. 503; *Fulham v. McCarthy*, 1 H. L. Ca. 703; see also *Blair v. Bromley*, 5 Hare, 542, 553; *Moore v. Moore*, 17 Ala. 631. It seems, however, that in general an objection of this kind if not raised upon the pleadings, will not be allowed at the hearing. *Eades v. Harris*, 2 Y. & C. 230; *Rubty v. King*, 1 Keen, 601; *Cashell v. Kelly*, 2 Dr. & W. 181; *Louis v. Meek*, 2 Greene (Iowa), 55; *Murray v. Hay*, 1 Barb. Ch. 59. But the Court may in its discretion, and under circumstances, in such a case, dis-

interest in the subject of the suit, but their interests are distinct *303 * and several, they will not be allowed to sue together as co-plaintiffs;¹ thus, in *Hudson v. Maddison*,² where a bill was filed by five several occupiers of houses in a town, to restrain the erection of a steam-engine, alleging that it would be a nuisance to each of them, the V. C. of England dissolved an injunction obtained in the suit, upon the ground that each occupier had a distinct right of suit, and therefore that they could not sue as co-plaintiffs.³

Now, however, the consequences of a misjoinder are by no means so serious as they were formerly; for, by the Chancery Amendment Act of 1852, it has been provided that "no suit in the said Court shall be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but whenever it shall appear to the Court that, notwithstanding the conflict of interests in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the Court shall have power to grant such relief, and to modify its decree, according to the special circumstances of the case, and for that purpose to direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs, as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there is misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff on the record without an interest, the Court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to the decision of the cause, if it shall see fit, and give such directions, as to costs or otherwise, as may appear just and expedient."⁴

miss the bill as to all the plaintiffs, or only as to those who are improperly joined. *Myers v. Farrington*, 18 Ohio, 72. Where a person is made a co-plaintiff improperly, without his privity or consent, the proper motion is that his name be stricken out, not that the bill be dismissed even as to him. *So. Life Ins. & Trust Co. v. Lanier*, 5 Florida, 110. It seems the objection of misjoinder of plaintiffs cannot be taken on a rehearing. *Fowler v. Reynal*, 3 M.N. & G. 500, 511; 15 Jur. 1019, 1021.

¹ *Hudson v. Maddison*, 12 Sim. 416; 5 Jur. 1194; and see *Powell v. Cockerell*, 4 Hare, 557, 562; 10 Jur. 243, where the objection was disallowed; and *Miles v. Durnford*, 2 Sim. N. S. 234; 21 L. J. Ch. 607, L. J.J.; where the plaintiff filed a bill in two characters, in one of which he could not sue. [See *infra*, 313, n. 8.] For a case since 15 & 16 Vic. c. 86, see *Beeching v. Lloyd*, 3 Drew. 227. See *Merrill v. Lake*, 16 Ohio, 373; *Ohio v. Ellis*, 10 Ohio, 456; *Poynes v. Creagh*, 2 Irish Eq. 190; *Beaty v. Judy*, 1 Dana, 103; *Boyd v. Hoyt*, 5 Paige, 65; *Story Eq. Pl. §§ 279, 530, 531*; *Yeaton v. Lenox*, 8 Peters,

123; *Harrison v. Hogg*, 2 Vesey J. 323, 328; *Brinkerhoff v. Brown*, 6 John. Ch. 139, 150-153; *Clarkson v. De Peyster*, 3 Paige, 320; *Lentilhon v. Moffat*, 1 Edw. Ch. 451; *Hallett v. Hallett*, 2 Paige, 15; *Egbert v. Woods*, 3 Paige, 517; *Van Cleef v. Sickles*, 5 Paige, 505; *Baily v. Bruton*, 8 Wendell, 339; *Kay v. Jones*, 7 J. J. Marsh. 37; *Burlingame v. Hobbs*, 12 Gray, 367, 372; *Emans v. Emaus*, 2 Beasley (N. J.), 205.

² 12 Sim. 416.

³ But it has been held that two or more persons, having separate and distinct tenements which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance, which is a common injury to the tenements of both, may join in a suit to restrain such nuisance. *Murray v. Hay*, 1 Barb. Ch. 59; *Putnam v. Sweet*, 1 Chand. (Wis.) 286; [*Pettibone v. Hamilton*, 40 Wis. 402.] The Court exercises a sound discretion, without adhering to an inflexible rule, in determining whether there has been a misjoinder of parties in Equity.

⁴ 15 & 16 Vic. c. 86, § 49.

The provision of the Act is imperative, and does not leave it to the discretion of the Court whether to dismiss the bill or not.⁵

* The Act applies to the case where a plaintiff sues on behalf *304 of himself and the others of a class ;¹ thus, where a bill was filed by one member of a company on behalf of himself and all others, except the defendants, praying an account of the receipts and payments of the defendants on behalf of the company, and payment of what should be found due to the plaintiff, and it appeared that there were circumstances which made the interest of some of the persons purporting to be represented by the plaintiff different from his, it was held, that the Court could, under the above-mentioned section, treat the absent plaintiffs as defendants, and determine whether a decree should be made ; and, accordingly, the Court decreed an account giving liberty to some of the shareholders whose interest differed from the plaintiff's to attend the proceedings in chambers.²

It has been held, that a misjoinder of plaintiffs is now no objection to a motion for an injunction and receiver, to protect property in danger of being lost pending litigation.³

⁵ *Clements v. Bowes*, 1 Drew. 684; see also, for cases of misjoinder since the Act, *Carter v. Sanders*, 2 Drew. 248; *Upton v. Vanner*, 10 W. R. 99, V. C. K.; *Burdick v. Garrick*, L. R. 5 Ch. Ap. 233. In *Barton v. Barton*, 3 K. & J. 512; 3 Jur. N. S. 808, the bill was not dismissed for misjoinder, but for want of interest in the plaintiffs; and the marginal note in 3 K. & J. 512 appears to be incorrect in this respect.

¹ *Clements v. Bowes*, 1 Drew. 634; and

see *Williams v. Page*, 24 Beav. 669; 4 Jur. N. S. 102; *Evans v. Coventry*, 5 De G., M. & G. 911; 2 Jur. N. S. 557; see also *Stupart v. Arrowsmith*, 3 Sm. & G. 176; *Williams v. Salmond*, 2 K. & J. 463; 2 Jur. N. S. 251; *Gwatkin v. Campbell*, 1 Jur. N. S. 131, V. C. W.

² *Clements v. Bowes*, 1 Drew. 634.

³ *Evans v. Coventry*, 5 De G., M. & G. 911; 2 Jur. N. S. 557.

THE BILL.

SECTION I. — *The different sorts of Bills.*

It has been before observed that a suit on the Equity side of the Court of Chancery is generally commenced, on behalf of a subject, by preferring what is termed a bill;¹ and that if commenced by the Attorney-General on behalf of the Crown, or of those partaking of its prerogatives, or under its protection, the suit is instituted by information.² The form of this bill and information is now regulated by statute and by the orders of the Court, but the mode of commencing proceedings in Chancery has been by bill since the earliest times.³

Bills, if they relate to matters which have not previously been brought before the consideration of the Court, are called original bills, and form the foundation of most of the proceedings before, what is termed, the extraordinary or equitable jurisdiction of the Court of Chancery.⁴ The same form of instituting a suit is also in use in all other equitable jurisdictions in the kingdom except the county courts.

Besides original bills, there are other bills in use in Courts of Equity, which were formerly always, and are still sometimes, necessary to be preferred, for the purpose of supplying any defects which may exist in the form of the original bill, or may have been produced by events subsequent to the filing of it. Bills of this description are called
 *306 bills which are not original. Sometimes a *person, not a party to the original suit, seeks to bring the proceedings and decree in the original suit before the Court, for the purpose either of

¹ [*Ante*, 2. Under the Judicature Act and Orders of Court based thereon, the defendant may waive any statement of claim by the plaintiff. But, if he fail so to do, the plaintiff must, within the time prescribed, deliver to the defendant a statement of his complaint, and of the relief or remedy to which he claims to be entitled. And the defendant shall, in like manner, deliver to the plaintiff a statement of his defence, set-off or counter-claim, and the plaintiff shall deliver a statement of his reply. The rules prescribed for the form of these statements are substantially those which are laid down for correct Chancery pleading, except in requiring the statements to be divided into paragraphs, numbered consecutively. *Morgan's Acts and Orders*, 487; *Order XIX.*] See *Belknap v. Stone*, 1

Allen, 572. [*Ante*, p. 2, n. 6.] The jurisdiction of the Supreme Judicial Court is exclusive over all actions in which relief in Equity is prayed for. The prayer for relief gives jurisdiction of the action, and therefore no affidavit for that purpose is necessary. Its character is that of a suit in Equity. *Stockbridge Iron Company v. Cone Iron Works*, 99 Mass. 468; see *Irvine v. Gregory*, 13 Gray, 215; *Stat. Mass.* 1865, c. 179, § 2. By Statute in Maine a bill in Equity may be inserted in a writ to be served as other writs. *Stephenson v. Davis*, 56 Maine, 73, 76.

² *Ante*, p. 2.

³ *Ld. Red.* 8.

⁴ *Story Eq. Pl.* §§ 16, 22.

obtaining the benefit of it, or of procuring the reversal of the decision which has been made in it. The bill which he prefers for this purpose is styled a bill in the nature of an original bill.¹

Besides the different divisions of the bills here enumerated, original bills are usually divided into: 1. Original bills praying relief; and 2. Original bills not praying relief.²

Original bills praying relief are again subdivided into three heads: 1. Original bills praying the decree of the Court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited; 2. Bills of interpleader; and 3. Certiorari bills.³ Original bills not praying relief, are of two kinds: 1. Bills to perpetuate the testimony of witnesses; and 2. Bills of discovery.⁴ The simplicity of modern proceedings, however, renders the foregoing subdivision of bills in Chancery comparatively unimportant.

As original bills of the first kind are those most usually exhibited, the reader's attention will, in the present chapter, be principally directed to them. The other descriptions of bills will be more particularly considered, when we come to treat of the practice of the Court applicable to the particular suits of which they are the foundation. Bills which are not original, or which are merely in the nature of original bills, will be separately considered in a future part of the work; but it may be here observed, that simple and economical modes of supplying the defects of original bills have been provided, which will be stated in the proper place,⁵ and which have rendered bills which are not original of rare occurrence.

SECTION II. — *The Authority to file the Bill.*

The first step to be taken by a party who proposes to institute a suit in Chancery, unless he intends to conduct the suit in person, is to authorize a solicitor practising in the Court to commence and conduct it on his behalf. It does not seem to be necessary that such authority should be in writing,⁶ although it would, perhaps, *be better *307 that a solicitor, before he commences a suit, should be in possession of some written authority for that purpose; as if he is not, the onus of the proof of the authority will be cast on him.¹ In order to warrant a solicitor in filing a bill, the authority, be it in writing or by

¹ Story Eq. Pl. §§ 16, 20, 21.

² Ld. Red. 34, 37, 51; Story Eq. Pl. §§ 17-19.

³ Ld. Red. 34, 37, 48, 50.

⁴ Ld. Red. 51, 53, 54.

⁵ *Post*, Chap. XXXIII.; and see 15 & 16 Vic. c. 86, §§ 52, 53.

⁶ Lord v. Kellett, 2 M. & K. 1. As to revocation of the authority, see Freeman v. Fairlie, 8 L. J. Ch. 44, V. C. E. For the

authority required in the case of a bill by a public company, see East Pant Mining Company v. Merryweather, 10 Jur. N. S. 1251; 13 W. R. 216, V. C. W.; 2 H. & M. 254; Exeter & Crediton Railway Co. v. Buller, 5 Railway Co. 211. For forms of authority to sue or defend, see Vol. III.

¹ Pinner v. Knights, 6 Beav. 174; Hood v. Phillips, *ib.* 176; Maries v. Maries, 23 L. J. Ch. 154, V. C. W.

parol, ought to be special; and it has been held that a general authority to act as solicitor for a party, will not be sufficient to warrant his commencing a suit on his behalf:² although, under a general authority, a solicitor may defend a suit for his client.³

The rule which requires a solicitor to be specially authorized to commence a suit on behalf of his client, applies as well to cases where the party sues as a co-plaintiff,⁴ as to cases where he sues alone; and even to cases where his name is merely made use of *pro formâ*. In *Wilson v. Wilson*,⁵ Lord Eldon said, "I cannot agree that making a person a plaintiff is only *pro formâ*, and I am disposed to go a great way in such cases: for it is too much for solicitors to take upon themselves to make persons parties to suits without a clear authority; there are very great mischiefs arising from it." Now, as we have already seen, before the name of any person is used in any suit as next friend of any infant, married woman, or other party, or as relator in any information, such person must sign a written authority to the solicitor for that purpose, and such authority must be filed with the bill or information.⁶

If a solicitor files a bill in the name of a person without having a proper authority for so doing, the course for such person to pursue, if he wishes to get rid of the suit, and is the sole plaintiff, is to move that the bill may be taken off the file,⁷ or dismissed⁸ with costs, to be paid

by the plaintiff; and that the solicitor who filed the bill without
*308 authority may be ordered to pay to the defendants * their costs of the suit, or to repay such costs to the plaintiff in case he pays them; and may be also ordered to pay the plaintiff's costs of the application, and his incidental expenses, as between solicitor and client.¹ The same course should be pursued where there are several plaintiffs, and all repudiate the suit. But where one or more of several plaintiffs desire to withdraw from the suit, they should move that their names may be struck out of the bill, and that the solicitor who has unauthor-

² *Wilson v. Wilson*, 1 J. & W. 457; see also *Dundas v. Dutens*, 1 Ves. J. 196, 200; 2 Cox, 235, 241; *Bligh v. Tredgett*, 5 De G. & S. 74; 15 Jur. 1101; *Bowley v. Seymour*, 14 Jur. 213, V. C. E.; *Re Manby*, 3 Jur. N. S. 259; S. C. *nom.* *Norton v. Cooper*, 3 Sm. & G. 375; and see *Solley v. Wood*, 16 Beav. 370, where it was held that an authority given to a country solicitor is sufficient to warrant his town agent in filing a bill.

³ *Wright v. Castle*, 3 Mer. 12.

⁴ Where a suit is commenced in the names of several persons by their solicitor, the Court will not inquire whether such suit was authorized by all, unless some of them object to the proceedings, or the adverse party shows affirmatively that the suit is commenced and carried on in the names of some of the parties without authority. *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497.

⁵ 1 J. & W. 458.

⁶ 15 & 16 Vic. c. 86, § 11, *ante*, pp. 13, 69, 110. In a pressing case, an information was allowed to be filed without the authority, on the undertaking of the solicitor to file it the next day. *Attorney-General v. Murray*, 13 W. R. 65, V. C. K. As to the liability of a person whose name is used as next friend without authority, whether originally or in the place of one deceased, see *Bligh v. Tredgett*, 5 De G. & S. 74; 15 Jur. 1101; *Ward v. Ward*, 6 Beav. 251.

⁷ *Jerdein v. Bright*, 10 W. R. 380, V. C. W.; *Palmer v. Walesby*, L. R. 3 Ch. Ap. 732.

⁸ *Wright v. Castle*, 3 Mer. 12; *Allen v. Bone*, 4 Beav. 493; *Crossley v. Crowther*, 9 Hare, 384; *Atkinson v. Abbot*, 3 Drew. 251.

¹ *Wright v. Castle*, 3 Mer. 12; *Palmer v. Walesby*, L. R. 3 Ch. Ap. 732; and see the order in *Allen v. Bone*, Seton, 852, No. 1. For form of notice of motion, see Vol. III.

izedly used their names may be ordered to pay their costs of the suit, and the costs of the application.²

The motion in either case must be supported by an affidavit of the respective applicants themselves, that the bill has been filed without any authority from them.³ To avoid the effect of such an application, the solicitor against whom it is made must show distinctly, upon affidavit, that he had a special authority from the party moving to institute the suit; and it will not be sufficient to assert generally, in opposition to the plaintiff's affidavit, that authority had been given. In *Wright v. Castle*,⁴ the affidavit of the plaintiff was met by another on the part of the solicitor, stating that an action had been brought by the defendant against the plaintiff, on certain promissory notes: to restrain proceedings in which action the bill had been filed, although not by the express directions of the plaintiff, yet in the course of business, and by virtue of a general authority, as the plaintiff's solicitor; but Lord Eldon did not consider such authority sufficient.

Notice of the intended motion must be given to the solicitor who filed the bill; and where one or more, but not all, the plaintiffs move, notice must also be served on the co-plaintiffs, and on the defendants, whose costs of appearance are usually ordered to be paid by the solicitor, if the motion succeeds.⁵ Where the sole plaintiff applies, service on the defendants is unnecessary, at least before decree; and in a recent case their costs of appearing, where improperly served, had to be borne by the plaintiff personally.⁶

The motion should be made as soon as possible after the plaintiff has become acquainted with the fact of the suit having been instituted in his name: for although, as between him and the solicitor, the mere fact of the plaintiff having neglected to move that *his *309 name should be struck out from the record will not exonerate the solicitor;¹ yet, as between the plaintiff and the other parties, the Court, if there has been delay on his part in making such application, will not generally dismiss the bill, but will so frame the order as not to prejudice any of the parties to the cause.² The last observation applies more especially to cases where the person whose name has been used without due authority, is co-plaintiff with others: for it can scarcely happen, where he is sole plaintiff, that defendants should have an interest in resisting an application to dismiss the bill with costs (except

² *Tabbner v. Tabbner*, 2 Keen, 679. For the order in that case, see *Seton*, 853, No. 2; and see *Wilson v. Wilson*, 1 J. & W. 457; *Pinner v. Knights*, 6 Beav. 174; *Hood v. Phillips*, *ib.* 176; see also *Malins v. Greenway*, 10 Beav. 564; 12 Jur. 66, 319, where a solicitor was ordered to pay the costs of unauthorized proceedings in the Master's office, on behalf of creditors. For form of notice of motion, see Vol. III.

³ For form of affidavit, see Vol. III.

⁴ 3 Mer. 12.

⁵ *Tabbner v. Tabbner*, 2 Keen, 679;

Seton, 853; *Hood v. Phillips*, 6 Beav. 176; *Pinner v. Knights*, *ib.* 174.

⁶ *Jerdein v. Bright*, 10 W. R. 380, V. C. W.

¹ *Hall v. Laver*, 1 Hare, 571; 5 Jur. 241; see also *Burge v. Bratten*, 2 Hare, 373; 7 Jur. 988, as to the lien of a solicitor upon a fund recovered in the cause.

² *Titterton v. Osborne*, 1 Dick. 350; and see *Tarback v. Tarback*, 6 Beav. 134; *Pinner v. Knights*, *ib.* 174; *Hood v. Phillips*, *ib.* 176; *Bligh v. Tredgett*, 5 De G. & S. 74; 15 Jur. 1101.

indeed after decree) ; but where he is co-plaintiff, it frequently happens that dismissing the bill would interfere with the interest of the other plaintiffs, or diminish the security of the defendants for costs : in such cases, the motion will usually be saved to the hearing, and then the solicitor will be ordered to pay all the costs and expenses of the party whose name has been used without authority.³ And further than that, the solicitor was, in the case of *Dundas v. Dutens*,⁴ ordered to pay to the defendants the difference between taxed costs and their costs and expenses.

Where a co-plaintiff was not apprised that his name had been made use of without his authority till after the bill had been dismissed with costs, and he was served with a *subpœna* to pay them, Lord Eldon, upon motion, ordered the solicitor to pay to the defendant the costs, which had been ordered to be paid by the plaintiffs to the defendant ; and also to pay to the plaintiff who made the application his costs of the application, as between solicitor and client.⁵ By the order made upon that occasion, the solicitor was ordered to pay the whole costs to be paid by all the plaintiffs to the defendants ; but he was to be at liberty to make any application as to those costs, as against the other plaintiffs, as he should be advised.⁶

As connected with this subject, it may be noticed here, that in certain cases it is necessary, before a suit is commenced, to obtain the sanction of the Court to its institution. The cases in which this is most usually done, are those in which the suit contemplated
*310 * is for the benefit of an estate which is already the subject of a proceeding in Court, and the expenses of which, are to be paid out of such estate. Thus, where there is a suit pending for the administration of assets, and it becomes necessary, in order to get in the estate, that a suit should be instituted against a debtor to the estate, it is usual for the personal representative, previously to filing a bill, to apply, in the administration suit, for the leave of the Court to exhibit a bill for that purpose. And so where a suit has been instituted for winding up partnership accounts upon a dissolution, and a receiver has been appointed to collect the outstanding effects : if it is necessary, in order to recover a debt due to the partnership, that the receiver should institute a suit for that purpose, application should be made to the Court, on the part of some of the parties, that the receiver may be at liberty to file the necessary bill in the names of the partners. It is to be observed that, in all such cases, the Court would not formerly direct the

³ See *Dundas v. Dutens*, 2 Cox, 235, 241 : 1 Ves. J. 196.

⁴ 1 Ves. J. 200.

⁵ *Wade v. Stanley*, 1 J. & W. 674.

⁶ S. C. Reg. Lib. B. 1849, fo. 1845. For other cases where a plaintiff, or a next friend, has applied to be relieved from orders for payment by them of money or costs, without their knowledge of the suit, see *Hood v. Phillips*, 6 Beav. 176 ; *Ward v. Ward*, *ib.*

251 : *Bligh v. Tredgett*, 5 De G. & S. 74 : 15 Jur. 1101 ; *Re Manby*, 3 Jur. N. S. 259 ; S. C. *nom.* *Norton v. Cooper*, 3 Sm. & G. 375. In *Hall v. Bennett*, 2 S. & S. 78, where the bill had been dismissed with costs for want of prosecution, the plaintiff's solicitor was ordered to pay the defendant's costs : the plaintiff having absconded before suit, and never authorized or sanctioned it.

institution of such a suit upon motion, although supported by affidavits, without previously referring it to the Master to inquire whether it would be for the benefit of the parties at whose joint expense it was to be : unless the other parties interested, being of age, and competent to consent, chose to waive such reference.¹ Now, however, the proper mode of application for orders of this description is by summons at Chambers,² supported by affidavit or other evidence of the facts from which the Judge can determine whether the proposed suit is proper to be instituted ; and the opinion of an Equity barrister, in actual practice, is usually required, that there is a good ground of suit.

In the same manner, where the property of an infant is the subject of a suit already depending, and it becomes necessary that another suit should be instituted on behalf of the infant, it is usual, before any steps are taken in it, to obtain in Chambers, on summons,² an order sanctioning such contemplated proceedings as being for the benefit of the infant.³ It is to be observed, however, that such order can only be made where the property of the infant is already subject to the control and disposition of the Court in another suit ; and that in ordinary cases, where a person commences an original proceeding on behalf of an infant as his next friend, he is considered as taking upon himself the whole responsibility of it ; nor will the Court, either before or after the commencement of the proceeding, direct an inquiry whether it will be for the infant's benefit, at the instance of the next friend himself (unless in cases where there are two or more suits brought by different next friends for the same object) : although, as we * have seen, it will *311 sometimes do so at the instance of other parties.¹

It has been before stated, that the committee of the estate of an idiot or lunatic ought, previously to instituting a suit on his behalf, to obtain the sanction of the Lord Chancellor or Lords Justices to the proceeding ;² and that in the case of suits by the assignees of bankrupts, it is necessary, previously to instituting the suit, to procure the sanction of the Court of Bankruptcy.³ And in like manner, before a suit can be instituted on behalf of a charity, unless by the Attorney-General, the sanction of the Charity Commissioners must be obtained.⁴

It is to be observed that, with respect to all the above-mentioned cases, in which it is stated to be right, previously to the institution of a suit, to obtain the proper sanction, the omission to obtain such sanction is not a ground upon which a defendant to the suit can object to its proceeding.

¹ Musgrave v. Medex, 3 V. & B. 167.

² For forms of summons, see Vol. III.

³ See *ante*, p. 80.

¹ *Ante*, pp. 71, 80.

² *Ante*, p. 85.

³ *Ante*, p. 65.

⁴ 16 & 17 Vic. c. 137. § 17; see *post*, Chap. XLV. § 2, *Charitable Trusts Acts*.

⁵ Having regard to the words of the 17th section of the Charitable Trusts Act above referred to, it would seem doubtful whether the want of sanction would not be an objection which a defendant might take to the suit's proceeding. [See *Braund v. Earl of Devon*, L. R. 3 Ch. App. 800; *In re Lister's Hospital*, 6 De G., M. & G. 104.]

SECTION III. — *By whom Prepared.*

The solicitor being duly authorized, the next step in the institution of a suit is to have the bill properly prepared. The duty of drawing the bill ought, strictly, to be performed by the solicitor, who is allowed a fee for so doing;⁶ but as the rules of Court require that the *312 draft should be signed by counsel,⁷ and as * much of the success of the suit may depend upon the manner in which the bill is framed, it has been found more convenient in practice that the bill should be prepared as well as signed by counsel; and accordingly, except in particular cases, instead of the draft of the bill being prepared by the solicitor, and laid before counsel for his perusal and signature, the instructions to prepare the bill are generally, in the first instance, laid before the counsel, who prepares the draft from those instructions, and afterwards affixes his signature to it.¹ If neither the draft of the bill nor the print or engrossment of it be signed by counsel before the bill is filed, or the hand be counterfeit or disowned, the bill will be dismissed on the defendant's demurrer or motion.² Thus, in

⁶ Regul. to Ord. 2d Sched.

⁷ Ord. VIII. 1, 2; Story Eq. Pl. §§ 47, 269; 1 Smith Ch. Pr. (2d Am. ed.) 106; Ayckbourn Ch. Pr. (Lond. ed. 1844) 5, 6; Comp. Eq. Pl. 18; *Davis v. Davis*, 4 C. E. Green (N. J.), 180; *Wright v. Wright*, 4 Halst. Ch. (N. J.) 153; *Chancery, Rule 1*, of New Jersey, 2 *McCart*, 513; *Hatch v. Eustaphievé*, 1 *Clarke*, 63; see *Belknap v. Stone*, 1 *Allen*, 572, 574; *Burns v. Lynde*, 6 *Allen*, 305. The signing on the back of the bill is sufficient. *Dwight v. Humphreys*, 3 *McLean*, 104. The 24th Equity Rule of the United States Supreme Court expressly requires the signature of counsel to the bill, "which shall be considered as an affirmation on his part, that upon the instructions given to him, and the case laid before him, there is good ground for suit, in the manner in which it is framed." Where a corporation is plaintiff, the bill, if not a sworn one, is drawn in the name of the corporation, by its chartered title, and signed by counsel. In cases where the bill is to be sworn to, it should be signed by the officer making the oath. 1 *Hoff. Ch. Pr.* 96; 1 *Barbour Ch. Pr.* 44; [*Dickinson's Ch. Pr.* 103, note]. The bill need not be under the corporate seal; that it is the bill of the corporation is sufficiently vouched for by the signature of the solicitor, whose authority need not be exhibited. *George's Creek Co. v. Detmold*, 1 *Md. Ch. Dec.* 371. If, however, the plaintiff manages his cause in person, as he may, the bill must be signed by him; and, in such case, it would appear that a bill need not be signed by counsel. See 1 *Hoff. Ch. Pr.* 97. The rules include informations, see *Prel. Ord.* 10 (4). The signature of the Attorney-General is required to an information, and to an amendment of it, in addition to the signature of the counsel who settles the draft. In *Attorney-General*

v. Fellows, 1 *J. & W.* 254, an amended information was ordered to be taken off the file, because it had not been sanctioned by the Attorney-General, though he had signed the original information. For forms of notice of motion in such case, see Vol. III.

¹ The bill must be signed by counsel. The mere signature of counsel by another person is not a compliance with the rule, either in spirit or letter. Counsel, before annexing his name to a bill, should have perused it, or been informed of its contents in such manner as would satisfy him that he might certify that the bill stated a case in which the plaintiff might be entitled to relief, set forth with so much regard to the essential rules of pleading, and praying relief in such manner as to entitle it to the consideration of the Court. Per Chancellor Zabriskie, in *Davis v. Davis*, 4 C. E. Green (N. J.), 180, 181; [but the signature by counsel in the firm name will be good. *Hampton v. Coddington*, 1 *Stew. Eq.* 557. And the signing on the back of the bill is sufficient. *Dwight v. Humphreys*, 2 *McLean*, 104.] See Rule 24 of the Equity Rules of the United States Supreme Court. [In the practice of Michigan, in which State all solicitors are also counsel, a bill signed by a solicitor is not demurrable for want of the signature of counsel. *Henry v. Gregory*, 29 *Mich.* 68. In Tennessee, and perhaps in other States, the lawyer who signs pleadings in Chancery usually designates himself as solicitor. 1 *Hicks' Man. Ch. Pr.* 46. See *Puterb. Ch. Pr.* 59. *Infra*, 732.]

² *Davis v. Davis*, 4 C. E. Green (N. J.), 180; *Carey v. Hatch*, 2 *Edw. Ch.* 190. It cannot be signed afterwards without an order of Court. *Partridge v. Jackson*, 2 *Edw. Ch.* 520. The want of the signature of counsel is a defect which requires an amendment. *Wright v. Wright*, 4 *Halst. Ch. (N. J.)* 153.

Kirkley v. Burton,³ a demurrer was allowed to an amended bill, because the name of counsel did not appear to the bill: and if, upon inspection of the record or an office copy, the name of counsel does not appear subscribed to the bill, the Court will, of its own accord, order it to be taken off the file.⁴

The usual course, however, in such a case, appears to be for the defendant to move that the bill may be taken off the file, and that the costs may be paid by the plaintiff.⁵ If, upon such a motion any doubt arises whether the draft of the bill was signed by counsel or not, the Court may direct an inquiry into the fact: and if it appears that it was not signed by counsel, the bill will be ordered to be taken off the file, and the plaintiff directed to pay the defendant his costs.⁶ A motion to take the bill off the file, with costs, may also be made where the draft has been altered after it was signed by counsel.⁷

Where it appeared that a solicitor had forged a counsel's name to a pleading, he was fined 20*l.*, and committed till the fine was paid; the party for whom he acted was also fined 100*l.*⁸

* Where the same counsel who signed the draft of the original *313 bill amends his former draft, which has his signature, it is not necessary that he should sign the draft again, as the signature will be applied as well to the amendment as to the former draft; nor is it necessary that there should be a second signature to the record. But if the amendments are made by another counsel, then it is necessary that there should be a second signature.¹ The usual practice, however, is for counsel in all cases to re-sign the draft, whenever he amends it.²

By one of the orders of the Court, it is ordered, that no counsel shall sign any bill, answer, or other pleading, unless it be drawn, or at least perused, by himself, before it is signed; and that counsel shall take care that deeds, writings, or records be not unnecessarily set out therein, in *hæc verba*; but that so much of them only as is pertinent and material be set out or stated, or the effect and substance of so much of them only as is pertinent and material be given, as counsel may deem advisable, without needless prolixity; and that no scandalous matter be inserted therein.³

³ 5 *Mad.* 378.

⁴ *French v. Dear*, 5 *Vesey*, 547, 550. Where the plaintiff discovers, before appearance, that counsel's name has been omitted to the bill as filed, he should obtain an order of course, on motion or petition, to amend, and then add the name to the bill. As to an omission to print the signature, see *Coppeard v. Mayhew*, 22 *L. J. Ch.* 408, *M. R.*

⁵ For form of notice of motion, see Vol. III.

⁶ *Dillon v. Francis*, 1 *Dick.* 68; *Pitt v. Macklew*, 1 *S. & S.* 136, n.

⁷ *Troup v. Ricardo*, 13 *W. R.* 147, *L. C.*
⁸ *Whitlock v. Marriot*, 1 *Dick.* 16; and see *Bull v. Griffin*, 2 *Aust.* 563.

¹ *Webster v. Threlfall*, 1 *S. & S.* 135;

Braithwaite's Pr. 304; see, however, *Burch v. Rich*, 1 *R. & M.* 156, 158.

² Where the amendments proposed to be made in the bill are merely of clerical errors in names, dates, or sums, and such errors are specified in the order authorizing the amendments, the signature of counsel to such amendments is not required; *Braithwaite's Pr.* 304.

³ *Ord. VIII.* 2; see *Davis v. Davis*, 4 *C. E. Green* (N. J.), 180, 181; *Hood v. Irwin*, 4 *John Ch.* 437; 24th, 26th, and 27th *Equity Rules of the United States Supreme Court*, stated in note to *Story Eq. Pl.* § 265. [See, for a case of prolixity, under the *Judicature Act* and the *New Rules*, *Davy v. Garrett*, 7 *Ch. Div.* 473.]

SECTION IV. — *The Matter of the Bill.*

An original bill in Chancery is in the nature of a declaration at Common Law,⁴ or of a libel and allegation in the Spiritual Courts.⁵ It was, in its origin, nothing but a petition to the King, which, after being presented, was referred to the Lord Chancellor, as the keeper of his conscience;⁶ and a bill still continues to be framed in the nature and style of a petition: though it is now, in the first instance, generally addressed to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal.⁷

Where a bill prays the decree of the Court, touching rights claimed by the person exhibiting it, in opposition to rights claimed by the person against whom it is exhibited, it must contain a statement showing the rights of the plaintiff or person exhibiting the bill, by whom and in what manner he is injured, or in what he wants the assistance of the Court,⁸ and in all cases, the bill must contain, as concisely as may be, a narrative of the material facts, matters, and circumstances on which the plaintiff relies,¹ and must pray specifically for the relief the plaintiff may conceive himself entitled to, and also for general relief.² This statement and prayer form the substance and essence of every bill;³ and before entering more in detail into the consideration of the form of a bill, the reader's attention should first be drawn to certain general rules and principles by which persons framing bills ought to be guided in the performance of their task.

In the first place it is to be observed, that every bill must show clearly that the plaintiff has a right to the thing demanded, or such an interest in the subject-matter⁴ as gives him a right to institute a suit

⁴ 3 Bl. Com. 442.

⁵ 3 Bl. Com. 442; Gilb. For. Rom. 44.

⁶ See 1 Spence, Eq. Jur. 335 *et seq.*; 1 Ld. Camp. Chancellors, Intro. *ib.* 266, 342.

⁷ Coop. Eq. Pl. 3.

⁸ [It should contain every averment necessary to entitle the plaintiff to be entertained in a Court of Equity. *Vanbibber v. Beirne*, 6 W. Va. 168. But it need not contain a specific allegation of the grounds of relief: it is sufficient if the grounds can be reasonably deduced from the facts stated. *Knox v. Gye*, 15 W. R. 628.] See *post*, "stating part" in this chapter. [*Infra*, 360.] A bill may be drawn with a double aspect; so that, if one ground fail, the plaintiff may rely upon another. *McConnell v. McConnell*, 11 Vt. 290; *Murphy v. Clark*, 1 Sm. & M. 221; *Baines v. McGee*, 1 Sm. & M. 208; *Ligan v. Henderson*, 1 Bland, 236; *Mills v. Metcalf*, 1 A. K. Marsh. 477; *Barnett v. Woods*, 2 Jones Eq. (N. C.) 198. A bill framed with a double aspect must be consistent with itself. *Hart v. McKee*, Walker Ch. 417; [*Wilkinson v. Dobbie*, 12 Blatchf. 298; *Bosley v. Phillips*, 3 Tenn. Ch. 649. *Ante*, 233, n. 4].

¹ Mass. Genl. Stats. c. 113, § 3; Mass. Ch. Pr. Rule 4; *Boynton v. Barstow*, 38 Maine, 577. As to the remedy for verbosity in a bill, see *Williams v. Sexton*, 19 Wis. 42.

² 15 & 16 Vic. c. 86, § 10.

³ An application to the Court for relief in Equity, which does not contain a prayer for process to be served on the defendant, or conclude with a general interrogatory, may be regarded as a bill; and, if properly amended, relief may be granted upon it. *Belknap v. Stone*, 1 Allen, 572.

⁴ A bill for the foreclosure of a chattel mortgage should show of what the property consists, the mortgagor's title or claim of title to it, and that it is within the jurisdiction of the Court. *Chapman v. Hunt*, 1 McCarter (N. J.), 149, 152. [An assertion by the bill of a claim against the defendant by way of inference arising out of a recital of the finding of the Master under an order of reference on *ex parte* proceedings by the complainant on petition, is insufficient. *Search v. Search*, 12 C. E. Green, 137. See *infra*, 360.]

concerning it.⁵ It would be foreign to the purpose of this work to attempt the enumeration of the various cases in which bills have been dismissed, because filed by parties having no interest in the subject-matter, or no right to institute proceedings concerning it: to do so, indeed, would necessarily lead to the consideration of the general principles of Equity, and would be more fitting for a treatise upon the equitable jurisdiction of the Court than for a book upon its practice. All that need now be said upon this subject is, that if it is not shown by the bill that the party suing has an interest in the subject-matter, and a proper title to institute a suit concerning it, the defendant may demur;⁶ * thus, where a plaintiff claims under a will, and *315 it appears upon the construction of the instrument, that he has no title, a demurrer will be allowed. In *Brownword v. Edwards*,¹ which is the case referred to in Lord Redesdale, in support of the above proposition, Lord Hardwicke is reported to have said, upon the argument of a demurrer, that if the Court had not been satisfied, and had, therefore, been desirous that the matter should be more fully debated at a deliberate hearing, the demurrer would have been overruled, without prejudice to the defendant's insisting on the same matter by way of answer; but in a note to his treatise,² Lord Redesdale observes, that "perhaps this declaration fell from the Court rather incautiously: as a dry question upon the construction of a will may be as deliberately determined upon argument of a demurrer, as at the hearing of a cause in the ordinary course, and the difference in expense to the parties may be considerable." Of the truth of this observation there can be no doubt; and it is much to be wished that, in cases of this description, where the right of the plaintiff in the subject-matter of the suit depends upon a simple point, such as that of the construction of a will, the practice of demurring to the bill were more frequently resorted to, as by

⁵ *Ld. Red.* 154; and see *Jerdein v. Bright*, 2 J. & H. 325; *Nokes v. Fish*, 3 Drew. 735; *Columbine v. Chichester*, 2 Phil. 27; 1 C. P. Coop. t. Cott. 295; *Kennebec & Portland R. R. Co. v. Portland & Kennebec R. R. Co.*, 54 Maine, 173, 185; *Cruger v. Haliday*, 11 Paige, 314; *Bailey v. Ryder*, 10 N. Y. 363; *Walthall v. Rives*, 34 Ala. 91. It is a fundamental rule in all cases of bills in Equity, that they must state a case within the appropriate jurisdiction of a Court of Equity. *Chase v. Palmer*, 25 Maine, 341; *May v. Parker*, 12 Pick. 34; *Stephenson v. Davis*, 56 Maine, 73, 74. In all bills in Equity, in the Courts of the United States, the citizenship should appear on the face of the bill to entitle the Court to take jurisdiction; otherwise the bill will be dismissed. *Dodge v. Perkins*, 4 Mason, 435; *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Peters, 148; *Vose v. Philbrook*, 3 Story, 335; see *Louisville and R. R. Co. v. Stetson*, 2 How. U. S. 497.

[A party will be precluded from relief in Equity who has made false and fraudulent

representations about a part of the property involved in a transaction, from the consequences of which he sought equitable relief, and it is impossible to separate that part from other property involved. *Kitchen v. Rayburn*, 19 Wall. 254. So, the Court will not entertain a bill against an agent for the value of a bond placed in his hands for collection, which at the time was known by both parties to have been stolen. *Kirk v. Morrow*, 6 Heisk. 445. Nor a bill by a person who has borrowed money of a bank on a loan forbidden by law to have the securities cancelled, and restraining the bank from negotiating them. *Elder v. First National Bank*, 12 Kan. 238.]

⁶ *Ld. Red.* 154.

¹ 2 Ves. S. 243, 247; and see *Mortimer v. Hartley*, 3 De G. & S. 316; *Evans v. Evans*, 18 Jur. 666, L. J.; *Cochrane v. Willis*, 10 Jur. N. S. 162, L. J.; *Collingwood v. Russell*, 10 Jur. N. S. 1062; 13 W. R. 63, L. J.; *Lautour v. Attorney-General*, 11 Jur. N. S. 48; 13 W. R. 305, L. J.

² *Ld. Red.* 154, n. (p).

such means considerable expense might frequently be saved: for if it appears at the hearing that the party filing the bill is not right in the construction he puts upon the instrument, the bill must be dismissed: which, if the plaintiff's bill had been demurred to in the first instance, would have been the result, without the additional expense caused by the other proceedings.³

The rule that a plaintiff should show by his bill an interest in the subject-matter of the suit, applies not to one plaintiff only, but to all the plaintiffs; and if several persons joined in filing a bill, and it appeared that one of them had no interest, the bill was formerly open to demurrer:⁴ though it appeared that all the other plaintiffs had an interest in the matter, and a right to institute a suit concerning it. This, as we have seen, is no longer so; but *the Court may make such order, on the hearing, as justice requires:¹ it must not, however, be supposed that it is not still important to avoid joining a plaintiff who has no interest in the bill.

The plaintiffs in a suit must not only show an interest in the subject-matter, but it must be an actual existing interest: a mere possibility, or even probability, of a future title will not be sufficient to sustain a bill;² therefore, where a plaintiff, claiming as a devisee in the will of a person who was living, but a lunatic, brought a bill to perpetuate the testimony of witnesses to the will, against the presumptive heir-at-law,³ and where persons, who would have been entitled to the personal estate of a lunatic, if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a bill in the lifetime of the lunatic to perpetuate the testimony of witnesses to his legitimacy, against the Attorney-General, as supporting the rights of the Crown,⁴ demurrers were allowed. For the parties in these cases had no interest which could be the subject of a suit: they sustained no character under which they could afterwards sue; and therefore the evidence, if taken, would have been wholly nugatory.⁵ Upon the same principle, it has been held, that a bill cannot be sustained by a purchaser from a contingent

³ But where the defendant allows the cause to be brought to a hearing in such a case, the practice is to dismiss the bill without costs. *Hill v. Reardon*, 2 S. & S. 431, 439; *Jones v. Davids*, 4 Russ. 278; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Webb v. England*, 29 Beav. 44; 7 Jur. N. S. 153; *Ernest v. Wise*, 9 Jur. N. S. 145; 11 W. R. 206, V. C. K.; *Nesbitt v. Berridge*, [4 De G., J. & S. 45;] 9 Jur. N. S. 1045; 11 W. R. 446, M. R.; *Godfrey v. Tucker*, [3 Beav. 280;] 9 Jur. N. S. 1188; 12 W. R. 33, M. R.; and see *Sanders v. Benson*, 4 Beav. 350, 357.

⁴ See the *Mayor and Aldermen of Colchester v. —*, 1 P. Wms. 595; *Troughton v. Gettey*, 1 Dick. 382; *Cuif v. Platell*, 4 Russ. 242; *Makepeace v. Haythorne*, 4 Russ. 244; *King of Spain v. Machado*, 4 Russ. 225; *Delondre v. Shaw*, 2 Sim. 237; *Page v. Town-*

send, 5 Sim. 395; *Story Eq. Pl. §§ 509, 541, 544*; *Clarkson v. De Peyster*, 3 Paige, 336; *Manning v. Gloucester*, 6 Pick. 6.

¹ 15 & 16 Vic. c. 86, § 49, *ante*, p. 303.

² *Ld. Red.* 156; and see observations of Lord Cottenham, in *Finden v. Stephens*, 2 Phil. 148; 1 C. P. Coop. 329; 10 Jur. 1019; *Davis v. Angel*, 31 Beav. 223; [4 De G., F. & J. 524;] 8 Jur. N. S. 709, 1024.

³ *Sackvill v. Ayleworth*, 1 Vern. 105; 1 Eq. Ca. Ab. 234, pl. 3; see also 2 *Prax. Alm.* 500, where the form of demurrer is set out.

⁴ *Smith v. Attorney-General*, cited *Ld. Red.* 157; 1 Vern. 105, n., ed. Raithby; 6 Ves. 255, 260; 15 Ves. 136.

⁵ *Story Eq. Pl. § 301*, and cases cited; 2 *Story Eq. Jur. § 1511*; *Dursley v. Berkley*, 6 Sumner's Ves. 251, and notes.

remainder-man of his interest in the property, against a tenant for life, for inspection of title deeds: although a bill would lie for that purpose by a person entitled to a vested remainder.⁶ But it must not be supposed that contingent remainder-men can, in no case, be plaintiffs: for in many cases (such as suits for the administration of, or to secure, the trust property to which they are contingently entitled), such persons may properly be plaintiffs;⁷ and orders have been made at the suit of such persons, for the payment of trust funds into Court.⁸

A bill filed by a person who filled the character of tenant in tail in remainder, and his children, to perpetuate testimony to the marriage of the tenant in tail, could not be supported: because the father, being confessedly tenant in tail in remainder, could have no interest whatever in proving the fact of his own marriage, * the remain- *317 der in tail being vested in him; and the other plaintiffs (the children) were neither tenants in tail nor remainder-men in tail, but the issue of a person who was *de facto* and *de jure* tenant in remainder in tail, having the whole interest in him; and, consequently, the children had no interest in them, in respect of which they could maintain their bill.¹ Upon the same principle, where the dignity of Earl was entailed upon an individual who died, leaving two sons, the eldest of whom inherited the dignity: upon a bill filed by his eldest son, in his lifetime, against the second son of the first Earl, and the Attorney-General, to perpetuate testimony as to his father's marriage, a demurrer was allowed.²

Where the plaintiff does not show an existing interest by his bill, the disclaimer or waiver of one defendant in his favor will not sustain the bill against the other defendants.³

Where, however, a party has an interest, "it is perfectly immaterial how minute the interest may be,⁴ or how distant the possibility of the possession of that minute interest, if it is a present interest.⁵ A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is, nevertheless, a present estate; and, as in the case upon Lord Berkeley's will,⁶ though the interest may, with reference to the chance, be worth nothing, yet it is in contemplation of law an estate and interest, upon which a bill may be supported."⁷

But, although a plaintiff may have a present estate or interest, yet, if his interest is such that it may be barred or defeated by the act of the

⁶ Noel v. Ward, 1 Mad. 322, 329; and see Davis v. Earl of Dysart, 20 Beav. 405; 1 Jur. N. S. 743, and cases there cited, for instances of vested remainder-men.

⁷ Roberts v. Roberts, 2 De G. & S. 29; 2 Phil. 534.

⁸ Ross v. Ross, 12 Beav. 89; Governesses' Benevolent Institution v. Rusbridger, 18 Beav. 467.

¹ Allan v. Allan, 15 Ves. 130, 135.

² Earl of Belfast v. Chichester, 2 J. & W. 439, 449, 452.

³ Griffith v. Ricketts, 7 Hare, 305; 14 Jur. 166, 325; Hollingsworth v. Shakeshaft, 14 Beav. 492.

⁴ See Seaton v. Grant, L. R. 2 Ch. Ap. 459, 463, 465.

⁵ Story Eq. Pl. § 301.

⁶ Lord Dursley v. Fitzhardinge, 6 Ves. 251.

⁷ Per Lord Eldon, in Allan v. Allan, 15 Ves. 135; see also Davis v. Angel, 31 Beav. 223; [4 De G., F. & J. 524;] 8 Jur. N. S. 709, 1024; 2 Story Eq. Jur. § 1511.

defendant, he cannot support a bill; as in the case put by Lord Eldon, in *Lord Dursley v. Fitzhardinge*,⁸ of a remainder-man filing a bill to perpetuate testimony against a tenant in tail. To such a bill it seems the tenant in tail might demur, upon the ground that he may at any time bar the entail, and thus deprive the plaintiff of his interest.⁹

A plaintiff must not only show in his bill an interest in the subject-matter of the suit, but he must also make it appear that he has a
 *318 proper title to institute a suit concerning it;¹⁰ for it very * often happens, that a person may have an interest in the subject-matter, and yet, for want of compliance with some requisite forms, he may not be entitled to institute a suit relating to it. Thus, for instance, the executor of a deceased person has an interest in all the personal property of his testator; but, till he has proved the will, he cannot assert his right in a Court of justice; if therefore, a man files a bill as executor, and does not state in it that he has proved the will, the bill will be liable to demurrer.¹

An executor may, however, it seems, pending an application for probate, file a bill to protect the estate, by obtaining an injunction or otherwise: although he alleges in the bill that he has not yet obtained probate.²

Formerly, it was necessary to allege that the will was proved in the proper Ecclesiastical Court, though it was not necessary to mention in what Court;³ and this still applies to all wills proved before the constitution of the Court of Probate;⁴ but since that date, it is conceived that it is sufficient simply to allege that the will has been proved: though in practice it is usual to allege that it has been proved in Her Majesty's Court of Probate, or that it has been duly proved. Formerly questions often arose, whether the will had been proved in the proper Court:⁵ whether, for instance, a prerogative probate was necessary;⁶ but these questions are removed by the constitution of the present Court of Probate, except as to wills proved before the 11th January, 1858.⁷

If an executor, before probate, file a bill, alleging that he has proved

⁸ 6 Ves. 262; see, however, *Butcher v. Jackson*, 14 Sim. 444, and the observations of Sir L. Shadwell V. C. at p. 455.

⁹ It would be a fruitless exercise of power to entertain a bill to perpetuate evidence in such a case. *Story Eq. Pl.* § 301.

¹⁰ *Ld. Red.* 155. It is not essential that the plaintiff's title should be explicitly averred. It is sufficient that it may fairly be inferred from the facts stated. *Webber v. Gage*, 39 N. H. 182; *Story Eq. Pl.* § 730; *Clapp v. Shephard*, 23 Pick. 228.

¹ *Humphreys v. Ingledon*, 1 P. Wms. 752; *Story Eq. Pl.* § 625; *Champion v. Parish*, 3 Edw. Ch. 581.

² *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583; 8 Jur. N. S. 738; see *Rawlings v. Lambert*, 1 J. & H. 458;

Steer v. Steer, 13 W. R. 225, V. C. K.; 2 Dr. & Sm. 311; *Overington v. Ward*, 34 Beav. 175; and also *post*, Chap. XXXIX. § 1, as to obtaining receivers pending litigation as to probate.

³ *Humphreys v. Ingledon*, 1 P. Wms. 752.

⁴ 20 & 21 Vic. c. 77.

⁵ *Tourtou v. Flower*, 3 P. Wms. 369, 370; but see *Jossaume v. Abbot*, 15 Sim. 127.

⁶ *Thomas v. Davies*, 12 Ves. 417; *Challnor v. Murhall*, 6 Ves. 118; *Newman v. Hodgson*, 7 Ves. 409; *Metcalf v. Metcalfe*, 1 Keen, 74, 79; *McMahon v. Rawlings*, 16 Sim. 429.

⁷ 20 & 21 Vic. c. 77, § 1; *Ord. in Council* of 2d Dec. 1857; 3 Jur. N. S. Pt. II. 479.

the will, such allegation will obviate a demurrer;⁸ he must, however, prove the will before the hearing of the cause, and then the probate will be sufficient to support the bill, although it bear date subsequently to the filing of it.⁹

In like manner, a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing.¹⁰

* It is to be observed that, although an executor or adminis- *319 trator may, before probate or administration granted, file a bill relating to the property of the deceased, and such bill will not, on that account, be demurrable, provided the granting of probate or of letters of administration be alleged in the bill, yet a defendant may take advantage of the fact not being as stated in the bill, by plea; thus, in *Simons v. Milman*,¹ where letters of administration had been granted to the defendant under the idea that the deceased had died intestate, whereas, in fact, he had made a will and appointed the plaintiff his executor, who, before probate, filed a bill, for the purpose of recovering part of the assets of the testator from the defendant, alleging that probate of the will had been granted to him, to which bill the defendant put in a plea stating that such was not the fact: Sir Lancelot Shadwell V. C. allowed the plea.

But although an executor, filing a bill before probate, must, as we have seen, allege in it that he has proved the will, it is not necessary that in a bill against an executor such a statement should be made: for if executors elect to act, they are liable to be sued before probate, and cannot afterwards renounce.² It also seems, that if a party entitled by law to take out administration to a deceased person, does not do so, but acts as if he were administrator, and receives and disposes of the property, he will be liable to account as administrator; but in both cases it is necessary to have a duly constituted legal personal representative before the Court.³

It may be here observed, that if it appears to the Court that the probate, or the letters of administration, bear a stamp applicable to a less sum than that which is sought to be recovered in the cause, no decree can be obtained until the defect has been remedied, and the party can show that he represents the estate to an amount sufficient to cover his claim.⁴

⁸ *Humphreys v. Ingledon*, 1 P. Wms. 752.

⁹ *Humphreys v. Humphreys*, 3 P. Wms. 349.

¹⁰ *Fell v. Lutwidge*, Barn. 320; *Humphreys v. Humphreys*, 3 P. Wms. 351; *Horner v. Horner*, 23 L. J. Ch. 10, V. C. K.; see *Call v. Ewing*, 1 Blackf. 301; *Langdon v. Potter*, 11 Mass. 313; *Savage v. Merriam*, 1 Blackf. 176; *Caller v. Dade*, Minor, 20; *Axers v. Musselman*, 2 Browne, 115.

¹ 2 Sim. 241; *Story Eq. Pl. § 727*; see *Belloat v. Morse*, 2 Hayw. 157, and see *Tene-*

pest v. Lord Camoys, 1 W. N. 16; 14 W. R. 326, M. R.

² *Blewitt v. Blewitt*, *Youngs*, 541; *Cleland v. Cleland*, *Free. Ch.* 64; see *Story Eq. Pl. § 91*.

³ *Creasor v. Robinson*, 14 Beav. 589; 15 Jur. 1049, and the cases there referred to. [See, in accord, *Cary v. Hills*, L. R. 15 Eq. 79, but, *contra*, *Rayner v. Koehler*, L. R. 14 Eq. 262, and *Coote v. Whittington*, L. R. 16 Eq. 534.]

⁴ *Jones v. Howells*, 2 Hare, 342, 353; *Christian v. Devereux*, 12 Sim. 264, 273;

Where it appears that, in order to complete the plaintiff's title to the subject of the suit or to the relief he seeks, some preliminary act is necessary to be done, the performance of such preliminary act ought to be averred upon the bill, and the mere allegation that the title is complete, without such averment will not be sufficient; thus, where a plaintiff claimed as a shareholder by purchase, of certain shares in a Joint-Stock Company or Association, alleging in his bill that he had purchased such shares for a valuable consideration, and had ever since held the same, but it appeared * in another part of the bill, that, by the rules of the company or association, no transfer of shares could be valid in Law or Equity unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations: Lord Brougham allowed a demurrer, on the ground that the performance of the rule above pointed out was a condition precedent, and ought to have been averred upon the bill, and that the allegation of the plaintiff having purchased the shares and being a shareholder, although admitted by the demurrer, was not sufficient to cure the defect.¹

When a plaintiff claims as heir-at-law, it was formerly considered that he must state in his bill how his title arose;² but it is now settled, that an allegation that he is heir is sufficient.³

Where there is a privity existing between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain his suit, it is not necessary to state the plaintiff's title fully in the bill; thus, where a plaintiff's claim against the defendant arises under a deed or other instrument, executed by the defendant himself, or by those under whom he claims, which recites, or is necessarily founded upon, the existence, in the plaintiff, of the right which he asserts, it is sufficient to allege the execution of the deed by the parties. In like manner, in the case of a bill, by a mortgagor in fee, against a mortgagee, to redeem the mortgage, it is sufficient merely to state the mortgage deed, without alleging that the mortgagor was seised in fee; or if the mortgagor has only a derivative title, it is not necessary to show the commencement of such derivative title, or its continuance: because the right of the plaintiff to redeem, as against the defendant, does not depend upon the title under which he claims, but upon the proviso for redemption in the mortgage deed. Upon the same principle, where a defendant holds under a lease from the plaintiff, the plaintiff need not set out his title to the reversion: the fact of the defendant

Howard v. Prince, 10 Beav. 312, 314; and see *Killock v. Gregg*, cited 2 Hare, 346, 354; *Harper v. Ravenhill*, Tambl. 145; *Roberts v. Madocks*, 16 Sim. 55; *Smith v. Creagh*, Batty, 384; *Nail v. Punter*, 5 Sim. 563.

¹ *Walburn v. Ingilby*, 1 M. & K. 61, 77; see also *Morris v. Kelly*, 1 J. & W. 481; *Colburn v. Duncombe*, 9 Sim. 151, 154; 2 Jur. 654; *Richardson v. Gilbert*, 1 Sim. N.

S. 336; 15 Jur. 389; *Story Eq. Pl. §§ 257, 257 a, 258*, and *Cassell v. Stiff*, 2 K. & J. 279, as to the title to be shown to copy-right.

² *Lord Digby v. Meech*, Bunb. 195; *Baker v. Harwood*, 7 Sim. 373.

³ *Barrs v. Feukes*, 10 Jur. N. S. 466; 12 W. R. 666, V. C. W.; and see *Delorne v. Hollingsworth*, 1 Cox, 421, 422; *Ford v. Peering*, 1 Ves. J. 72.

having accepted a lease from the plaintiff being sufficient to preclude his disputing the title under which he holds.⁴ In like manner, where a man employs another as his bailiff or agent, to receive his rents or tithes, the right to call upon the bailiff or agent for an account does not depend upon the title of the employer to the rents or tithes, but to the privity existing between *him and his bailiff or agent: the *321 employer may, therefore, maintain a bill for an account, without showing any title to the rents or tithes in question.

Where, however, the plaintiff's right does not depend upon any particular privity between him and the defendant, existing independently of his general title to the thing claimed, there it will be necessary to show his title in the bill.¹ Thus, where a bill is filed by the lessee of a lay impropiator against an occupier, for an account of tithes, there the right of the plaintiff to the account depends solely upon his title: he must, therefore, deduce his title regularly, and show not only the existence of the lease, but that the person from whom it is derived had the fee.²

In like manner, where a plaintiff in a bill for specific performance intends to rely on a waiver of title by the defendant, it is not sufficient to allege upon his pleadings the facts constituting the waiver: he must show how he means to use the facts, by alleging that the title has been waived thereby.³

The same precision which is required in stating the case of a plaintiff, is not necessary in showing the interests of the defendant against whom the relief is sought; ⁴ because a plaintiff cannot always be supposed to be cognizant of the nature of a defendant's interest, and the bill must frequently proceed with a view to obtain a discovery of it; thus, where a bill was filed by a lessee for years, for a partition, and the plaintiff, after stating his own right to one undivided tenth part, with precision, alleged that the defendant was seised in fee-simple of, or otherwise well entitled to, seven other tenth parts, a demurrer, on the ground that the plaintiff had not set out the defendant's title with sufficient certainty, was overruled.⁵ And even where it is evident, from the nature of the case, that a plaintiff must be cognizant of the defendant's title, and sets out the same informally, yet, if he alleges enough to show that the defendant has an interest, it will be sufficient. Thus, where a bill was filed to redeem a mortgage, but the conveyance was so stated that it did not show that any legal estate had passed to the defendant, a demurrer was overruled: because the defendant could not be permitted to dispute his own title, which was admitted by the plaintiff to be good.⁶

⁴ If the plaintiff claims as heir, or under a derivative title from the mortgagor, or lessor, he must, as in other cases, show how he makes out his title.

¹ See *Humphrey v. Tate*, 4 Ired. Eq. 220; *Smith v. Turner*, 4 Ired. Eq. 433; *Peck v. Mallows*, 10 N. Y. 509.

² *Penny v. Hoper*, Bunb. 115; *Burwell v. Coates*, *ib.* 129.

³ *Clive v. Beaumont*, 1 De G. & S. 397; 13 Jur. 226.

⁴ *Story Eq. Pl.* § 255; *Morgan v. Smith*, 11 Ill. 194.

⁵ *Baring v. Nash*, 1 V. & B. 551, 552.

⁶ *Roberts v. Clayton*, 3 Anst. 715.

In all cases, however, a bill must show that a defendant is in some way liable to the plaintiff's demand,⁷ or that he has some interest in the subject of the suit:⁸ otherwise it will be liable to *demur. Thus, where a bill was brought by the obligee in a bond, against the heir of the obligor, alleging that the heir, having assets by descent, ought to satisfy the bond, a demurrer was allowed, because the plaintiff had not expressly alleged in the bill that the heir was bound in the bond; although it was alleged that the heir ought to pay the debt;¹ so, where a bill was brought against an assignee, touching a breach of covenant in a lease, and the covenant, as stated in the bill, appeared to be collateral, and not running with the land, and did not, therefore, bind assignees, and was not stated by the bill expressly to bind assignees, a demurrer by the assignee was allowed.² Upon the same principle, where, in a bill against A. and B., the plaintiff stated a circumstance which was material in order to charge B., not as a fact, but as an allegation made by A., a demurrer by B. was allowed.³

And here it may be observed that, although it is generally necessary to show that the plaintiff has some claim against a defendant, or that a defendant has some interest in the subject-matter in litigation, yet there are cases in which a bill may be sustained against defendants who have no interest in the subject, and who are not in any manner liable to the demands of the plaintiff. The cases alluded to are those, which have been before referred to, of the members or officers of a corporation aggregate, who, as we have seen, may be made parties to a suit against the corporation for the purposes of discovery. With respect to the other persons who are generally included amongst the exceptions to the rule, that persons who have no interest, or against whom no decree can be pronounced, cannot be made parties to a suit, namely, arbitrators, attorneys, or agents, it will be seen, upon reference to what has been before stated upon this subject,⁴ that the right to make them parties is confined to cases where relief is, in fact, prayed against them, *viz.*, where they are implicated in fraud or collusion, and it is specifically asked that they may pay the costs; or where they are the holders of a particular instrument, which the plaintiff is entitled to have delivered up.⁵

A bill must not only show that the defendant is liable to the plaintiff's demands, or has some interest in the subject-matter, but it must also show that there is such a privity between him and the plaintiff as gives the plaintiff a right to sue him:⁶ for it is frequently the case

⁷ Ld. Red. 163.

⁸ Ld. Red. 160: *Plumbe v. Plumbe*, 4 Y. & C. Ex. 345, 350; Story Eq. Pl. § 262 *et seq.*; *Humphreys v. Tate*, 4 Ired. Eq. 220.

¹ *Crosseing v. Honor*, 1 Vern. 180.

² *Lord Uxbridge v. Staveland*, 1 Ves. S. 56; Story Eq. Pl. §§ 255, 256, 257.

³ *White v. Smale*, 22 Beav. 72; *Clark v. Lord Rivers*, L. R. 5 Eq. 91, 95-97; *Ponsford*

v. Hankey, 3 De G., F. & J. 544; 7 Jur. N. S. 929.

⁴ *Ante*, pp. 297-299.

⁵ *Ante*, p. 298.

⁶ Ld. Red. 158; Story Eq. Pl. §§ 178, 227, 514; *Long v. Majestre*, 1 John. Ch. 305; *Elmslie v. M'Aulay*, 3 Bro. C. C. (Perkins's ed.) 624, note (1), 627, note (a), and cases cited; *Eden Injunct.* (2d Am. ed.), 354, and cases in note (a).

that a plaintiff has an interest in the subject-matter * of the suit *323 which may be in the hands of a defendant, and yet, for want of a proper privity between them, the plaintiff may not be the person entitled to call upon the defendant to answer his demand. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied in a due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy :¹ for there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator. Upon the same principle, where a bill was filed by the creditors of a person who was one of the residuary legatees of a testator, against the personal representative, for an account of his personal estate, it was held to be impossible to maintain such a bill.² And so, where a creditor of a testator, who had previously been a bankrupt, and had obtained his certificate, brought a bill against the executor for an account, and made the assignees under the testator's bankruptcy parties, for the purpose of compelling them to account to the executor for the surplus of the bankrupt's estate, a demurrer by the assignees was allowed.³

It is to be observed, however, that, in cases of collusion between the debtor and the executor, or of the insolvency of the executor, bills by creditors or residuary legatees against debtors to a testator's estate will be entertained;⁴ and in the case of *Barker v. Birch*,⁵ which was a bill by universal legatees under a will, for an account against a debtor to the testator's estate, Sir J. L. Knight Bruce V. C., under the circumstances, made a decree for an account, although collusion was not established between the debtor and the personal representative, and there was not any * evidence of insolvency on the part of the *324 personal representative, or of his refusal to sue for the debt, other than his omission to institute proceedings for a considerable period.¹

¹ *Bickly v. Dorrington*, cited *Ld. Red.* 158, n. (h); *Barn.* 32; 6 *Ves.* 749; *Monk v. Pomfret*, cited *Ld. Red.* 158, n. (h).

² *Elmslie v. M'Aulay*, 3 *Bro. C. C.* 624, 626.

³ *Utterson v. Mair*, 4 *Bro. C. C.* 270, 276; 2 *Ves. J.* 95, 97; 6 *Ves.* 749; *Bickly v. Dorrington*, cited *Ld. Red.* 158, n. (h); *Barn.* 32; 6 *Ves.* 749.

⁴ *Utterson v. Mair*, 4 *Bro. C. C.* 270, 276; see also *Joran v. Simpson*, 4 *Ves.* 651, 665; *Alsager v. Rowley*, 6 *Ves.* 748; *Troughton v. Binkes*, *ib.* 573, 575; *Benfield v. Solomons*, 9 *Ves.* 86; *Burrowes v. Gore*, 6 *H. L. Ca.* 907; 4 *Jur. N. S.* 1245; *Jerdein v. Bright*, 2 *J. & H.* 325, where the bill was filed against the trustee of a creditor's deed, and a purchaser from him; *Bouck v. Bouck*, *L. R.* 2 *Eq.* 19; *Ld. Red.* 158, 159; *Elmslie v. M'Aulay*, 3 *Bro. C. C.* (Perkins's ed.) 627, note (a.); [*Mason v. Spurlock*, 4 *Baxt.* 554.] A special case must be made out to authorize a bill by a creditor against

an administrator of the deceased debtor, and a third person having assets of the deceased, to subject those assets to the payment of his debt; it is not, however, necessary to charge collusion between the defendants; it is enough that the third person holds all the property of the deceased under a secret trust in fraud of creditors; insists on retaining the property to his own use, and that the administrator has not proceeded against him for the space of about two years, and resists the bill by relying on the statute of limitations. *Hagan v. Walker*, 14 *How. U. S.* 29, 34, 35; *Long v. Majestre*, 1 *John. Ch.* 306; see *Harrison v. Righter*, 3 *Stockt. (N. J.)* 389; *Goble v. Andross*, 1 *Green Ch.* 66. A single creditor of an insolvent estate cannot sustain a bill against a debtor of such estate without joining other parties. *Isaacs v. Clark*, 13 *Vt.* 657.

⁵ 1 *De G. & S.* 376; 11 *Jur.* 881.

¹ See *Bolton v. Powell*, 14 *Beav.* 275; 2 *De G., M. & G.* 1; 16 *Jur.* 24; *Saunders v. Druce*, 3 *Drew.* 140.

It seems also, that when persons other than the personal representative of the testator have possessed specific assets of the testator, such persons may be made parties to a suit by a creditor.² So also, where it is desirable to have the account of the personal estate entire, a creditor may make the surviving partner of a deceased debtor a defendant to his bill, though no fraud or collusion is alleged;³ and it seems that a joint creditor may maintain a suit against the representatives of a deceased partner, for satisfaction of his entire demand out of the assets, although the surviving partner is not alleged to be insolvent, and is made a party to the bill.⁴ In *Bowsher v. Watkins*,⁵ it was determined, that residuary legatees may sustain a bill for an account against the executor and surviving partners of the testator, though collusion between the executor and the surviving partners is neither charged nor proved,⁶ but it must be shown that the executors have neglected their duty of themselves suing.⁷

It seems, that where it is necessary to allege fraud or collusion, a general allegation of it in the bill will not be sufficient to shut out a demurrer; but that the facts upon which such allegation is founded must be stated, as there is great inconvenience in joining issue upon such a general charge, without giving the defendant a hint of any fact from which it is to be inferred.⁸

² *Newland v. Champion*, 1 Ves. S. 105; see also the report of this case, 2 Coll. 46; and see *Consett v. Bell*, 1 Y. & C. C. C. 569; 6 Jur. 869. [A creditor who had taken possession of the books of account and vouchers of a testator, and proceeded to collect the debts, would seem to be a proper party to an administration suit. *Earl Vane v. Rigdon*, 18 W. R. 308; but see *S. C.* on appeal, 18 W. R. 1092.]

³ *Ibid.*; see also *Gedge v. Traill*, 1 R. & M. 281, n.; *Long v. Majestre*, 1 John. Ch. 306; *Harrison v. Righter*, 3 Stockt. (N. J.) 389.

⁴ *Wilkinson v. Henderson*, 1 M. & K. 582, 588; *Hills v. M'Rae*, 9 Hare, 297; 15 Jur. 766; *Story Eq. Pl. §§ 167, 178*.

⁵ 1 R. & M. 277, 283; see also *Law v. Law*, 2 Coll. 41; 9 Jur. 745, on appeal, 11 Jur. 463; *Travis v. Milne*, 9 Hare, 141; *Stainton v. Carron Company*, 18 Beav. 146; and see *Davies v. Davies*, 2 Keen, 534, and the observations of Lord Langdale, p. 539, on *Bowsher v. Watkins*.

⁶ See *Collyer Partn.* § 366.

⁷ *Stainton v. Carron Company*, and *Travis v. Milne*, *ubi sup.* Where an executrix neglected to defend a suit, leave was given to the plaintiff, in a suit for the administration of the estate, to do so in her name. *Olding v. Poulter*, 23 Beav. 143.

⁸ *Benfield v. Solomons*, 9 Ves. 86; *Munday v. Knight*, 3 Hare, 497, and cases cited in note, p. 501; 8 Jur. 904; *Bothamley v. Squire*, 1 Jur. N. S. 694, V. C. K.; *Moss v. Bainbridge*, 3 Jur. N. S. 58, V. C. W.; *Gilbert v. Lewis*, 1 De G., J. & S. 38, 49, 50; 9 Jur. N. S. 187; *Ringgold v. Stone*, 20 Ark.

526; *Bryan v. Spruill*, 4 Jones Eq. (N. C.) 27; *Farnam v. Brooks*, 9 Pick. 212; *Bull v. Bull*, 2 Root, 476; *Elston v. Blanchard*, 2 Scam. 420; *Moore v. Greene*, 19 How. U. S. 69; *Small v. Boudinot*, *Boudinot v. Small*, 1 Stockt. (N. J.) 381; *De Louis v. Meek*, 2 Greene (Iowa), 55; *Weatherspoon v. Carmichael*, 6 Ired. Eq. 143; *Frazer v. Hoyt*, 2 Strobb. Eq. 250; *Harding v. Handy*, 11 Wheat. 103. If fraud is relied upon, it must be substantially charged in the bill. *Crocker v. Higgins*, 7 Conn. 342; *Hogan v. Burnett*, 37 Miss. 617; *Howell v. Sebring*, 1 McCarter (N. J.), 84, 90; *Parsons v. Heston*, 3 Stockt. (N. J.) 150; *Grove v. Rentch*, 26 Md. 367, 377. In *Other v. Smurthwaite*, L. R. 5 Eq. 437, 441, Sir W. Page Wood V. C. (Lord Hatherley) said: "On behalf of the plaintiff it is said that he is not bound to let the defendants know beforehand, or give them any chance of knowing beforehand, what he contemplates proving. But if there be any one thing more contrary to the course of our proceedings in Equity than another, it is the taking an opponent by surprise. If I were to find the defendant taken by surprise, I should certainly direct the case to stand over, in order that he might have an opportunity of meeting the case made against him. Although it is fraud that is charged, fraud must be distinctly charged and properly proved. So far from its being the principle that a defendant is to be allowed to be taken by surprise, and, without any preparation, is to be called upon to meet something which a witness may assert, nothing is more settled than the doctrine that when you charge fraud you must state the facts upon which you allege

*With reference to the subject of privity between the plain- *325
tiff and defendant, it is to be observed, that the employment of
agents or brokers in a transaction does not interfere with the privity be-
tween the principals, so as to deprive them of their right to sue each other
immediately. Thus, where a principal transmits goods to a factor, he
may sue the person who buys of the factor; and where a bill was brought
by some merchants against the defendant, to discover what quantity of
straw hats he had purchased of their agents, and for payment to them,
and not to the agents, a demurrer was overruled:¹ and so, where a
merchant, acting upon a *del credere* commission, became bankrupt,
having sold goods of his principals for which he had not paid them,
and, shortly before his bankruptcy, drew bills on the vendees, which he
delivered to some of his own creditors to discharge their demands, they
knowing his insolvency, a suit by the principals against the persons who
had received the bills, for an account and payment of the produce, was
sustained.²

A bill must not only show that the plaintiff is entitled to or interested
in the subject-matter of the litigation, and is clothed with such a char-
acter as entitles him to maintain the suit, and that the defendant is also
liable to the relief sought against him, or is in some manner interested
in the dispute, and that there is such a privity between him and the
plaintiff as gives the plaintiff a title to sue him, but it must also pray
the Court to grant the proper relief suited to the case, as made
by the bill;³ and if, for * any reason founded on the substance *326
of the case as stated in the bill, the plaintiff is not entitled to the
relief he prays, either in the whole or in part, the defendant may demur.
In some of the most ancient bills, as appears by the records, the
plaintiff does not expressly ask any relief, nor any process, but prays
the Chancellor to send for the defendant and to examine him; in

fraud, and prove them strictly." See *McLane v. Manning*, 1 Wins. (N. C.) No. 2 (Eq.) 60; [*Webster v. Power*, L. R. 2 P. C. App. 69, 81; *Sharpe v. San Paolo R. Co.*, 8 Ch. App. 598; *Fort v. Orndorf*, 7 Heisk. 167; *Winham v. Crutcher*, 2 Tenn. Ch. 536; *Castle v. Bader*, 23 Cal. 75.]

¹ *Lissett v. Reave*, 2 Atk. 394.

² *Neuman v. Godfrey*, cited Ld. Red. 160; 2 Bro. C. C. 332; *Leverick v. Meigs*, 1 Cowen 645, 663, 664, 665; *ante*, 195, notes. Ordinarily, the principal cannot avail himself, by suit in his own name, of a written contract, made between his agent and a third person, in the name of the agent; for it is treated as a contract merely between the parties named in it, although the agent is known to be acting in that character. *United States v. Parmele*, 1 Paine C. C. 252; *Clark v. Wilson*, 3 Wash. C. C. 560; *Newcomb v. Clark*, 1 Denio, 226; *Finney v. Bedford Com. Ins. Co.*, 8 Met. 348; *Harp v. Osgood*, 2 Hill, 216. There are, however, exceptions to this rule, as well established as the rule itself. As in case of a written contract by a factor in his own name for the purchase or sale of goods

for his principal. So in case of a policy of insurance procured by an agent in his own name for the benefit of his principal, the agent, as well as the principal, may sue thereon. *Brewster v. Lunt*, 8 Louis. 296.

³ Story Eq. Pl. §§ 40, 41, 42. The prayer of a bill in Chancery is an essential part, and without its insertion no decree can be rendered for a plaintiff. *Driver v. Tatner*, 5 Porter, 10; see *Smith v. Smith*, 4 Rand. 95; see also *post*, "The Prayer for Relief," in this chapter. If the plaintiff prays for relief in a certain capacity, this will be a test of the ground on which he seeks the aid of the Court. *Sayles v. Tibbitts*, 5 R. I. 79. If the allegations of a bill refer to the condition of things at the time the bill is filed, the relief afforded must be limited to that state of facts. *Win-nipiseogee Lake Company v. Young*, 40 N. H. 420. [Under a bill alleging that all of the defendants had an interest in the land subject to the plaintiff's claim, and praying relief against all, the bill may be dismissed as to part of the defendants, and relief given against the residue. *Brooks v. Carpenter*, 51 Cal.]

others, where relief is prayed, the prayer of process is various: sometimes a *habeas corpus cum causâ*, sometimes a *subpœna*, and sometimes other writs.¹ Afterwards, the bill appears to have assumed a more regular form, and not only to have prayed the *subpœna* of the Court, but also suitable relief adapted to the case contained in the statement:² which is the general form of all bills in modern use; except, that, since the late Act, the prayer for *subpœna* is omitted. But although it was the general practice, previously to the late Act, in all cases where relief was sought, to specify particularly the nature of such relief, yet, it seems that such special prayer was not absolutely necessary, and that praying general relief was sufficient;³ and, in *Partridge v. Hayercraft*,⁴ Lord Eldon said, that he had seen a bill with a simple prayer that the defendant might answer all the matters aforesaid, and then the general prayer for relief.

By the Act to amend the practice of the Court of Chancery it is now provided, that the plaintiff shall pray specifically for the relief which he may conceive himself entitled to, and also for general relief.⁵

The requisites above set out are necessary in every bill which is filed in a Court of Equity for the purpose of obtaining relief. There are other requisites appertaining to bills adapted to particular purposes, which will be hereafter pointed out, as well as those distinctive properties which belong to bills not filed for the purposes of relief. But besides those points which are generally necessary to be attended to in the frame of all bills, as each case must depend upon its own particular circumstances, matters must be introduced into every bill which will occasion it to differ from others, but which it is impossible to reduce under any general rules, and must be left to the discretion of the draftsman. Care, however, must be taken in framing the bill that every thing which is intended to be proved be stated upon the face of it: otherwise, evidence cannot be admitted to prove it.⁶ This is required,

*327 in *order that the defendant may be aware of what the nature

¹ Jud. Auth. M. R. 91, 92; see 1 Spence Eq. Jur. 368 *et seq.*

² Jud. Auth. M. R. 91, 92; see 1 Spence Eq. Jur. 368 *et seq.*

³ Cook v. Martyn, 2 Atk. 3; Grimes v. French, *ib.* 141.

⁴ 11 Ves. 574.

⁵ 15 & 16 Vic. c. 86, § 10.

⁶ Gordon v. Gordon, 3 Swanst. 472; Miller v. Colton, 5 Geo. 341; Parker v. Beavans, 19 Texas, 406; Bailey v. Ryder, 10 N. Y. 363; Rowan v. Bowles, 21 Ill. 17; Laud v. Cowan, 19 Ala. 247; Chadlin v. Kimball, 23 Ill. 36; The Camden and Amboy R.R. Co. v. Stewart, 4 C. E. Green (N. J.), 343; Hewett v. Adams, 50 Maine, 271, 276; Lovell v. Farrington, 50 Maine, 239; Ashton v. Atlantic Bank, 3 Allen, 217; Howell v. Sebring, 1 McCarter (N. J.), 84; Badger v. Badger, 2 Wallace U. S. 87. No facts are properly in issue, unless charged in the bill; and of course no proofs can generally be offered of

facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the Court pronounces its decision *secundum allegata et probata*. Story Eq. Pl. § 257; Crocket v. Lee, 7 Wheat. 522; Jackson v. Ashton, 11 Peters, 229; James v. McKernon, 6 John. 564; Barraque v. Manual, 2 Eng. 516; [Tripp v. Vincent, 2 Barb. Ch. 614; Browning v. Pratt, 2 Dev. Eq. 49; Sheratz v. Nicodemus, 7 Verg. 13; Austin v. Ramsey, 3 Tenn. Ch. 118.] A trustee is not to be held for any neglect or breach of duty, which is not charged in the bill. Page v. Oleott, 28 Vt. 465. But the plaintiff need not, and indeed should not, state in the bill any matters, of which the Court is bound judicially to take notice, or is supposed to possess full knowledge. Many of these matters are enumerated by Mr. Justice Story, in Story Eq. Pl. § 24. So also by Mr. Greenleaf, in his work on Evidence, vol. 1, §§ 4, 5,

of the case to be made against him is. The necessity of observing this rule was strongly insisted on by the L. C. B. Richards, in the case of *Hall v. Maltby*.¹ And in *Montesquieu v. Sandys*,² the principle upon which it is founded is strongly illustrated; in that case, a bill was filed to set aside a contract entered into by an attorney for the purchase of a reversionary interest from his client, on the ground of fraud and misrepresentation; the evidence adduced in support of the allegation of fraud, did not, in Lord Eldon's opinion, substantiate the case as laid in the bill: a transaction, however, was disclosed in the evidence which his Lordship appeared to think would have raised a question of considerable importance in favor of the plaintiff, if it had been properly represented upon the pleadings; but as it had not been stated in the bill, he thought it would be far too much to give relief upon circumstances which were not made a ground of complaint upon the record.

It is to be observed in this place, that not only will it be impossible to introduce evidence as to facts which are not put in issue by the bill, but that even an inquiry will not be directed, unless ground for such inquiry is laid in the pleadings.³ Thus, where a bill was filed for a foreclosure, and a motion was made for a reference to the Master, under the 7th Geo. II. c. 20, to inquire into the amount due upon the mortgage, and it was insisted that the Master ought to be directed to take an account of the costs *incurred by the plaintiff in certain *328 proceedings in an ejectment at Law which were not alluded to in the bill, the Court held that no such inquiry could be directed, but gave the plaintiff leave to amend his bill in that respect.¹

It is, moreover, an established doctrine of the Court, that where the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not, in general, entitled to a decree by establishing some one or more of the facts, quite independent of fraud, but which might of themselves create a case under a distinct head of Equity from that which would be applicable to the case of fraud, originally stated.²

6. In a bill to restrain an infringement of a patent, an express averment of the novelty of the invention protected by the patent is not necessary. *Amory v. Brown*, L. R. 8 Eq. 663. The allegation of the grant and production of the letters-patent throw upon the defendant the *onus* of disputing the novelty. It is no longer necessary to charge the evidence relied on, except for the purpose of procuring admissions, per Sir W. P. Wood V. C., *Mansell v. Feeney*, 2 J. & H. 313, 318. [Where, however, the question turns upon a particular fact not specifically alleged in the bill, and which the defendant has not had the opportunity of denying, it seems that the Court will direct an inquiry as to such fact. *Western v. Empire Assurance Association*, L. R. 6 Eq. 23.] A bill should not set out the evidence, whether oral or written, by which the facts are to be proved. *The Camden and Amboy R.R. Co. v. Stewart*, 4 C. E.

Green (N. J.), 343; *Winebrenner v. Colder*, 43 Penn. St. 244.

¹ 6 Pri. 240, 259.

² 18 Ves. 302, 314; see also *Powys v. Mansfield*, 6 Sim. 565.

³ *Holloway v. Millard*, 1 Mad. 414, 421; *Searf v. Soulbly*, 1 M.N. & G. 364, 375; see, however, *Baker v. Bradley*, 7 De G., M. & G. 597; 2 Sm. & G. 531; and see, for cases where inquiries have been directed on suggestions in answer, *McMahon v. Barchell*, 2 Phil. 127, 132; *Barnett v. Stockton and Darlington Railway Company*, 1 H. L. Ca. 34; 11 Cl. & F. 590.

¹ *Millard v. Magor*, 3 Mad. 433.

² *Price v. Berrington*, 3 M.N. & G. 486; 15 Jur. 999; *Macquise v. O'Reilly*, 3 Jo. & Lat. 224; *Ferraby v. Hobson*, 2 Phil. 255, 258; *Glascott v. Lang*, *ib.* 310, 322; *Wilde v. Gibson*, 1 H. L. Ca. 605; *Sugd. Law Prop.* 632; *Baker v. Bradley*, *ubi sup.*; *Burdett v.*

It is right here to observe that, independently of the qualities which have been above pointed out as necessary to bills in general, it is requisite that the object for which a bill is brought should not be beneath the dignity of the Court: for the Court of Chancery will not entertain a suit where the subject-matter of the litigation is under the value *329 of 10*l.*; ³ except in cases of charities, ⁴ * or of fraud, ¹ or of bills to establish a general right, as in the case of tithes, ² or other special circumstances. ³ It is said, that the Court will not entertain a bill for land under the yearly value of 40*s.*; ⁴ but instances occur in the books where bills have been entertained for the recovery of ancient quit-rents, though very small, *viz.*, 2*s.* or 3*s.* per annum. ⁵ It seems, that

Hay, 11 L. T. N. S. 259, L. C.; [Hickson v. Lombard, L. R. 1 H. L. 324; Eyre v. Potter, 15 How. 42; Hoyt v. Hoyt, 12 C. E. Green, 399; Stucky v. Stucky, 3 Stew. Eq. 546;] Tillinghast v. Champlin, 4 R. I. 173; Mount Vernon Bank v. Stone, 2 R. I. 129; Master-son v. Finnegan, *ib.* 316. The rule applies only where actual or moral, as distinguished from constructive fraud, is charged; but it is sufficient that such actual or moral fraud is substantially charged, whether the word fraudulent be used or not. Tillinghast v. Champlin, *ibi supra*; see Grove v. Rentch, 26 Md. 367, 377. [And see for exceptions where other matters are alleged to give the Court jurisdiction, *infra*, 382, n. 2.] The facts and circumstances of the alleged fraud should be set forth. Castle v. Bader, 23 Cal. 75.

³ The true ground of this rule is, that the entertainment of suits of small value has a tendency, not only to promote expensive and mischievous litigation, but also to consume the time of the Court in unimportant and frivolous controversies, to the manifest injury of other suitors, and to the subversion of the public policy of the land. Moore v. Lyttle, 4 John. Ch. 183; Swedesborough Church v. Shivers, 1 C. E. Green (N. J.), 453, 458. This rule seems to have been of great antiquity in the Court of Chancery. See Story Eq. Pl. § 501, and cases cited. A similar rule, it is apprehended, prevails in the Courts of Equity in America, so far as they have been called upon to express any opinion on the subject. Story Eq. Pl. § 502; see Williams v. Berry, 3 Stew. & P. 284. It was formerly held in New York that the Court of Chancery would not take cognizance of a case where the amount in controversy was below 10*l.* sterling. Moore v. Lyttle, 4 John. Ch. 185; Fullerton v. Jackson, 5 John. Ch. 276. The amount was afterwards increased in that State by statute to the sum of one hundred dollars; 2 Rev. Stats. New York, 173, § 37; see Vredenburg v. Johnson, 1 Hopk. 112; Mitchell v. Tighe, 1 Hopk. 119; Smets v. Williams, 4 Paige, 364. No such statute exists in Massachusetts, but a similar principle is applied. Cummings v. Barrett, 10 Cush. 190. The value of the matter in dispute should appear by the record. Watson v. Wells, 5 Conn. 468. But a bill for the

specific performance of a contract to convey land need not contain an averment that the value of the land exceeds \$100. Church v. Ide, 1 Clarke, 494. The jurisdiction of the Court does not, however, depend upon the amount that may ultimately be found due to the plaintiff, but upon the claim stated by him. Bradt v. Kirkpatrick, 7 Paige, 62; Whitecotton v. Simpson, 4 J. J. Marsh. 12; Judd v. Bushnell, 7 Conn. 205; Skinner v. Bailey, 7 Conn. 496; Wheat v. Griffin, 4 Day, 419; Douw v. Sheldon, 2 Paige, 323; Bailey v. Burton, 8 Wend. 395. These provisions seem to apply, however, only to cases of bills for relief, and not to cases of bills for discovery merely. Goldey v. Beeker, 1 Edw. Ch. 271; Schröppel v. Redfield, 5 Paige, 245.

At the present time, in New York, there is no limitation to the amount in controversy required to give jurisdiction in actions of an equitable nature, the same having been abolished by construction of the Constitution of 1846, and the code of procedure. Sarsfield v. Van Vaughan, 15 Ab. Pr. 65.

⁴ Parrot v. Paulet, Cary, 103; Anon., 1 Eq. Ca. Ab. 75, margin.

¹ Bunb. 17, n.

² Griffith v. Lewis, 2 Bro. P. C. ed. Toml. 407. If a suit have no other object than the mere recovery of a sum of \$1.75, the bill will be dismissed; but if it seeks to establish a right of a permanent and valuable nature, it falls within the recognized exceptions to the general principle, and the Court will maintain jurisdiction. Swedesborough Church v. Shivers, 1 C. E. Green (N. J.), 453, 458; Story Eq. Pl. §§ 500, 501.

³ Ord. IX. 1. In Seaton v. Grant, L. R. 2 Ch. Ap. 459, 463, Lord Justice Turner said: "Another objection that has been taken is the insignificance of the plaintiff's interest in the subject-matter of the suit. He is, however, suing on behalf of himself and the other shareholders of the company, and I am not prepared to say that the ordinary rule as to suits for a subject-matter of less value than 10*l.*, applies to a case of this kind."

⁴ 1 Eq. Ca. Ab. 75, margin; Almy v. Pycroft, Cary, 103.

⁵ Cocks v. Foley, 1 Vern. 359.

if a bill is brought for a demand which, by the rule of the Court, cannot be sued for, the defendant may either demur to it. on the ground that the plaintiff's demand, if true, is not sufficient for the Court to ground a decree upon,⁶ or he may (which is the most usual course) move to have the bill dismissed, as below the dignity of the Court.⁷ But even if the defendant should take neither of these courses, yet, when the cause comes to a hearing, if it appears that, on account taken, the balance due to the plaintiff will not amount to the sum of 10*l.*, the Court will dismiss the bill.⁸ Thus, where, upon a bill being brought relating to tithes, it was clearly admitted that the plaintiff had a right to some tithes of the defendant, but the tithes which were due appeared to be only of the value of 5*l.*, Lord Harcourt dismissed the bill at the hearing;⁹ and in *Brace v. Taylor*,¹⁰ a similar objection was taken, at the hearing, and allowed.¹¹ But in *Beckett v. Bilbrough*,¹² the suit was held to be sustainable, although the sum recovered was only 9*l.*, on the ground that the plaintiff, when he filed his bill, must have been justified in supposing that a larger sum would be recovered; and the defendant, who knew the amount, had not given any information respecting it.¹³

*A bill must not only be for a subject which it is consistent with the dignity of the Court to entertain, but it must also be brought for the whole subject. The Court will not permit a bill to be brought for part of a matter only,¹ so as to expose a defendant to be harassed by repeated litigations concerning the same thing; it, therefore, as a general rule, requires that every bill shall be so framed as to afford ground for such a decision upon the whole matter, at one and the same time, as may, as far as possible, prevent future litigation concerning it. It is upon this principle that the Court acts, in requiring in every case, with such exceptions as we have noticed above, the presence, either as plaintiffs or defendants, of all parties interested in the object of the suit. And upon the same principle, it will not allow a plaintiff who has two distinct claims upon the same defendant, or to which the same defendant may eventually prove liable, to bring separate bills for each particular claim, or to bring a bill for one and omit the other, so as to leave the other to be the subject of future litigation.² Thus, in *Pure-*

⁶ *Fox v. Frost*, Rep. t. Finch, 253.

⁷ Mos. 47, 356; Bunb. 17; *Swedesborough Church v. Shivers*, 1 C. E. Green (N. J.), 453, 457.

⁸ Coop. Eq. Pl. 166; *Swedesborough Church v. Shivers*, 1 C. E. Green (N. J.), 453, 457; [*McNew v. Toby*, 6 Hum. 27.]

⁹ Cited 2 Atk. 253.

¹⁰ 2 Atk. 253.

¹¹ "If it appears on the face of the bill, that the matter in dispute, exclusive of costs, does not exceed the amount to which the jurisdiction of the Court is limited, the defendant may either demur, or move to have the bill dismissed with costs; or if it does not appear on the face of the bill, it may be pleaded in bar of the suit. *Smets v. Wil-*

liams, 4 Paige, 364; *McElwain v. Willis*, 3 Paige, 505; S. C. on appeal, 9 Wend. 548; *Schroepel v. Redfield*, 5 Paige, 245; *Bradt v. Kirkpatrick*, 7 Paige, 62. By "exclusive of costs," above, is meant the costs of the suit in Chancery. *Van Tyne v. Bunce*, 1 Edw. Ch. 583.

¹² 8 Hare, 188; 14 Jur. 238.

¹³ In *Smith v. Matthews*, M. R. 2 July, 1859, the usual decree was made to administer real and personal estate on a bill by a creditor, suing on behalf of all the creditors of the deceased debtor; though his individual debt, as alleged in the bill, was under 5*l.*

¹ Ld. Red. 183.

² Story Eq. Pl. § 287. So, at Law, a plaintiff cannot split an entire cause of action,

foy v. Purefoy,³ where an heir, by his bill, prayed an account against a trustee of two several estates, that were conveyed to him for several and distinct debts, and afterwards would have had his bill dismissed as to one of the estates: and have had the account taken as to the other only, the Court decided that an entire account should be taken of both estates: "for that it is allowed as a good cause of demurrer in this Court, that a bill is brought for part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes and make a multiplicity of suits." And so, where there are two mortgages, and more money has been lent upon one of them than the estate is worth, the heir of the mortgagor cannot elect to redeem one and leave the heavier mortgage unredeemed, but shall be compelled to take both.⁴ Upon the same principle it is held, that "where there is a debt secured by mortgage, and also a bond debt: when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too, *in case the heir be bound."¹ The ground of this rule is the prevention of circuity of remedy: for, as the bond of the ancestor, where the heir is bound, becomes, upon the death of such ancestor, the heir's own debt, and is payable out of the real estate descended, it is but reasonable that, where the heir comes to redeem the estate by payment of the principal money and interest, he should at the same time be called upon to pay off the bond: as otherwise, the obligee would be driven to sue him for the recovery of the bond, which in the result might be payable out of the same property that the heir has redeemed.

When it is laid down as a rule, that the Court will not entertain a suit for part of a matter, it must be understood as subject to this limitation, *viz.*, that the whole matter is capable of being immediately disposed of;² for if the situation of the property in dispute is such, that no immediate decision upon the whole matter can be come to, the Court will frequently lend its assistance to the extent which the actual state of the case, as it exists at the time of filing the bill, will warrant. Upon this principle

so as to maintain two suits upon it, without the defendant's consent. If he attempts so to do, a recovery in the first suit, though for less than the whole demand, is a bar to the second. *Ingraham v. Hall*, 11 Serg. & R. 78; *Crips v. Talvande*, 4 M'Cord, 20; *Smith v. Jones*, 15 John. 229; *Willard v. Sperry*, 16 John. 121; *Avery v. Fitch*, 4 Conn. 362; *Vance v. Lancaster*, 3 Hayw. 130; *Colvin v. Corwin*, 15 Wend. 557; *Strike's case*, 1 Bland, 95; *James v. Lawrence*, 7 Har. & J. 73; *Stevens v. Lockwood*, 13 Wend. 644; see also *Guernsey v. Carver*, 8 Wend. 492, and the remarks on it in *Badger v. Titcomb*, 15 Pick. 415. In this last case it was said that "as the law is, we think it cannot be maintained, that a running account for goods sold and delivered, money loaned, or money had and received, at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course

of dealing from which such an agreement or understanding may be inferred."

³ 1 Vern. 29.

⁴ *Ibid.*; *Margrave v. Le Hooke*, 2 Vern. 207.

¹ *Shuttleworth v. Laycock*, 1 Vern. 245; *Anon.*, 2 Ch. Ca. 164; and see *Jones v. Smith*, 2 Ves. J. 376; see also *Elvy v. Norwood*, 5 De G. & S. 240; 16 Jur. 493; *Sinclair v. Jackson*, 17 Beav. 405; *Fisher on Mortgage*, 381; 2 Story Eq. Jur. § 1023, note; *Jones v. Smith*, 2 Sumner's Ves. 372, n. (c), and cases cited; *Lee v. Stone*, 1 Gill & J. 1.

² The principle is well established, that a contract to do several things at several times, is divisible in its nature; and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a separate contract. *Badger v. Titcomb*, 15 Pick. 414.

Courts of Equity act, in permitting bills for the preservation of evidence *in perpetuum rei memoriam*: which it does upon the ground that, from the circumstances of the parties, the case cannot be immediately the subject of judicial investigation; and if it should appear upon the bill, that the matter to which the required testimony is alleged to relate can be immediately decided upon, and that the witnesses are resident in England, a demurrer would hold.³ It is upon the same principle that the Court proceeds, in that class of cases in which it acts as ancillary to the jurisdiction of other Courts, by permitting suits for the preservation of property pending litigation in such Courts; or by removing the impediments to a fair litigation before tribunals of ordinary jurisdiction. In all these cases, it is no ground of objection to a bill that it embraces only part of the matter, and that the residue is, or may be, the subject of litigation elsewhere. The preservation of the property, or the removal of the impediments, is all that the Court of Equity can effect; the bill, therefore, in seeking this description of relief, seeks the whole relief which, in such cases, a Court of Equity can give; but if a bill, praying only this description of relief, should disclose a case in * which a Court of Equity is capable of taking upon itself the *332 whole decision of the question: in such a case, it is apprehended, the bill would be defective in not seeking the relief which the plaintiff is entitled to.

With reference to this part of the subject may be noticed the much litigated question, to what extent a person engaged in trade in copartnership can have relief in Equity against his partners, without praying a dissolution of the partnership; upon this point the decisions were very conflicting.¹ In *Forman v. Homfray*,² Lord Eldon said he did not recollect an instance of a bill filed by one partner against another, praying the account merely, and not a dissolution: proceeding on the foundation that the partnership was to continue; and observed upon the inconvenience that would result if a partner could come here for an account merely, pending the partnership. as there seems to be nothing to prevent his coming annually; ³ and in *Loscombe v. Russell*, Sir Lancelot Shad-

³ Ld. Red. 150; see Story Eq. Pl. § 303, and note; *Moodelay v. Morton*, 1 Bro. C. C. (Perkins's ed.) 469, and notes; *post*, Chap. XXXIV. § 4 *Bills to perpetuate Testimony*.

¹ In 1 Story Eq. Jur. § 671, Mr. Justice Story says: "Courts of Equity may, perhaps, interpose and decree an account where a dissolution of partnership has not taken place, and is not asked for; although, ordinarily, they are not inclined to decree an account, unless under special circumstances, if there is not an actual or contemplated dissolution, so that all the affairs of the partnership may be wound up." See also the cases cited in the note at the place above cited, and *Waters v. Taylor*, 15 Sumner's Ves. 10, note (b), and cases cited; *Judd v. Wilson*, 6 Vt. 185; 1 Smith Ch. Pr. (2d Am. ed.) 89; Collyer

Partn. (Perkins's ed.) §§ 299, 300, 1128 to 1133.

² 2 V. & B. 329; and see *Marshall v. Colman*, 2 J. & W. 268; *Lindley Partn.* 752.

³ It is said by one of the learned reporters, in a note to 2 V. & B. 330, that, in the case of theatres, the Court has refused to take jurisdiction upon any other principle than a dissolution of partnership. *Waters v. Taylor*, 15 Ves. 10. But it is to be observed, that theatres are property of a very peculiar description, and that any interference with the management of them by the Court might be productive of irreparable damage and ruin to the parties concerned, and that it is upon this principle that, in *Waters v. Taylor*, the Court hesitated to interfere during the existence of the partnership; see 15 Ves. 20. It

well V. C. allowed a demurrer to a bill praying the account of a partnership, because it did not pray for a dissolution.⁴ In *Harrison v. Armitage*,⁵ however, a contrary opinion was expressed by Sir John Leach V. C.: and in *Richards v. Davies*,⁶ which was a bill by one partner against another, praying for an account of what was due to the plaintiff respecting past partnership transactions, and that the partnership might be carried on under the decree of the Court, his Honor decreed an account of past partnership transactions, but said that he could make no order for carrying on the partnership concerns, unless with a view to a dissolution. In pronouncing his judgment upon that case, the learned Judge observed, that a partner, during the partnership, has no relief at Law for moneys due to him on partnership account; and that,

if a Court of Equity refuses him relief, he is wholly without
 *333 remedy: which would be contrary *to the plain principles of justice, and cannot be the doctrine of equity. With respect to the objection that the defendant might be vexed by a new bill, whenever new profits accrued, his Honor said: "What right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to the plaintiff? Would not the same objection lie in a suit for tithes, which accrue *de anno in annum*?" It is to be observed, that in the last quoted case of *Richards v. Davies*, the case of *Chapple v. Cadell*¹ was cited in argument, and is referred to by the reporters as an authority for the position that a decree may be made for partnership accounts without the bill having prayed a dissolution; but, upon reference to the case itself, it will be found that it was one of a very peculiar nature, and that the principal object of the suit was, not an account of the partnership transactions, but to have a declaration as to the effect of a sale of some shares in a partnership undertaking (the *Globe* newspaper); and that the account of the profits which was decreed was merely the consequence of the declaration of the Court upon that point. The same observation applies to *Knowles v. Haughton*,² which is also referred to in *Richards v. Davies*:³ there, the bill was filed to establish a partnership in certain transactions, and the sole question in the case was, partnership or no partnership; and the Court being of opinion that a partnership did exist in part of the transactions referred to, as a necessary consequence decreed an account of these transactions.

In *Roberts v. Eberhardt*,⁴ Sir W. P. Wood V. C. said: "It is certainly not the ordinary practice of this Court to direct an account

was said by the Solicitor-General, *arguendo* in *Loscombe v. Russell*, that it appeared from the brief in *Forman v. Homfray*, that the plaintiff there prayed for an account, which was to be continued until the end of the term of the partnership. 4 Sim. 9.

⁴ 4 Sim. 8, 10.

⁵ 4 Mad. 143, cited in *Loscombe v. Russell*, *ubi sup.*

⁶ 2 R. & M. 347; and see observations of Lord Cottenham in *Walworth v. Hold*, 4 M. & C. 639, *ante*, pp. 234, 235.

¹ Jac. 537.

² 11 Ves. 168.

³ 2 R. & M. 347.

⁴ Kay, 148, 158.

between partners, except upon a bill for the dissolution of the partnership concern. It is true that it is not now necessary to ask for a dissolution in every case in which relief is sought respecting partnership affairs; but I apprehend that when a bill seeks an account, that is one of the cases in which a dissolution must be prayed; unless some special ground is raised the general accounts cannot be taken, without asking for the dissolution of the firm." It is conceived that it is now settled that, where the general accounts of the partnership are sought, the bill must pray for a dissolution, except in special cases; but that there are cases in which the Court will interpose, to support as well as to dissolve a partnership: as by appointing a receiver, where the conduct of the defendant is such as to endanger the existence of the partnership concern.⁵

In endeavoring to avoid the error of making a bill not sufficiently * extensive to answer the purpose of complete justice, *334 care must be taken not to run into the opposite defect, *viz.*, that of attempting to embrace in it too many objects: for it is a rule in Equity, that two or more distinct subjects cannot be embraced in the same suit. The offence against this rule is termed multifariousness, and will render a bill liable to a demurrer.¹

⁵ Fairthorne v. Weston, 3 Hare, 387, 391; 8 Jur. 353; Hall v. Hall, 3 M.N. & G. 79, 83; 15 Jur. 363, and cases cited in note to S. C. 12 Beav. 419; Bailey v. The Birkenhead Railway Company, *ib.* 433, 440; 6 Rail. Ca. 256; 14 Jur. 119; Cropper v. Coburn, 2 Curtis, C. C. 465, 473; Williamson v. Haycock, 11 Iowa (3 With.), 40.

¹ "By multifariousness in a bill," says Mr. Justice Story, "is meant the improperly joining, in one bill, distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story Eq. Pl. § 271; West v. Randall, 2 Mason, 201; Fellows v. Fellows, 4 Cowen, 682; Brinkenhoff v. Brown, 6 John. Ch. 139; Bedsole v. Monroe, 5 Ired. Eq. 313; Richardson v. McKinson, Litt. Sel. Ca. 320; Jackson v. Forrest, 2 Barb. Ch. 576; Ryan v. Shawneetown, 14 Ill. 20; Metcalf v. Cady, 8 Allen, 587; Warren v. Warren, 56 Maine, 360; Newland v. Rogers, 3 Barb. Ch. 432; Kennebec and Portland R. R. Co. v. Portland & Kennebec R. R. Co., 54 Maine, 173; Crane v. Fairchild, 1 McCarter (N. J.), 76. To render a bill multifarious, it must contain several good distinct grounds of suit in Equity, which cannot properly be joined in one suit. Many v. Beekman Iron Co., 9 Paige, 188; McCabe v. Bellows, 1 Allen, 269; Varick v. Smith, 5 Paige, 137; Pleasant v. Glasscock, 1 Sm. & M. Ch. 17; Richards v. Pierce, 52 Maine, 562. A bill asking for an injunction to restrain waste, and also an account for rent due, is demurrable on the ground of

multifariousness. Reed v. Reed, 1 C. E. Green (N. J.), 248, 250. If a joint claim against two or more defendants is improperly joined in the same bill with a separate claim against one of the defendants only, in which the other defendants have no interest, and which is wholly unconnected with the claim against them, all or either of the defendants may demur to the bill for multifariousness. Swift v. Eckford, 6 Paige, 22; Boyd v. Hoyt, 5 Paige, 65; Richards v. Pierce, 52 Maine, 562. [But a bill is not multifarious which is filed by a stockholder against the corporation, its directors and treasurer, alleging various fraudulent transactions between the directors as a board, certain directors, and the treasurer, and seeking a recovery of the gains thereby made. Lewis v. St. Albans Iron Works, 50 Vt. 477. And see Sturgeon v. Burrall, 1 Ill. App. 537.] A bill against one for a claim against him in his individual character, and another claim against him as heir for the debt of his ancestor, may be objected to for multifariousness. Bryan v. Blythe, 4 Blackf. 249; see Robinson v. Guild, 12 Met. 323. So a bill is multifarious which mixes up independent claims made by the plaintiff in his own right with others made by him as administrator. Carter v. Treadwell, 3 Story, 25, 51, 52. A bill filed by an administrator, in conjunction with the heirs and distributees of the intestate, to recover personal property in the hands of the defendant, and to divide and distribute it, is multifarious. Thurman v. Shelton, 10 Yerger, 383.

"The conclusion," says Mr. Justice Story, "to which a close survey of all the authorities will conduct us, seems to be, that there

According to Lord Cottenham, it is utterly impossible, upon the authorities, to lay down any rule or abstract proposition as to what con-

is not any positive, inflexible rule, as to what, in the sense of Courts of Equity, constitutes multifariousness, which is fatal to a suit on demurrer." Story Eq. Pl. § 539; *Oliver v. Piatt*, 3 How. U. S. 333, 411, 412; *Per Wilde J.* in *Robinson v. Guild*, 12 Met. 323, 328; *McLean v. Lafayette Bank*, 3 McLean, 415. For a survey of the positions and doctrines held by Courts of Equity on this subject in different cases, see Story Eq. Pl. §§ 271-289, 530, 540; *Bugbee v. Sargent*, 23 Maine, 269; *Robinson v. Cross*, 22 Conn. 587; *Warren v. Warren*, 56 Maine, 360; *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 54 Maine, 173; *Abbot v. Johnson*, 32 N. H. 9; *Chase v. Searls*, 45 N. H. 511, 519-521; *Camp v. Mills*, 6 Jones Eq. (N. C.) 274. [The recent cases show an increasing tendency to consider the objection of multifariousness as addressed to the discretion of the Court. Where all the plaintiffs have a common interest in the whole of the matter comprised in the bill, the objection of multifariousness set up by defendants who are concerned only in a portion of the subject-matter, is a question of discretion to be determined upon considerations of convenience with regard to the circumstances of each particular case. *Coates v. Legard*, L. R. 19 Eq. 56. And see *Pointon v. Pointon*, L. R. 12 Eq. 547; *House v. Mullen*, 22 Wall. 43; *Warren v. Warren*, 52 Me. 360; *Woodward v. Hall*, 2 Tenn. Ch. 164. So, where a plaintiff has two causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other, or growing out of the same subject-matter, where all the defendants have some interest in every question raised on the record, and the suit has a single object, they may be properly joined, *Ferry v. Laible*, 12 C. E. Green, 146. So a bill is not multifarious which asks a declaration of title in favor of plaintiffs as *cestui que trusts* to half the property and for partition, or because the plaintiff is not entitled to the relief asked against one defendant. *Darling v. Hammer*, 5 C. E. Green, 220. So a bill is not multifarious which alleges that two separate patents owned by plaintiff have been infringed by the defendant. *Gillespie v. Cummings*, 3 Sweeny, 259; *Hornum Patent Man. Co. v. Brooklyn City R. Co.*, 7 Rep. 295, U. S. C. C. N. Y. So, where the bill is filed for the settlement of several commercial partnerships of which the complainants and defendants were members. *Miller v. Harris*, 1 Tenn. Leg. Rep. 157. Nor does the objection lie where there is a common liability in the defendants, and a common, although not co-extensive interest in the plaintiffs. *Fiery v. Emmert*, 36 Md. 464. Nor where the bill is upon homogeneous matters, and does not pray for multifarious relief, although the case stated might support such a prayer. *Dick v. Dick*, 1 Hogan, 290; *Arnold v. Arnold*, 9 R. I. 397. And see *Judson v. Toulmin*, 9 Ala. 662; and *Davis v. Miller*, 4 Jones, Eq. 447. So, a bill by a husband and wife for the same premises,

based upon a parol agreement with the husband and a written agreement with the wife, although demurrable perhaps upon the ground of misjoinder, is not subject to the objection of multifariousness. *Green v. Richards*, 8 C. E. Green, 32. A creditor's bill against the debtor's executor and another, alleging a *devastavit*, and the insolvency of the executor, and for an account, is not multifarious because it also seeks to set aside a conveyance by the executor of the debtor's realty to one of the defendants. *Ragsdale v. Holmes*, 1 S. C. 91. And an alternative prayer does not necessarily make a bill multifarious. *Kilgour v. N. O. Gas Light Co.*, 2 Woods, 144. The joinder of several property owners in a bill to restrain a tax assessment does not render it bad for multifariousness. *Mount Carbon, Coal Co. v. Blanchard*, 54 Ill. 240. But see *Howell v. City of Buffalo*, 2 Abb. App. Dec. 412. Nor does the joinder of several owners of adjoining tracts of land to restrain separate assessments for the construction of a road. *Robbins v. Sand Creek T. Co.*, 34 Ind. 461. See also *Price v. Minot*, 107 Mass. 63; *Eddy v. Caprin*, 4 R. I. 397; *Taylor v. King*, 32 Mich. 42; *Richardson v. Brooks*, 53 Miss. 500; *Douglas v. Walbridge*, 38 Wis. 179; *Jones v. Foster*, 50 Miss. 47; *Winsor v. Bailey*, 55 N. H. 218; *Free v. Buckingham*, 57 N. H. 95.

When the bill is by an heir for partition, and for an injunction against the executor restraining him from waste, and also asks that the widow be required to give security for the complainant's share of the fund in her hands, it is open to the objection of multifariousness. *Burnett v. Lester*, 53 Ill. 325. And so is a bill which joins several defendants, some of whom are liable to one plaintiff only, some to another, and some of whom are responsible, if at all, for independent violations of a statute. *Sheriff v. Oil Co.*, 7 Phila. 4. So, where a person is made a defendant upon a case with a large portion of which he has no connection. *Waller v. Taylor*, 42 Ala. 297. And see, for further instances of multifariousness, *Kinsey v. Howard*, 47 Ala. 236; *Hardin v. Swoope*, 47 Ala. 273; *Dorsey v. Lake*, 46 Miss. 109; *Roberts v. Starke*, 47 Miss. 257. And for a case both of multifariousness and misjoinder. *Haines v. Carpenter*, 1 Woods, 262.

The objection of multifariousness will not be regarded unless it appear on the face of the bill: *Edwards v. Sartor*, 1 S. C. 266; nor entertained if only made at the hearing: *Cousens v. Rose*, L. R. 12 Eq. 366; *Green v. Richards* 8 C. E. Green, 32; *Sanborn v. Adair*, 12 C. E. Green, 425.

In Tennessee, it is provided by statute that the uniting in one bill against one defendant of several matters of equity, distinct and unconnected, is not multifariousness: Code, § 4327; that the objection is no ground for dismissing the bill unless made by motion to dismiss or demurrer: § 4325; that if made at the hearing, the Court may proceed to render a decree saving rights, or grant leave to amend:

stitutes multifariousness, which can be made universally applicable. The cases upon the subject are extremely various; and the Court, in deciding them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule.² The only way of reconciling the *authorities *335 upon the subject is, by adverting to the fact, that although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised, though termed multifariousness, is in fact more properly misjoinder;¹ that is to say, the cases or claims united in the bill are of so different a character, that the Court will not permit them to be litigated in one record.² It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar, that the Court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term multifariousness, as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever.³ Thus where a bill was exhibited by trustees under a trust for sale, against several persons who were the purchasers of the trust estates, which had been sold to them by auction in different lots, *Sir Thomas Plumer v. C.* allowed a demurrer, which had been put in by one of the defendants, on the ground that the bill was multifarious. His Honor said: "This Court is always averse to a multiplicity of suits, but certainly a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters, relating to individuals with whom he has no concern."⁴ In a subsequent case, where an information and bill were filed for the purpose of setting aside leases, granted by the same trustees at different times to different persons, the same learned

§ 4337; and that, if a demurrer on that ground is sustained, the Court may direct separate bills without new process: § 4326.]

² See *Carroll v. Roosevelt*, 4 Edw. Ch. 211; *Emans v. Emans*, 1 McCarter (N. J.), 118, 119; *Bowers v. Keesecher*, 9 Iowa (1 With.), 422. The substance of the rules on the subject of multifariousness appears to be, that each case is to be governed by its own circumstances, and must be left in a great measure to the sound discretion of the Court. *Clegg v. Varnell*, 18 Texas, 294; *Gaines v. Chew*, 2 How. U. S. 619; *Oliver v. Piatt*, 3 How. U. S. 333; *Butler v. Spann*, 27 Mis. (Cush.) 234; *Marshall v. Means*, 12 Geo. 61; *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 52 Maine, 173, 182; *Chase v. Searls*, 45 N. H. 520; *Abbot v. Johnson*, 32 N. H. 26; *Warren v. Warren*, 56 Maine, 368; *People v. Morrill*, 26 Cal. 336; [*Bartee v. Tompkins*, 4 Sneed, 623.] To determine whether a bill is multifarious, regard must be had to the stating part of the bill, and not to the prayer alone. *Hammond v. Michigan Bank*, *Walker Ch.* 214.

¹ By the 15 & 16 Vic. c. 86, § 49, *ante*, p. 303, objections for misjoinder of plaintiffs are abolished; but this section applies to misjoinder of parties, and not to the misjoinder of subjects mentioned in the text.

² *Emans v. Emans*, 1 McCarter (N. J.), 114, 118.

³ *Campbell v. Mackay*, 1 M. & C. 618; *Crow v. Cross*, 7 Jur. N. S. 1298, V. C. S.; see *Turner v. Baptist Missionary Union*, 5 McLean, 344; *Swayze v. Swayze*, 1 Stock: (N. J.) 273; *New England, & C. Bank v. Newport Steam Factory*, 6 R. I. 154.

⁴ *Brookes v. Lord Whitworth*, 1 Mad. 86, 89; see also *Rayner v. Julian*, 2 Dick. 677; 5 Mad. 144, n. The marginal note to 2 Dick. 677 is wrong; and see *Rump v. Greenhill*, 20 Beav. 512; 1 Jur. N. S. 123; *Aberystwith, & C. Railway Company v. Piercey*, 12 W. R. 1000, V. C. W.; 2 H. & M. 602; *Bent v. Yardley*, 4 N. R. 50, V. C. W.; *Bouck v. Bouck*, L. R. 2 Eq. 19, M. R.; *Crane v. Fairchild*, 1 McCarter (N. J.), 76; *Metcalf v. Cady*, 8 Allen, 587; *Robinson v. Cross*, 22 Conn. 171.

Judge held, that if the case had been free from other objections *336 it would have been * liable to the charge of multifariousness.¹

The same principle was afterwards acted upon by Lord Eldon in *Salvidge v. Hyde*,² where a bill had been filed for an account of a testator's estate, and also to set aside certain sales which had been made by the executor and trustee to himself and another person of the name of Laying, a demurrer to which bill, put in by Laying, had been overruled by Sir John Leach V. C.³ The case came on before the Lord Chancellor, by appeal: when his Lordship reversed the judgment of the Vice-Chancellor, and allowed the demurrer: observing that "when there are trustees to sell and a bill is filed against them, it is not usual to make the purchasers parties, but to state the contracts and pray an inquiry."⁴ His Lordship, however, added, that "there may be cases which cannot be delayed till those inquiries can be made, on account of injury that may be done in the mean time."

It is to be remarked that Sir John Leach, in pronouncing his judgment upon the above demurrer observed, with reference to multifariousness, that "in order to determine whether a suit is multifarious, or in other words contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the Court, in order that the suit may conclude the whole subject."⁵ There is no doubt that, in the above observation, the learned Judge stated the principle correctly; though, in his application of it, he went, in the opinion of Lord Eldon, too far.⁶

Although the administration of the estates of two different persons cannot, in general, be joined in the same suit, where the parties interested in such estates are different, yet, where the same parties claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other, the joinder of them in the same suit is not multifarious.⁷

¹ Attorney-General v. Moses, 2 Mad. 294, 305.

² Jac. 151, 153; and see Lund v. Blanshard, 4 Hare, 9, 19; Thomas v. Rees, 1 Jur. N. S. 197, M. R.; Norris v. Jackson, 1 J. & H. 319; 7 Jur. N. S. 540.

³ 5 Mad. 138.

⁴ Story Eq. Pl. § 274.

⁵ *Salvidge v. Hyde*, 5 Mad. 146.

⁶ See Turner v. Robinson, 1 S. & S. 313, 315; S. C. *nom.* Turner v. Doubleday, 6 Mad. 94; Dunn v. Dunn, 2 Sim. 329; Marcos v. Pebrer, 3 Sim. 466; Jerdein v. Bright, 2 J. & H. 325; Bouek v. Bouek, L. R. 2 Eq. 19; and see *Margetts v. Perks*, 12 W. R. 517, M.

R.; *Marshall v. Gilliard*, 1 W. N. 255; 12 Jur. N. S. 483, V. C. S.

⁷ *Campbell v. Mackay*, 1 M. & C. 603, 623; *Lewis v. Edmund*, 6 Sim. 251, 254; *Rump v. Greenhill*, 20 Beav. 512; 1 Jur. N. S. 123; *Attorney-General v. Cradock*, 3 M. & C. 85, 93; 1 Jur. 556; *Young v. Hodges*, 10 Hare, 158; *Carter v. Balfour*, 19 Ala. 814. The estates of two persons who are joint debtors may be administered in the same suit. *Woods v. Sowerby*, 14 W. R. 9, V. C. W. [So, where a bill is filed for a settlement of several commercial partnerships, of which the complainants and defendants were members, the bill is not multifarious. *Miller v. Harris*, 1 Tenn. Leg. Rep. 157.]

* This observation leads us to a distinction pointed out by *337 Lord Eldon in the case of *Salvidge v. Hyde*,¹ and which has perhaps been extended by later cases. The bill in that case was filed by persons interested under a will, and by creditors of a testator, to set aside two contracts, one of which had been entered into by the trustees for sale of an estate to one of their own number, and the other for the sale of another estate to the defendant Laying; and Lord Eldon, although he thought that the object of setting aside the contract entered into with Laying could not be embraced in a bill to set aside the contract entered into with the trustee, yet held, that if the trustee had purchased for himself, and then Laying had bought the same estate of him, the case would have been different.²

From this it may be inferred, that an objection for multifariousness will not be allowed, where the person making the objection has united his case with that of another defendant, against whom the suit is entire and incapable of being separated.³ And so, in *Benson v. Hadfield*,⁴ where the plaintiffs had appointed A., B., and C. their foreign agents, and A. had retired, whereupon the plaintiffs had appointed B., C., and D. their agents, and then filed a bill for an account of the two agencies, A., the retiring party, demurred for multifariousness. In giving judgment upon the demurrer, Lord Langdale M. R. observed: "I can very well conceive a case properly stated, in which it would be quite necessary, and it may ultimately be quite necessary in this case, to continue any person who was a partner in one of those agency firms, a party to the cause by which the accounts are to be taken;"⁵ but, upon perusal of the bill, he did not find any such allegations as appeared to render it necessary to continue, as parties to the suit, the different persons parties to the transactions, and consequently he allowed the demurrer. In the case of the *Attorney-General v. The Corporation of Poole*,⁶ where the case against one defendant was so entire as to be incapable of being prosecuted in several suits, but yet another defendant was a necessary party in respect of a portion only of that case, it was decided, that such other defendant could not object to the suit on the ground of multifariousness. And in *Campbell v. Mackay*,⁷ Lord Cottenham held, that where the plaintiffs * have a common inter- *338 est against all the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of some

¹ Jac. 151.

² *Salvidge v. Hyde*, Jac. 153.

³ Story Eq. Pl. § 278, a, and note. Nor can a defendant demur for multifariousness on the ground of the joinder of another defendant, who does not object. *Warthen v. Brantley*, 5 Geo. 571; *Whitbeck v. Edgar*, 2 Barb. Ch. 106; [*Miller v. Jamison*, 9 C. E. Green, 41. *Ante*, 302, n. 4].

⁴ 5 Beav. 546, 553.

⁵ See *Warthen v. Brantley*, 5 Geo. 571.

⁶ 4 M. & C. 17, 34; 2 Jur. 1080; 8 Cl. &

Fin. 409, *nom.* *Parr v. Attorney-General*; see also *Inman v. Wearing*, 3 De G. & S. 729, which was a case of foreclosure of three distinct estates, and a prayer to set aside a sale by a prior mortgagee of one of them, as improvident.

⁷ 1 M. & C. 603; and see *Attorney-General v. Cradock*, 3 M. & C. 85, 95; 1 Jur. 556; *Walsham v. Stainton*, 9 Jur. N. S. 1261; 12 W. R. 63, L. J. L.; 1 De G., J. & S. 678, overruling *S. C.* 1 H. & M. 323; *Hamp v. Robinson*, 3 De G., J. & S. 97.

of the defendants being subject to distinct liabilities, in respect to different branches of the subject-matter, will not render the bill multifarious.¹ The facts of that case were as follow: Sir James Campbell, by a deed of settlement executed on his marriage with Lady D. L. Campbell, had vested a fund in two trustees, A. and B., upon trust for his wife for life, and after her decease in trust for the sons of the marriage who should attain the age of twenty-one years, and daughters who should attain twenty-one years or marry: with a proviso that the persons to be appointed guardians of the children by his will, together with the trustees of the settlement, should have authority to apply the interest, and also, in certain cases, part of the capital, of the children's presumptive shares, towards their maintenance and advancement during their respective minorities. By a second deed, executed after marriage, Sir James Campbell vested another fund in two other trustees, C. and D., but upon similar trusts to those of the first settlement; and by his will, after making some specific bequests to his wife, he bequeathed his property to A., B., and C., upon certain trusts for the benefit of his children, and appointed A., B., and C. his executors and guardians of his infant children, in conjunction with their mother. After the death of Sir James Campbell, Lady D. L. Campbell, the wife, together with the children of the marriage, filed a bill against A., B., C., and D., for the accounts and administration of the property comprised in the two deeds and will, to which bill a joint demurrer was put in by A., B., and C., on the ground of multifariousness. The demurrer was, however, overruled, upon argument, by Sir Lancelot Shadwell V. C., and afterwards by Lord Cottenham upon appeal; his Lordship being of opinion, that the result of the principles to be extracted from

the cases was, that where there is a common liability and a common interest, the common liability being in the defendants, * and the common interest in the plaintiffs, different grounds of property may be united in the same record.¹

¹ Where the purpose of the bill was to enable the plaintiff to obtain satisfaction of a judgment at Law out of the property of his debtor, one of the defendants; and to this end the plaintiff sought to remove out of his way certain fraudulent conveyances and incumbrances, and to bring within the reach of his judgment equitable interests which were not the subjects of execution at Law, it was held to be no objection that one or more of the defendants, to whom parts of the property had been fraudulently conveyed, had nothing to do with other fraudulent transactions. *Way v. Bragaw*, 1 C. E. Green (N. J.), 213, 216; *Randolph v. Daly*, 1 C. E. Green (N. J.), 313; see *Boyd v. Hoyt*, 5 Paige, 78; *Brinkerhoff v. Brown*, 4 John. Ch. 671; *Fellows v. Fellows*, 4 Cowen, 682; *Story Eq. Pl. § 271*, b.; *Hicks v. Campbell*, 4 C. E. Green (N. J.), 183; *Coleman v. Barnes*, 5 Allen, 374; *Cuyler v. Moreland*, 6 Paige, 273; *Richards v. Pierce*, 52 Maine,

560; *Chase v. Searls*, 45 N. H. 511, 519, *et seq.*; *Morton v. Weil*, 33 Barb. 30; [*Johnson v. Brown*, 2 Humph. 327; *Fogg v. Rogers*, 2 Coldw. 290; *Hughes v. Tennison*, 3 Tenn. Ch. 641. So, where the bill was by four children to set aside six deeds of property made by their father at one time to six other children, on the ground of undue influence and mental incompetency. *Arnold v. Arnold*, 11 W. Va. 449. So, where the bill is by children against their father, his judgment creditor, and a purchaser under the judgment, setting up a resulting trust in the property sold. *Taylor v. Smith*, 54 Miss. 50. So, where the bill is to set aside a will as fraudulently procured against a second wife and her children. *Winsor v. Pettis*, 11 R. I. 506. And see *Prevost v. Gorrell*, 7 Rep. 296, U. S. C. C. Pa.]

¹ See *1 M. & C. 623*. A bill is not multifarious which unites several matters distinct in themselves, but which together make up

It should be noticed here, that where the right of a person to call upon the Court for specific relief against another is so incumbered that he cannot assert his own right till he has got rid of that incumbrance, he cannot include the object of getting rid of the incumbrance, in a suit for the specific relief which, but for that incumbrance, he would be entitled to; and that, if he attempt to do so by the same suit, his bill will be multifarious. Thus, it was held by Lord Eldon that, when a bill is filed for specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate: and that, if there is a title in other persons which the plaintiff is bound to get in, he should file a bill for specific performance only, and should fortify the defect in his title, by such means as he can, so as to be enabled to complete it by the time when the contract will have to be enforced.²

The principle which renders it improper to mix up, in the same bill, demands against different persons arising out of distinct transactions, renders it improper to include in one suit separate infringements of the same patent, by different defendants;³ and for the same reason, where a copyright has been infringed, bills must be filed against each bookseller taking spurious copies for sale.⁴ And so, joint and separate demands cannot be united in the same bill;⁵ * and although *340 the defendants may be liable in respect of every one of the demands made by the bill, yet they may be of so dissimilar a character

the plaintiff's Equity, and are necessary to complete relief; nor, on the ground of misjoinder of several plaintiffs, where either of them would not be entitled to proceed separately for relief without making the others defendants. *Hicks v. Campbell*, 4 C. E. Green (N. J.), 183; *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 54 Maine, 173; see *Coleman v. Barnes*, 5 Allen, 374; *Skeel v. Spraker*, 8 Paige, 182; *Myers v. United Guarantee, &c. Co.*, 7 De G., M. & G. 112.

² *Mole v. Smith*, Jac. 494; *Mason v. Franklin*, 1 Y. & C. C. C. 239, 241; see also *Whaley v. Dawson*, 2 Sch. & Lef. 367; and *ante*, p. 230, 231; *Story Eq. Pl. § 272*; *Whitten v. Whitten*, 36 N. H. 326. So a bill by a mortgagee against the mortgagor, and an adverse claimant of the land would be multifarious. *Banks v. Walker*, 2 Sandf. Ch. 344; [*Dial v. Reynolds*, 96 U. S. 340; *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; *Corning v. Smith*, 6 N. Y. 82; *Wilkins v. Kirkbride*, 12 C. E. Green, 93. *Ante*, 277, n. 2.] A bill alleging that the plaintiff and one of the defendants were copartners, and praying for a settlement of the copartnership concerns; and alleging a fraudulent sale of all the property of the firm by the said defendant to a third party, who was the other defendant, and praying that such sale may be declared void, is bad for multifariousness. *Sawyer v. Noble*, 55 Maine, 227.

³ The plaintiff should not, however, file an unnecessary number of bills, if he does,

the Court will consolidate the suits, or make some equivalent order; see *Foxwell v. Webster*, 10 Jur. N. S. 137; 12 W. R. 186, L. C.; 2 Dr. & Sm. 250; 9 Jur. N. S. 1189. [See *infra*, 797, note 3.]

⁴ *Dilly v. Doig*, 2 Ves. J. 486; *Story Eq. Pl. § 277*, 278.

⁵ *Harrison v. Hogg*, *ib.* 323, 328; *Swift v. Eckford*, 6 Paige, 22; *Story Eq. Pl. §§ 271, 279*; *McLellan v. Osborne*, 51 Maine, 118, 120; *Emans v. Emans*, 2 Beasley (N. J.), 205. Thus a bill praying for an account of two distinct firms, made up, in part, of the same persons, was held bad for multifariousness, *Griffin v. Merrill*, 10 Md. 264. So where three persons had successively withdrawn from a firm, reducing the number from five to two, a bill praying for an account and settlement of the partnership concerns for the whole time, was held to be bad for multifariousness, and was dismissed. *White v. White*, 5 Gill, 359. So a prayer in a bill by one of several part-owners of a vessel against other part-owners, who became such at several different times, for an account, during that period of time when all were owners, was held correct; if the prayer was not thus limited, the bill would be bad for multifariousness. *McLellan v. Osborne*, 51 Maine, 118; see *Latting v. Latting*, 4 Sandf. Ch. 31; as to suing co-executors, separately liable, for contribution, see *Singleton v. Selwyn*, 9 Jur. N. S. 1149; 12 W. R. 98, V. C. W.; *Micklethwait v. Winstanley*, 13 W. R. 210, L. JJ.

as to render it improper to include them all in one suit. The objection, in these cases, is more strictly called misjoinder, and has been before alluded to in the quotation from Lord Cottenham's judgment in *Campbell v. Mackay*: where his Lordship observes, that the distinction between misjoinder and multifariousness is clearly exhibited in the case of *Ward v. The Duke of Northumberland*.¹ "In that case," said his Lordship, "the plaintiff had been tenant of a colliery under the preceding Duke of Northumberland, and continued also to be tenant under his son and successor, the then Duke; and he filed a bill against the then Duke and Lord Beverley, who were the executors of their father, seeking relief against them in respect of transactions, part of which took place in the lifetime of the former Duke, and part between the plaintiff and the then Duke after his father's decease. To this bill the defendants put in separate demurrers, and the forms of the two demurrers, which were very different, clearly illustrate the distinction above adverted to. The Duke could not say there was any portion of the bill with which he was not necessarily connected: because he was interested in one part of it as owner of the mine, in the other as representing his father. But his defence was, that it was improper to join in one record a case against him as representative of his father, and a case against him arising out of transactions in which he was personally concerned."² The form of his demurrer was that there was an improper joinder of the subject-matters of the suit. Lord Beverley's demurrer again was totally different: it was in the usual form of a demurrer for multifariousness, and proceeded on the ground that, by including transactions which occurred between the plaintiff and the other defendant with transactions between the plaintiff and the late Duke (with the latter of which only Lord Beverley could have any concern), the bill was drawn to an unnecessary length, and the demurring party exposed to improper and useless expense.³ Both demurrers were allowed, and both, it may be said, in a sense, for multifariousness; but it is obvious that the real objection was very different in the two cases. In *Harrison v. Hogg*,⁴ which was also more properly a case of misjoinder, the plaintiffs endeavored to unite in one record a demand in which all the plaintiffs jointly had an interest, with a demand in which only one of them had an interest; and the demurrer was

*341 * allowed upon the ground that the subject-matters were such as, in the opinion of the Court, ought not, according to the rules of pleading, to be included in one suit.¹ In *Saxton v. Davis*,² the suit prayed an account against the representatives of a bankrupt's assignees, and against Davis, a person who claimed through those assignees, and

¹ 2 Anst. 469, 476; see *Emans v. Emans*, 2 Beasley (N. J.), 205, 207; *Boyd v. Hoyt*, 5 Paige, 79.

² See *Latting v. Latting*, 4 Sandf. Ch. 31; *Vax Mater v. Sickler*, 1 Stockt. (N. J.) 483.

³ See *Turner v. Amer. Bapt. Missionary Union*, 5 McLean, 344.

⁴ 2 Ves. J. 323, 328.

¹ Story Eq. Pl. § 279; *Boyd v. Hoyt*, 5 Paige, 65; *Larkins v. Biddle*, 21 Ala. 252; *Emans v. Emans*, 2 Beasley (N. J.), 205.

² 18 Ves. 72, 80.

also against a person who had been his assignee under the Insolvent Debtors' Act; and there also the bill was held to be bad for multifariousness."³

It is to be observed, that this objection will only apply where a plaintiff claims several matters of different natures by the same bill; and that where one general right only is claimed by the bill, though the defendants have separate and distinct interests, a demurrer will not hold.⁴ As where a person, claiming a general right to the sole fishery of a river, files a bill against a number of persons claiming several rights in the fishery, as lords of manors, occupiers of lands or otherwise;⁵ so, in a bill for duties, the city of London was permitted to bring several of the persons before the Court, who dealt in those things whereof the duty was claimed, to establish the plaintiff's right to it;⁶ and where the lord of a manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders, and leaseholders, who owed rents to the lord, but had confused the boundaries of their several tenements, praying a commission to ascertain the boundaries, and it was objected, at a hearing, that the suit was improper, as it brought before the Court *many parties having distinct interests, it was an- *342 swered that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenements: and a decree was made accordingly.¹ Upon the same principle it is, that one suit is entertained for tithes against several parishioners. Suits of this kind, however, must all be for objects of the same nature; and if a bill is filed against several defendants for objects of a different nature, although the plaintiff claims them all in the same character, it will be

³ 1 M. & C. 619; Story Eq. Pl. §§ 276, 285, 530.

⁴ Ld. Red. 182; *Bowers v. Keesecher*, 9 Iowa (1 With.), 422; *Dimmock v. Bixby*, 20 Pick. 368; *Sears v. Carrier*, 4 Allen, 341; *Tucker v. Tucker*, 29 Miss. (8 Jones) 350; *Chase v. Searles*, 45 N. H. 519; *Bugbee v. Sargent*, 23 Maine, 269; *Warren v. Warren*, 56 Maine, 367; *Foss v. Haynes*, 31 Maine, 81; *Fellows v. Fellows*, 4 Cowen, 682; *Richards v. Pierce*, 52 Maine, 562; *People v. Morrill*, 26 Cal. 336; Story Eq. Pl. § 278, note; *Murray v. Hay*, 1 Barb. Ch. 59; *Mix v. Hotchkiss*, 14 Conn. 32; *Booth v. Stamper*, 10 Geo. 109; *Nail v. Mobley*, 9 Geo. 278; *Winslow v. Dousman*, 18 Wis. 456; see *Watson v. Cox*, 1 Ired. Eq. 389; *Stuart v. Colter*, 4 Rand. 74; *Newland v. Rogers*, 3 Barb. Ch. 432; *Robertson v. Stevens*, 1 Ired. Ch. 247; *Walkup v. Zehring*, 13 Iowa (5 With.), 306; *Delafield v. Anderson*, 7 Sm. & M. 630; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Scrimgeur v. Buchannon*, 3 A. K. Marsh. 219; *Parish v. Sloan*, 3 Ired. Ch. 607; *Vaun v. Hargett*, 2 Dev. & Bat. Ch. 31. Nor will the objection of multifariousness prevail where the interests of the several plaintiffs, though distinct and upon distinct conveyances, are yet of a similar nature against the same de-

fendants, and in relation to the same subject-matter, and the relief prayed is in character the same to all. *Kunkel v. Markell*, 26 Md. 390, 409; see *Thomas v. Doub*, 8 Gill, 7; *Young v. Lyons*, 8 Gill, 166; *Williams v. West*, 2 Md. 198; *Peters v. Van Lear*, 4 Gill, 263, 264. But a bill is held bad for multifariousness, where it is brought against several defendants, seeking redress for injuries arising out of transactions with them separately, at different times, and relating to different subjects. *Coe v. Turner*, 5 Conn. 86; *Marselis v. Morris Canal Soc.*, 1 Saxton (N. J.), 31; *Meacham v. Williams*, 9 Ala. 842; *Colburn v. Broughton*, 9 Ala. 351; *Hungerford v. Cushing*, 8 Wis. 332. Unconnected demands against different estates cannot be united in the same bill, though the defendant is executor of both. *Daniel v. Morrison*, 6 Dana, 186; *Kay v. Jones*, 7 J. J. Marsh. 37; see *McCartney v. Calhoun*, 11 Ala. 110.

⁵ *Mayor of York v. Pilkington*, 1 Atk. 282, cited Ld. Red. 182; *Smith v. Earl Brownlow*, L. R. 9 Eq. 241; *Chase v. Searles*, 45 N. H. 511, 521.

⁶ *City of London v. Perkins*, 3 Bro. P. C. ed. Toml. 602.

¹ *Magdalen Coll. v. Athill*, cited Ld. Red. 183.

multifarious; ² thus, if a parson should prefer a bill against several persons, *viz.*, against some for tithes and against others for glebe, it would be liable to demurrer; and so, if the lord of a manor were to prefer one bill against divers tenants for several distinct matters and causes, such as common, waste, several piscary, &c., this would be wrong: though the foundation of the suit, *viz.*, the manor, be an entire thing.³

It is to be remarked, that Lord Redesdale appears to confine the meaning of multifariousness to cases where a plaintiff demands several matters of different natures of several defendants by the same bill; ⁴ but in *Attorney-General v. The Goldsmiths' Company*,⁵ Sir Lancelot Shadwell V. C. said: "I apprehend that, besides what Lord Redesdale has laid down upon the subject, there is a rule arising out of the constant practice of the Court, that it is not competent, where A. is sole plaintiff, and B. is sole defendant, for A. to unite in his bill against B. all sorts of matters wherein they may be mutually concerned."⁶ If such a mode of proceeding were allowed, we should have A. filing a bill against B., praying to foreclose one mortgage, and, in the same bill,

*343 praying to redeem another, and asking many other kinds of relief with *respect to many other subjects of complaint." In that case, the information against the Company stated, that there was a charity for the benefit of young men, being free of the Company, and then alleged that divers other bequests had been made to the Company for the purpose of making loans to young men for their advancement in business or life, and prayed that the first-mentioned charity, and all other (if any) like gifts and bequests to the Company might be established, and that the due performance of the charitable trusts might be enforced for the future; and the Vice-Chancellor, upon a demurrer being put in to the information, because it was exhibited for several and distinct matters which ought not to be joined together in

² *West v. Randall*, 2 Mason, 181; *Cambridge Water Works v. Somerville Dyeing &c. Co.*, 14 Gray, 193; *Swift v. Eckford*, 6 Paige, 22.

³ *Berke v. Harris*, Hard. 337.

⁴ *Ld. Red.* 181.

⁵ *Sim.* 670, 675; and see *Attorney-General v. The Corporation of Carmarthen*, G. Coop. 30; *Attorney-General v. St. Cross Hospital*, 17 Beav. 435; *Hughes v. Cook*, 34 Beav. 407; see *Story Eq. Pl.* §§ 531, 532, 533; *Kent v. Lee*, 2 Sandf. Ch. 105. A bill is multifarious which seeks to redeem a mortgage of an entire estate, and a subsequent mortgage by one tenant in common of his share in a part of the estate. *White v. Curtis*, 2 Gray, 467. But a bill is not necessarily multifarious, by reason of its seeking to redeem two distinct mortgages of different parcels of real estate, or by reason of its seeking specific performance of distinct contracts relating to different parcels of real estate. *Robinson v. Guild*, 12 Met. 323; see *Price v. Minot*, 107 Mass. 63, and *Holman v. Bank of*

Norfolk, 12 Ala. 369. Nor, where it seeks to foreclose a mortgage of land, and to redeem a prior mortgage of one of the tracts held by one of the defendants. *Bell v. Woodward*, 42 N. H. 181. A bill for a general account and settlement of a copartnership may embrace every object necessary to the complete adjustment of the concern, without being objectionable for multifariousness. *Wells v. Strange*, 5 Geo. 22; see *Kent v. Lee*, 2 Sandf. Ch. 105; *Tomlinson v. Claywell*, 4 Jones Eq. (N. C.) 317.

⁶ See *Story Eq. Pl.* § 280; *Bryan v. Blythe*, 4 Blackf. 249; *White v. Curtis*, 2 Gray, 467; *Davoue v. Fanning*, 4 Johns. Ch. 204; *Carmichael v. Bowder*, 3 Howard (Miss.) 252; *Robertson v. Stevens*, 1 Ired. Eq. 247; *Story Eq. Pl.* § 282; *Lynch v. Johnson*, 2 Litt. 104. Debt and detinue may be joined, and for a similar reason, a claim for a specific tract of land, and for a sum of money, the parties being the same, may be united in the same suit in Chancery. *Whitney v. Whitney*, 5 Dana, 329.

one information, held the information to be multifarious, and allowed the demurrer.¹

It should be noticed that, in the above case, there was nothing in the information to show that the character of the bequests was *homogeneous*, and that his Honor held, that if there had been any allegation to show that they were of that character, although there might be minute differences between the bequests, they might all have been comprised in the same information.² Thus, in the case of *Attorney-General v. The Merchant Tailors' Company*,³ where the information prayed the establishment or regulation of a great number of different charitable gifts, which were stated in the information to have been made to the Company, by way of bequest or otherwise, on trust to lend out the same to freemen of the Company, or upon some other like or corresponding trust, for the benefit and advancement of freemen in trade or business: the number of charities in respect of which the relief was sought by the information was eight; but as they were to be applied mainly and substantially for the same objects, and it appeared upon the information that, owing to the minuteness of the sums, each of them could not be administered as the donors pointed out, Sir Lancelot Shadwell V. C. thought that the Court ought, at the hearing, to deal with them conjointly, and that the information was not multifarious.⁴ On appeal, Lord Brougham concurred with this decision, as to seven of the charities, and gave leave to amend the bill by adding parties or waiving relief as to the eighth.⁵

From the above cases it may be deduced, that a plaintiff cannot join in his bill, even against the same defendant, matters of different natures, although arising out of the same transaction; yet, when the matters are *homogeneous* in their character, the introduction of them into the same bill will not be multifarious; and * it is to *344 be observed, that this distinction will not be affected by the circumstance of the plaintiff claiming the same thing under distinct titles, and that the statement of such different titles in the same bill will not render it multifarious.¹ Thus, where a bill was filed for tithes by the rector of a parish in London, in which the title was laid under a decree made pursuant to the 37th Hen. VIII.,

¹ See Story Eq. Pl. §§ 532, 533.

² See 5 Sim. 676.

³ 5 Sim. 288.

⁴ Story Eq. Pl. § 281. It is no objection to a bill in Equity praying for the specific performance of an agreement to convey land, that it also alleges that the defendant purchased the land as the plaintiff's agent, and with his money, and therefore holds it in trust for the plaintiff. *Gerrish v. Towne*, 3 Gray, 82.

⁵ 1 M. & K. 189, 192.

¹ Neither is a bill multifarious where its allegations all relate to one transaction, between the same parties, to one and the same subject-matter and the same injury, although it may pray for two different methods of relief against that injury. *Wells v. Bridgeport*

&c. Co., 30 Conn. 316. Nor is a bill multifarious because several grounds are set out to show the plaintiff's right to the relief sought. *Cauley v. Lawson*, 5 Jones Eq. N. C. 132.

Where the transactions charged are parts of a series of acts, all tending to defeat the plaintiff's remedy at Law, they may properly be united in the same bill. *Randolph v. Daly*, 1 C. E. Green (N. J.), 313; *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 54 Maine, 173. A bill brought by an insurance company, praying that a policy of insurance, which has been obtained from them by fraud, may be delivered up to be cancelled, and also that a commission may issue for the examination of witnesses, is not multifarious. *Commercial Mut. Ins. Co. v. McLoon*, 14 Allen, 351.

c. 12, by which payment of tithes was decreed in London at the rate of 2s. 9d. in the pound on the rents, with a charge that, in case such decree should not be deemed binding, the plaintiff was entitled to a similar payment, under a previous decree, made in the year 1535, and confirmed by the same Act; and in case neither of the said decrees were binding, the bill charged that the plaintiff was entitled, by ancient usage and custom from time immemorial, to certain dues and oblations calculated according to rent at 2s. 9d. in the pound: a demurrer for multifariousness was overruled.²

As a bill by the same plaintiff against the same defendant for different matters would be considered multifarious, so, *à fortiori*, would a bill by several plaintiffs, demanding distinct matters, against the same defendants.³ Thus, if an estate is sold in lots to different purchasers, the purchasers cannot join in exhibiting one bill against the vendor for a specific performance; for each party's case would be distinct, and

there must be a distinct bill upon each contract.⁴ Upon the *345 same principle, where the heir *and next of kin of an intestate, who was an infant, was joined with his sister, who was the other next of kin, as plaintiff in a bill against the widow, who had taken out administration to the intestate's effects, and had also taken possession of the real estate, as guardian to the infant heir, for an account both of the real and personal estate, Sir Lancelot Shadwell V. C. allowed a demurrer for multifariousness, on the ground that the interests in the real and personal estate were distinct from each other.¹ But it has

² *Owen v. Nodin*, M'Lel. 238; 13 Pri. 478; and see *Boyd v. Moyle*, 2 Coll. 316, 323; where a bill to restrain two actions relating to the same matter was held not to be multifarious; see also *Davis v. Cripps*, 2 Y. & C. C. C. 430, 434.

³ *Jones v. Garcia del Rio*, T. & R. 297, 301; see *Finley v. Harrison*, 5 J. J. Marsh. 158; *Kay v. Jones*, 7 J. J. Marsh. 37; *Allen v. Miller*, 4 Jones Eq. (N. C.) 146; *Mix v. Hotchkiss*, 14 Conn. 32; *Kennedy v. Kennedy*, 2 Ala. 571; *Armstrong v. Athens Co.*, 10 Ohio, 235; *Ohio v. Ellis*, 10 Ohio, 456; *Marshall v. Means*, 12 Geo. 61; *Ayers v. Wright*, 8 Fred. Eq. 229. But a widow who is administratrix of her husband's estate, and brings a bill in Equity to redeem real estate mortgaged by him, does not make the bill multifarious, by therein claiming to maintain her suit in both capacities. *Robinson v. Guild*, 12 Met. 323; see *Fairly v. Priest*, 3 Jones Eq. (N. C.) 21. One tax-payer of a school district cannot sue in behalf of himself and of the other tax-payers of the district, to restrain the sale of their real estate for the purpose of collecting a delinquent tax assessed to pay certain judgments against the district, and to have the judgments declared void, on the ground that they were obtained on illegal and void school orders, &c. Each tax-payer desiring the relief sought, must bring his several action. *Newcomb v. Horton*, 18 Wis. 566.

⁴ *Hargreaves v. Wright*, 10 Hare, Ap. 56;

Story Eq. Pl. § 272, and notes; and see *Hudson v. Maddison*, 12 Sim. 416, 418; 5 Jur. 1194, which was the case of a bill by several persons to restrain a nuisance; see, however, *Pollock v. Lester*, 11 Hare, 266, where it was held that, in a similar case, it was no misjoinder, and within the provisions of 15 & 16 Vic. c. 86, § 49. But where an administrator has collusively sold separate lots to separate purchasers at the same sale, a bill against all the purchasers is not multifarious. *Forniquet v. Forstall*, 34 Miss. (5 George), 87; see *Coleman v. Barnes*, 5 Allen. 374; *Tucker v. Tucker*, 29 Miss. (8 Jones) 350; *Gaines v. Chew*, 2 How. U. S. 619; *Williams v. Neel*, 10 Rich. Eq. 1 (S. C.) 338; *Bray v. Thatcher*, 28 Miss. (7 Jones) 129. A bill to have certain notes delivered up and cancelled, the notes being all made by the plaintiff, and payable to the same party, is not multifarious, for joining as respondents the several persons holding these notes. *Garrett v. Mississippi & Ala. R. R. Co.*, 1 Freeman Ch. 70; see *Sears v. Carrier*, 4 Allen, 339; *Bartee v. Tompkins*, 4 Sneed (Tenn.), 623; *Halstead v. Shepard*, 23 Ala. 558; *Martin v. Martin*, 13 Mis. 36.

¹ *Dunn v. Dunn*, 2 Sim. 329; *Maud v. Acklom*, *ib.* 331; *Exeter College v. Rowland*, 6 Mad. 94; see, however, *Sanders v. Kelsey*, 10 Jur. 833, V. C. E.; *Innes v. Mitchell*, 4 Drew. 57; 3 Jur. N. S. 756; *Thomas v. Rees*, 1 Jur. N. S. 197, M. R.; *Allen v. Miller*, 4 Jones Eq. (N. C.) 146.

been decided, that a bill does not become multifarious because all the plaintiffs are not interested to an equal extent; as in *Knye v. Moore*,² where a bill was filed by a woman and her children to compel the delivery up of a deed, by which the defendant had made a provision for the woman (with whom he had cohabited), and her children, and which had been executed in pursuance of an agreement, whereby he was bound, besides the execution of the deed, to pay to the woman an annuity for her life, an account of which was also sought by the bill: it was objected, upon demurrer, that the bill was multifarious, because, besides seeking the performance of the agreement under which the mother alone was entitled, it joined to that the claim for the deed, in which she was interested jointly with her children; but Sir John Leach V. C. thought that, the whole case of the mother being properly the subject of one bill, the suit did not become multifarious because all the plaintiffs were not interested to an equal extent.³

And so, where several persons claim under one general right, they may file one bill for the establishment of that right, without incurring the risk of a demurrer for multifariousness, although the title of each plaintiff may be distinct;⁴ thus, in *Powell v. The *Earl *346 of Powis*,¹ where the freehold tenants of a lordship having rights of common over certain lands, the lord approved parts of the common lands and granted them to other persons, but the tenants prostrated the fences, upon which actions of trespass were brought against them, and they filed a bill in the Court of Exchequer, in the nature of a bill of peace, against the lord and his grantees, to be quieted in the enjoyment of their commonable rights, a general demurrer was overruled: the Court being of opinion, that the objection that the plaintiffs might each have a right to make a separate defence to the actions at Law, was not valid, as there was one general question to be settled, which pervaded the whole.

The proper way in which to take advantage of multifariousness in a bill is by demurrer;² and it is too late to object to a suit, on that ground, at the hearing.³ It seems, however, from the report of the

² 1 S. & S. 61, 64; [*Fiery v. Emmert*, 36 Md. 464.]

³ See observations on this case in *Dunn v. Dunn*, 2 Sim. 331.

⁴ Story Eq. Pl. § 279 a; *Shields v. Thomas*, 18 How. U. S. 253. Where a bill in Equity, by several plaintiffs, to enjoin a nuisance, contained also a prayer for an account and compensation for the damage to each complainant respectively, it was held, that multifarious relief could not be granted as prayed for; but that the objection might be obviated by striking out the prayer for an account of the damage to the plaintiffs respectively. *Murray v. Hay*, 1 Barb. Ch. 59; *Brady v. Weeks*, 3 Barb. (S. C.) 157. So in other cases, where all the plaintiffs are interested in the principal matter stated in the bill, but the bill states a distinct ground for the in-

terference of Equity, which concerns only one of the plaintiffs, if there is no prayer for relief touching this latter matter, the bill is not multifarious. *Judson v. Toulmin*, 9 Ala. 662; *Davis v. Miller*, 4 Jones Eq. (N. C.) 447. [*Ante*, 334, n. 1.]

¹ 1 Y. & J. 159; see *Cornwell v. Lee*, 14 Conn. 524.

² For form of demurrer, see Vol. III.

³ *Ward v. Cooke*, 5 Mad. 122; *Wenne v. Callander*, 1 Russ. 293, 296; *Powell v. Cookereil*, 4 Hare, 557, 562; Story Eq. Pl. § 284, a; [*Green v. Richards*, 8 C. E. Green, 32; *Amin v. Amin*, 9 C. E. Green, 184; *Samborn v. Adair*, 12 C. E. Green, 425; *Cossens v. Rose*, L. R. 12 Eq. 366. Upon demurrer for multifariousness, a portion of the bill asking relief which it is not in the power of the Court to grant may be disregarded, and the

judgment of Sir John Leach M. R. in *Greenwood v. Churchill*,⁴ that the objection may be taken by answer,⁵ and that though the defendants are precluded from raising the objection at the hearing, the Court itself will take the objection, if it thinks fit to do so, with a view to the order and regularity of its proceedings.⁶

*347 * Great care must be taken, in framing a bill, that it does not contain statements or charges which are scandalous or impertinent;¹ for, if it does, it may be objected to by the defendant.² Any proceeding before the Court may be objected to for scandal or impertinence, and the scandalous matter expunged: with costs to the party aggrieved.³

Scandal consists in the allegation of any thing which is unbecoming

residue of the bill, if unobjectionable, sustained. *Snively v. Harkrader*, 29 Gratt. 112.] It is held, in the following cases, that advantage must be taken of multifariousness by demurrer. *Bryan v. Blythe*, 4 Blackf. 249; *Grove v. Fresh*, 9 Gill & J. 281; *Thurman v. Shelton*, 10 Yerger, 383; *Luckett v. White*, 10 Gill & J. 480; *Bell v. Woodward*, 42 N. H. 181, 189; see *Avery v. Kellogg*, 11 Conn. 562; *Moreau v. Safiarans*, 3 Sneed (Tenn.), 595; *Redmond v. Dana*, 3 Bosw. (N. Y.) 615. Filing an answer and going into an examination of testimony as to the merits of the whole matter in controversy, is a waiver of the objection. *Gibbs v. Clagett*, 2 Gill & J. 14; but see *Murdock v. Ratcliff*, 7 Ohio, 119; *Nelson v. Hill*, 5 How. U. S. 127; *Wellborn v. Tiller*, 10 Ala. 305; *Veghte v. The Raritan Water Power Co.*, 4 C. E. Green (N. J.), 142, 144, 145. In *Oliver v. Piatt*, 3 How. U. S. 333, 412, it was held, that the objection of multifariousness cannot, as a matter of right, be taken by the parties except on demurrer, plea, or answer; if not so taken, it must be regarded as waived. *Wilson v. Lynt*, 30 Barb. (N. Y.) 124; *Abbot v. Johnson*, 32 N. H. 9. A demurrer to a bill for multifariousness goes to the whole bill. *Boyd v. Hoyt*, 5 Paige, 65; *McIntosh v. Alexander*, 16 Ala. 87; *White v. White*, 5 Gill, 359. To a bill to foreclose a mortgage of land, and to redeem a prior mortgage of one of the tracts, held by one of the defendants, a plea was filed that the plaintiff's mortgage did not cover the tract which was sought to be redeemed, and the bill was therefore multifarious. It was held that the facts, if well pleaded and established by the proof, showed the bill to be defective on the ground of multifariousness. *Bell v. Woodward*, 42 N. H. 181.

⁴ 1 M. & K. 559. [When the objection is presented by answer, the Court has discretionary power on the hearing to sustain or disregard the objection. *Labadie v. Hewitt*, 85 Ill. 341.]

⁵ *Bell v. Woodward*, 42 N. H. 181, 189; *Abbot v. Johnson*, 32 N. H. 9. To sustain a demurrer to a bill for multifariousness against several defendants, it is not necessary that the defendant demurring should so far answer the bill as to deny the ordinary general charge of combination. *Emans v. Emans*, 3 Beasley (N. J.), 205, 207; see *Brookes v.*

Whitworth, 1 Mad. 86; *Salvidge v. Hyde*, 5 Mad. 138.

⁶ *Greenwood v. Churchill*, 1 M. & K. 557; *Ohio v. Ellis*, 10 Ohio, 456. Where the defendant omits to demur for multifariousness, the Court may, *sua sponte*, take the objection and dismiss the bill; but the Court should not interfere in this way when the trouble and expense by reason of multifariousness might have been saved by a demurrer. *Chew v. Bank of Baltimore*, 14 Md. 299; *Oliver v. Piatt*, 3 How. U. S. 333, 412; *Ohio v. Ellis*, 10 Ohio, 456; *Hickman v. Cooke*, 3 Humph. 640; *Swayze v. Swayze*, 1 Stockt. (N. J.) 273; *Rockwell v. Morgan*, 2 Beasley (N. J.), 384, 386; *Wales v. Newbould*, 9 Mich. 445; *Emans v. Emans*, 1 McCarter (N. J.), 114. But, as stated in note above, the objection of multifariousness, when apparent on the face of the bill, can, in general, be taken only by demurrer; and in such case is waived by not demurring to the bill; but, if it be not apparent upon the bill, it is open to the defendant on his plea, or his answer made expressly for the purpose of taking advantage of it. *Bell v. Woodward*, 42 N. H. 181; *Veghte v. The Raritan Water Power Co.*, 4 C. E. Green (N. J.), 142, 145, per Chancellor Zabriskie; see *Wilson v. Lynt*, 30 Barb. (N. Y.) 124; *Avery v. Kellogg*, 11 Conn. 562; *Cuyler v. Moreland*, 6 Paige, 273; *Luckett v. White*, 10 Gill & J. 480; *Thurman v. Shelton*, 10 Yerger, 383; *Buffalow v. Buffalow*, 2 Ired. Ch. 113; *Grove v. Fresh*, 9 Gill & J. 280; *Gibbs v. Cloyett*, 2 Gill & J. 14; *Bryan v. Blythe*, 4 Blackf. 249; *Veghte v. The Raritan Water Power Co.*, 4 C. E. Green (N. J.) 142. And where the bill sets forth two distinct and independent grounds of complaint, the objection of multifariousness is obviated by the removal of one of those grounds by the defendant after the filing of the bill and before answer. *Whitney v. Union Railway Co.*, 11 Gray, 359; *Commercial Mut. Ins. Co. v. McLoon*, 14 Allen, 351; *McCabe v. Bellows*, 1 Allen, 269.

¹ See 26th Equity Rule of United States Courts, *post*, 326, note, Ap.

² Ord. VIII. 2, XVI. 21.

³ *Erskine v. Garthshore*, 18 Ves. 114; *Ex parte Le Heup*, *ib.* 221, 223; *Doe v. Green*, 2 Paige, 349; *Somers v. Torrey*, 5 Paige, 64; *Powell v. Kane*, 5 Paige, 265; *The Camden*

the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause :⁴ to which may be added, that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous.⁵

There are many cases, however, in which, though the words in the record are very scandalous, yet, if they are material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered as scandalous :⁶ for a man may be stated on the record to be guilty of a very notorious fraud, or a very scandalous action, as in the case of a brokerage bond, given before marriage, to draw in a poor woman to marry ; or where a * man falsely represents him- *348 self to have a great estate, when in fact he is a bankrupt ; or where one man is personated for another ; or in the case of a common cheat, gamester, or sharper about the town : in these, and many other instances, the allegations may appear to be very scandalous, and not fit to remain on the records of the Court ; and yet, perhaps, without having an answer to them, the party may lose his right ; the Court, therefore, always judges whether, though matter be *primâ facie* scandalous, it is or is not of absolute necessity to state it ; and if it materially tends to the point in question,¹ and is become a necessary part of the cause, and material to the defence of either party, the Court never looks upon this to be scandalous.² Were it otherwise, it would be laying down a rule that all charges of fraud are scandalous : which would be dangerous.³ Upon this principle, therefore, it has been determined, that if a bill be filed by a *cestui que trust* for the purpose of removing a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, or to impute to him corrupt or improper motives, in the execution of the trust, or to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation.⁴ It is to be observed, however,

and *Amboy R. R. Co. v. Stewart*, 4 C. E. Green (N. J.), 343, 346. [But the bill cannot be referred for impertinence after answer, nor even after submitting to answer, as by praying time. *Anon.*, 2 Ves. 631; *Ferrar v. Ferrar*, 1 Dick. 173; *Anon.*, 5 Ves. 656; *Jones v. Spencer*, 2 Tenn. Ch. 776.]

⁴ *Wyatt's P. R.* 383.

⁶ Per Lord Eldon, in *Ex parte Simpson*, 15 Ves. 476; and see *Coffin v. Cooper*, 6 Ves. 514; *Atwool v. Ferrier*, 1 W. N. 276; 14 W. R. 1014, V. C. W. Facts not material to the decision are impertinent, and, if reproachful, are scandalous. *Woods v. Morrell*, 1 John. Ch. 103; [*Christie v. Christie*, L. R. 8 Ch. App. 499.]

⁶ [Nothing can be scandalous which is relevant. *Fisher v. Owen*, 8 Ch. Div. 645, 653; *Gleaves v. Morrow*, 2 Tenn. Ch. 592; *Goodrich v. Rodney*, 1 Min. 195.] Thus a statement in an answer, introduced to show the temper with which a bill is filed, and the oppressive course pursued by the plaintiff, is not scandalous or impertinent, inasmuch as it

may have an effect on the costs. *Desplaces v. Goris*, 1 Edw. Ch. 350. So it has been held, that an executor, who is called to account, is not subject to an exception for scandal and impertinence, for saying in his answer, that some of the property is withheld from him under a forged deed possessed by the plaintiff; for his silence might prejudice him afterwards. *Jolly v. Carter*, 2 Edw. Ch. 209; see *Somers v. Torrey*, 5 Paige, 54; *Rees v. Evans*, Chancery, N. Y. Jan. 25, 1841, cited 1 Smith Ch. Pr. (2d Am. ed.) 567, note (b.)

¹ *Everett v. Prythergh*, 12 Sim. 365, 367; *B. v. W.*, 31 Beav. 342; S. C. *nom. A. v. B.*, 8 Jur. N. S. 1141; *Edmunds v. Lord Brougham*, 1 W. N. 67, V. C. S.; 12 Jur. N. S. 156, V. C. S.

² *Gilb. For. Rom.* 207.

³ *Fenhoulet v. Passavant*, 2 Ves. S. 24.

⁴ *Earl of Portsmouth v. Fellows*, 5 Mad. 450; and see *Anon.*, 1 M. & C. 78; *Lord St. John v. Lady St. John*, 11 Ves. 526, 539; *Reeves v. Baker*, 13 Beav. 436.

that in such case it would be impertinent, and might be scandalous, to state any circumstance as evidence of general malice or personal hostility, without connecting such circumstance with the acts of the trustee which are complained of: because the fact of the trustee entertaining general malice or hostility against the plaintiff, affords no necessary or legal inference that his conduct in any particular instance results from such motive.

It has been decided, that, under a general charge of immorality, evidence of particular instances of misconduct may be introduced.⁵ Where, therefore, such evidence can be made use of under the general charge, the specific instances should not, if it can be avoided, be introduced into the bill; thus, it is improper, in a suit which is founded upon the want of chastity in a particular individual, as in cases of bills to set aside securities given *turpi consideratione*, to charge particular instances of levity which might affect the character of strangers, and to fill the record with private scandal: because evidence of those particular instances may be given under the general charge.⁶

*349 *From what has been said before, it may be collected that, although nothing relevant can be scandalous, matter in a bill may be impertinent without being scandalous.¹ Impertinences are described by Lord Chief Baron Gilbert to be, "where the records of the Court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question: as where a deed is unnecessarily set forth *in hæc verba*." ²

⁵ See *Moore v. Moore*, 1 C. E. Green (N. J.), 275, 277.

⁶ *Whaley v. Norton*, 1 Vern. 483; *Clarke v. Periam*, 2 Atk. 333, 337.

¹ *Fenhoulet v. Passavant*, 2 Ves. S. 24; *Goodrich v. Rodney*, 1 Min. 195; *Hood v. Inman*, 4 John. Ch. 437. Impertinence is the introduction of any matters into a bill, answer, or other pleading or proceeding in a suit, which are not properly before the Court for decision at any particular stage of the suit. *Wood v. Mann*, 1 Sumner, 506, 578. The best test to ascertain whether matter be impertinent, is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties. *Woods v. Morrell*, 1 John. Ch. 103. [*Spaulding v. Farwell*, 62 Maine, 319; *Mrzena v. Brucker*, 3 Tenn. Ch. 161.] The Court will not, because there are here and there a few unnecessary words, treat them as impertinent. *Hawley v. Wolvertown*, 5 Paige, 522. [*Del Pont v. Tastet*, 1 Turn. & R. 486. So in an answer. *Gleaves v. Morrow*, 2 Tenn. Ch. 592. *Infra*, 759. And the introduction of scandalous and impertinent matter in a bill will not justify similar matter in the answer, though introduced to meet the allegations of the bill. *Langdon v. Pickering*, 19 Me. 214. But see *contra McIntyre v. Ogden*, 24 N. Y. Sup. Crt. 604.] A bill may contain matter which is impertinent, without the matter being scan-

dalous; but if, in a technical sense, it is scandalous, it must be impertinent. *McIntyre v. Trustees of Union College*, 6 Paige, 239.

An exception to impertinence will be overruled if the expunging the matter excepted to will leave the residue of the clause which is not covered by the exception, either false or wholly unintelligible. *McIntyre v. Trustees of Union College*, 6 Paige, 239.

² *Gilb. For. Rom.* 209; and see *Norway v. Rowe*, 1 Mer. 135; *Lowe v. Williams*, 2 S. & S. 574; *Bally v. Williams*, 1 M'L. & Y. 334; *Slack v. Evans*, 7 Pri. 278, n.; *Gompertz v. Best*, 1 Y. & C. Ex. 114, 117; *Byde v. Masterman*, C. & P. 265, 271; *Attorney-General v. Rickards*, 6 Beav. 444, 449; 1 Phil. 383, 386; S. C. *nom.* *Rickards v. Attorney-General*, 12 Cl. & F. 30; *Allfrey v. Allfrey*, 14 Beav. 235; *Goodrich v. Rodney*, 1 Min. 195; *The Camden and Amboy R. R. Co. v. Stewart*, 4 C. E. Green, 343. All matters not material to the suit, or, if material, which are not in issue, or which, if both material and in issue, are set forth with great and unnecessary prolixity, constitute impertinence. A bill in Chancery, like a declaration at Law, should confine its statements to such facts as are proper to show that the plaintiff is entitled to relief, and which, if proved, will entitle him to relief; and should not set out the evidence, whether oral or written, by which the facts are to be proved. *The Camden and Amboy R. R. Co.*

It is to be observed, that neither scandal nor impertinence, however gross it may be, is a ground of demurrer: it being a maxim of pleading that *utile per inutile non vitiatur*.³ Where, however, *there *350 is scandal in a bill, the defendant is entitled to have the record purified by expunging the scandalous matter; and it was formerly the same with reference to impertinent matter. In order that this might be done, the course formerly was for the defendant to move the Court for an order to have the bill referred to a Master to report whether it was scandalous or impertinent. This reference was obtained of course, and being general, without specifying the particular passages objected to,¹ obviously precluded the party, whose pleading was alleged to be scandalous and impertinent, from exercising any judgment upon the subject, much less from submitting to have the objectionable passages expunged. To remedy this it was provided by a General Order of the Court, that no order should be made for referring any pleading, or other matter for scandal or impertinence, unless exceptions were taken in writing, to the particular passages complained of.²

The practice of excepting to bills, answers, and other proceedings for impertinence has been abolished:³ the Court may, however, direct the costs occasioned by any impertinent matter introduced into any

v. Stewart, 4 C. E. Green (N. J.), 343; [S. C. 6 C. E. Green, 484, 491. "A prolix setting forth of pertinent matter is itself impertinent." Per Lord Eldon in *Slack v. Evans*, 1 Price, 278, note.] In the United States Courts, it is required that every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verbi*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the Court for impertinence, or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the Court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the defendant shall be entitled to all costs occasioned by the reference. Equity Rule, 26.

In New Hampshire, "Every bill and answer shall be expressed as concisely as may be, and no deed, will, agreement, or other writing shall be set forth at length, or annexed to any bill or answer, but so much of either as is material, and no more shall be inserted." Rule of Chancery, 4, 38 N. H. 606. "The idle repetitions, 'your orator further complains,' 'your orator further sheweth to your Honors,' and the like, in bills; and 'this defendant, further answering, saith,' and the like, in answers, shall be omitted. Where the names of parties are omitted, they shall be referred to as *plaintiffs* or *defendants*." Rule of Chancery of N. H. 7.

³ See Broom's Maxims, 602; Story Eq. Pl. § 269.

¹ Harr. by Newl. 43; 1 T. & V. 519.

² 38th Ord. May, 1845; Sand. Ord. 998; afterwards the 23d Ord., Nov., 1850, was substituted. 12 Beav. xxvii. The ground of this order is substantially covered by the 27th Equity Rule of the United States Courts. Exceptions for scandal or impertinence must point out the exceptionable matter with sufficient certainty to enable the adverse party and the officers of the Court to ascertain what particular parts of the pleading or proceeding are to be stricken out, if the exceptions are allowed. *Whitmarsh v. Campbell*, 1 Paige, 645; *Franklin v. Keeler*, 4 Paige, 382; see also *German v. Machin*, 6 Paige, 288. In Maine, exceptions for scandal and impertinence may be taken within twenty days after service of the bill. Chancery Rule 5.

³ By the settled practice in New Jersey, exceptions will lie for impertinence in a bill, answer, or other pleading, and in interrogatories, depositions, or affidavits in any suit. The Camden and Amboy R. R. Co. *v. Stewart*, 4 C. E. Green (N. J.), 343, 344, 345. But the rule to file exceptions and refer them to a master, is for the relief of the Court, and they may be heard at his option directly by the Chancellor. *Ibid.* [S. C. 6 C. E. Green, 484. So, in Tennessee, exceptions lie for impertinence in pleadings and evidence. Code, § 4401; *Johnson v. Tucker*, 2 Tenn. Ch. 244. Objections to evidence for impertinence alone are usually ordered to stand over until the hearing. *White v. Fussell*, 19 Ves. 113; *Osmond v. Tindall*, Jac. 625; *Middlemas v. Wilson*, L. R. 10 Ch. App. 230; *Jones v. Spencer*, 2 Tenn. Ch. 776.]

proceeding, to be paid by the party introducing the same, upon application being made to the Court for that purpose:⁴ such application to be made at the time when the Court disposes of the costs of the cause or matter, and not at any other time.⁵ The Court may also, without any application being made, declare that any pleading, petition, or affidavit, is improper or of unnecessary length: or may direct the taxing master to distinguish what part thereof is improper, or of unnecessary length;⁶ and in like manner, the Judge may disallow impertinent *351 or unnecessary matter in proceedings in Chambers;⁷ in *the first case, the Court may deal with the costs as may be just:¹ and in the second, the costs occasioned in respect of the matter so disallowed to the other party are to be paid by the party on whose behalf the proceeding was brought in, and his own costs in respect thereof disallowed.² Exceptions may still be taken to pleadings, and other matters depending before the Court, for scandal: they must be in writing, and signed by counsel,³ and describe the particular passages alleged to be scandalous.⁴

It appears to have been formerly the opinion that, in cases of scandal, "the Court itself was concerned to keep its records clean, and without dirt or scandal appearing thereon;"⁵ and in *Ex parte Simpson*,⁶ Lord Eldon said that, with reference to the subject of scandal in proceedings, either in causes or in bankruptcy, he did not think that any application by any person was necessary; and that the Court ought to take care that, either in a suit or in a proceeding in bankruptcy, allegations bearing cruelly upon the moral character of individuals, and not relevant to the subject, should not be put upon the record. Any party to the cause may file exceptions for scandal;⁷ hence, a defendant not served with the bill may appear gratis, and file exceptions for scandal;⁸ and one defendant may file exceptions for scandal in a co-defendant's answer.⁹

There was formerly some doubt whether, under any circumstances, a person not a party to the cause could except to any record for scandal.¹⁰ In the case of *Williams v. Douglas*,¹¹ the authorities upon the subject were brought before Lord Langdale M. R. who had to decide upon the question, whether a person not being a party to the cause, who alleged that the bill contained matter at the same time impertinent as

⁴ 15 & 16 Vic. c. 86, § 17; see *Dufour v. Sigell*, 4 De G., M. & G. 520, 526.

⁵ Ord. XL. 11.

⁶ Ord. XL. 9. As to this Ord. see *Moore v. Smith*, 14 Beav. 396; *Mayor of Berwick v. Murray*, 7 De G., M. & G. 497; 3 Jur. N. S. 1, 5; *Re Farrington*, 33 Beav. 346; and for form of Order thereunder, see *Seton*, 89, No. 17.

⁷ Ord. XL. 10.

⁸ Ord. XL. 9. As to this Ord. see *Moore v. Smith*, 14 Beav. 396; *Mayor of Berwick v. Murray*, 7 De G., M. & G. 497; 3 Jur. N. S. 1, 5. For form of order thereunder, see *Seton*, 89, No. 17.

² Ord. XL. 10.

³ Ord. XVI. 2; and see Ord. VIII. 1, 2.

⁴ Ord. XVI. 2. For form of exceptions, see Vol. III.

⁵ 2 P. Wms. 312, *Arg.* [Campbell v. Taul, 3 Yerg. 563.]

⁶ 15 Ves. 476, 477. As to scandal in a proceeding under the summary jurisdiction, see *Re Gornall*, 1 Beav. 226.

⁷ *Coffin v. Cooper*, 6 Ves. 514; 13 & 14 Vic. c. 35, § 27; Ord. XVI. 2.

⁸ *Fell v. Christ's College, Cambridge*, 2 Bro. C. C. 279.

⁹ *Coffin v. Cooper*, 6 Ves. 514.

¹⁰ *Ibid.*; *Anon.*, 4 Mad. 252; see 5 Beav. 86.

¹¹ 5 Beav. 82, 85; 6 Jur. 379.

between the parties, and scandalous as against him, was, of course, and without leave, entitled to file exceptions for scandal, with a view to have the scandalous and impertinent matter expunged.¹² His Lordship said: "There is but little authority on the subject; but from the terms in which Lord Bacon's order is expressed, from the *dicta* of Lord Eldon, expressed in a manner to show that he had considered the subject, and from the apparent necessity of the case, there being, as I conceive, no other way of doing effectual justice to an injured * party, *352 it would seem that the Court must have jurisdiction and authority to expunge scandal from the record, at the instance of a person who may not be a party to the cause." His Lordship, however, thought, that a person not a party to the record could not adopt this proceeding without special leave; and he, therefore, discharged the order then in question, on the ground of its having been obtained *ex parte*. From this case it would appear, that a stranger to the suit can, if the circumstances justify it, obtain the leave of the Court to except to a record for scandal.

It has been decided under the former practice, that in the case of exceptions for impertinence, an exception cannot be partially allowed; and therefore, if part of an exception be good, and the rest bad, the whole exception must be overruled.¹ It has not, it is believed, ever been so held as to exceptions for scandal; and if the question should arise, it is conceived that the practice with reference to exceptions for impertinence would not be followed.

Exceptions must be written on paper of the same description and size as that on which bills are printed,² and be indorsed with the name and place of business of the solicitor and of his agent, if any,³ or with the name and place of residence of the party acting in person,⁴ by whom they are filed.⁵ The exceptions must be filed at the Record and Writ Clerks' Office,⁶ and notice of the filing thereof be given, on the same day, to the solicitor for the opposite party, or to the party himself if he acts in person;⁷ but if the notice is not given at the proper time, the party will be relieved from the irregularity on payment of costs.⁸ No time is limited within which exceptions for scandal must be filed. The

¹² Story Eq. Pl. § 270.

¹ Wagstaff v. Bryan, 1 R. & M. 30; Tench v. Cheese, 1 Beav. 571, 575, and reporter's note, *ibid.*; Byde v. Masterman, C. & P. 265, 272; 5 Jur. 643; Desplaces v. Goris, 1 Edw. Ch. 353. The Court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear, that it is such as ought to be struck out of the record, for the reason that the error on one side is irremediable, on the other, not. See Davis v. Cripps, 2 Y. & C. (N. R.) 443; Story Eq. Pl. § 267; [Johnson v. Tucker, 2 Tenn. Ch. 344.]

² Ord. March 6, 1860, r. 16. The paper must be cream-wove, machine-drawn, foolscap, folio paper, 19 lbs. per mill ream, and have an inner margin about three-quarters

of an inch wide, and an outer margin about two inches and a half wide. Ord. IX. 3.

³ Ord. III. 2.

⁴ Ord. III. 5.

⁵ For form, see Vol. III.

⁶ Ord. XVI. 3. No fee is payable on filing.

⁷ Ord. XVI. 3. The notice must be served before seven o'clock in the evening, except on Saturday, when it must be served before two in the afternoon; or the service will be deemed to have been made on the following day, or on Monday, as the case may be. Ord. XXXVII. 2. For form of notice, see Vol. III.

⁸ Bradstock v. Whatley, 6 Beav. 61; Lowe v. Williams, 12 Beav. 482; and see Lord Sufield v. Bond, 10 Beav. 146, 153.

party whose pleading is excepted to takes an office copy of the exceptions.⁹

Exceptions for scandal must be set down for hearing before the Court,¹⁰ within six days after the filing thereof, exclusive of vacations:¹¹ otherwise, they will be considered as abandoned, and

*353 * the person by whom such exceptions were filed must pay to the opposite party such costs as may have been incurred by such party, in respect of such exceptions.¹ It is presumed that, in such case, by analogy to the practice where a demurrer or plea, though filed, is not set down for argument,² the opposite party may obtain an order of course, on motion, or on petition at the Rolls, for the taxation of the costs of the exceptions, and for payment thereof by the excepting party.

The exceptions must be set down to be heard before the Judge to whose Court the cause is attached.³ The Registrar's Clerk at the order of course seat, will set down the exceptions, on production to him by the solicitor of the party filing them of the Record and Writ Clerks' certificate of the filing of the exceptions, indorsed by the solicitor with a request for that purpose.⁴ The exceptions will then be put in the paper of such Judge, for hearing on an early day; and on the day on which the exceptions are so set down, notice thereof must be served on the party whose pleading or other matter is excepted to: otherwise the exceptions will be deemed not set down.⁵

Exceptions will not be allowed to stand over to an indefinite period.⁶

As this is the first occasion upon which it has been necessary to refer to the time allowed in procedure, it will be convenient to state here some general rules concerning the manner in which such periods are to be computed.

Where any limited time, from or after any date or event, is appointed or allowed for doing any act or taking any proceeding, and such time is not limited by hours, the computation of such limited time is not to include the day of such date, or of the happening of such event, but is to commence at the beginning of the next following day; and the act or proceeding is to be done or taken at the latest on the last day of such limited time, according to such computation.⁷

⁹ Ord. XXXVI. 1.

¹⁰ 13 & 14 Vic. c. 35, § 27.

¹¹ Ord. XXXVII. 13 (2).

¹ Ord. XVI. 20. Similar provisions are made for securing an early decision of exceptions for scandal or impertinence, in the 27th Equity Rule of the United States Courts. It seems that the party whose pleading is excepted to may, if he desires it, obtain an order of course to set the exceptions down before the expiration of the six days. Coyle v. Alleyne, 14 Beav. 171.

² See Ord. XIV. 14, 15, 17; Seton, 1257; and *post*, Chap. XIV. § 4, *Demurrers*; and Chap. XV. § 4, *Pleas*. For forms of motion paper and petition, see Vol. III.

³ Ord. VI. 4.

⁴ Ord. XVI. 10; Reg. Regul., 15 March,

1860, rr. 1, 5. For form of request, see Vol. III.

⁵ Ord. XVI. 10. The notice must be given as directed by Ord. XXXVII. 2; *ante*, p. 352, n. 7. For form of notice, see Vol. III.

⁶ Ord. XXI. 13. For further information as to exceptions, see *post*, Chap. XVII. § 4, *Exceptions to Answers*.

⁷ Ord. XXXVII. 9. [When any matter of proceeding or practice is required by statute or rule of Court to be within a certain number of days, the first day, or terminus *a quo*, is excluded. *Thorne v. Mosher*, 5 C. E. Green, 257. And see *Jones v. Planters' Bank*, 5 Hum. 619; *Elder v. Bradley*, 2 Sneed, 251.]

Where the time for doing any act or taking any proceeding is limited by months, not expressed to be calendar months, such time is to be computed by lunar months of twenty-eight days each.⁸

* Where the time for doing any act or taking any proceeding *354 expires on a Sunday or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding is, as far as regards the time of doing or taking the same, to be held to be duly done or taken, if done or taken on the day on which the offices shall next open:¹ and where any time limited is less than six days, Sundays and other days on which the offices are closed (except Monday and Tuesday in Easter week), are not to be reckoned.²

Exceptions for scandal may be taken at any stage of the suit.³ It is to be noticed, that in *Lady Abergavenny v. Lady Abergavenny*,⁴ Lord King discharged an order obtained for referring a bill for scandal after answer: intimating, that it should be observed as a rule, for the future, not to refer a bill for scandal after the defendant had submitted to answer it; but his Lordship's determination to alter the old practice of the Court in this respect does not appear to have been adhered to.⁵

Upon the production of an order allowing exceptions for scandal, it is the duty of the officer, having the custody or charge of the pleading or other matter, to expunge such parts thereof as the Court has held to be scandalous;⁶ and when he has so done, he usually writes a memorandum in the margin of the document, opposite the expunged passages, to the effect that the same have been expunged pursuant to order, adding its date, and signs the memorandum. If an office copy of the document has been taken at the Record and Writ Clerks' Office, it will be amended, without fee, on being left there for that purpose.⁷

Where a bill had been held scandalous, the Court refused to hear a motion for an injunction until the scandalous matter had been expunged.⁸

Where scandalous matter has been introduced into any proceedings at Chambers, any party wishing to complain of it should take out a

⁸ Ord. XXXVII. 10.

¹ Ord. XXXVII. 12. [Feuchtwanger v. McCool, 2 Stew. Eq. 151.]

² Ord. XXXVII. 11.

³ Ellison v. Burgess, 2 P. Wms. 312, n.; Anon., 5 Ves. 656; Fenhoulet v. Passavant, 2 Ves. S. 24; Anon., *ib.* 631; Barnes v. Saxby, 3 Swanst. 232, n.; Everett v. Prythergh, 12 Sim. 363; Booth v. Smith, 5 Sim. 639; Anon., 5 Sumner's Ves. 656, and cases cited in note.

⁴ 2 P. Wms. 311; see also Jones v. Langham, Bunb. 53.

⁵ Anon., 2 Ves. S. 631; Anon., 5 Ves. 656; see also Woodward v. Astley, Bunb. 304; Everett v. Prythergh, 12 Sim. 363.

⁶ Ord. XVI. 21. No fee is payable. For cases where scandalous or irrelevant documents have been ordered to be taken off the file, see, by consent, Tremaine v. Tremaine, 1 Vern. 189; Jewin v. Taylor, 6 Beav. 120; Walton v. Broadbent, 3 Hare, 334; Clifton v. Bentall, 9 Beav. 105; Makepeace v. Romicux, 8 W. R. 687, V. C. K.; and without consent, Goddard v. Parr, 24 L. J. Ch. 783; 3 W. R. 633, V. C. K.; Kernick v. Kernick, 12 W. R. 335, V. C. W.; and for costs, in such cases, see *Ex parte* Simpson, 15 Ves. 476.

⁷ Braithwaite's Pr. 132.

⁸ Davenport v. Davenport, 6 Mad. 251; and see Coyle v. Alleyne, 14 Beav. 171.

summons for the Judge to examine such matter; and, if scandalous, the Judge may cause it to be expunged.⁹

*355 *As a general rule, the costs occasioned by scandalous matter, and of the application to have it expunged, follow the decision; but they should be asked for when the application is heard.¹

SECTION V. — *The Form of the Bill.*

Having thus endeavored to point out the matter of which a bill in Equity ought to consist, it remains to direct the reader's attention to the form.

The form of an original bill commonly used, previously to the late Act, according to the analysis of Lord Redesdale,² consisted of nine parts: some of which, however, were not essential, and might be used or not at the discretion of the person who prepared it.³ These nine parts were as follows:—

I. The address to the person or persons holding the Great Seal.

II. The names and addresses of the parties complainant.

III. The statement of the plaintiff's case, commonly called the *stating part*.

IV. The charge that the defendant unlawfully confederated with others to deprive the plaintiff of his right.

V. The allegation that the defendants intend to set up a particular sort of defence, the reply to which the plaintiff anticipates by alleging certain facts which will defeat such defence. This was usually termed the *charging part*, from the circumstances that the plaintiff's allegations were usually introduced by way of charge, instead of statement.

VI. The statement that the plaintiff has no remedy without the assistance of a Court of Equity: which was termed the *averment of jurisdiction*.

VII. The *interrogating part*, in which the stating and charging part were converted into interrogatories, for the purpose of eliciting from the defendant a circumstantial discovery, upon oath, of the truth or falsehood of the matters stated and charged.

VIII. The *prayer of relief*, adapted to the circumstances of the case.

IX. The *prayer that process* might issue, requiring the defendant *356 to appear and answer the bill; to which sometimes was * added

⁹ Ord. XXXV. 60. For form of summons, see Vol. III.

¹ *Muscott v. Halhed*, 4 Bro. C. C. 222; *Joddrell v. Joddrell*, 12 Beav. 216. The costs are taxed as between party and party. *Edmunds v. Lord Brougham*, 1 W. N. 93, V. C. S.

² *Ld. Red.* 42. [The character of a pleading is determined by the averments it con-

tains, and not by the name given it, and, therefore, a paper styled a "supplemental petition" may be treated as an amended petition. *City of Cincinnati v. Cameron*, 8 Cent. L. J. 17, Sup. Com. Court of Ohio; see also *Northman v. Insurance Co.*, 1 Tenn. Ch. 312; *Arnold v. Moyers*, 1 Lea, 308.

³ *Ld. Red.* 47.

a prayer for a provisional writ, such as an injunction or a *ne exeat regno*, for the purpose of restraining some proceedings on the part of the defendant, or of preventing his going out of the jurisdiction till he had answered the bill. And as against some of the defendants, this part sometimes contained a prayer that such parties might, upon being served with a copy of the bill, be bound by all the proceedings in the cause.¹

The form of a bill has, however, been materially altered by the Chancery Amendment Act of 1852, by which, as we have seen,² it is enacted that every bill "should contain, as concisely as may be, a narrative of the material facts, matters, and circumstances, on which the plaintiff relies: such narrative being divided into paragraphs, numbered consecutively: and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation,³ and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief."⁴

A bill, as ordinarily framed, may now be said to consist of the first, second, third, and eighth parts above enumerated only; the charging part is, indeed, still occasionally inserted, but it is rather as part of the narrative than as a separate part, and the allegations are, by most draftsmen, introduced as statements, and not by way of charge; so that practically, this part may now be considered as included in the stating part.⁵ The averment of jurisdiction is also still sometimes inserted, but it may also, when inserted, be considered as a portion of the stating part. The fourth part, or charge of confederacy, gradually became disused, and is now universally omitted; the seventh, or interrogating part, is now omitted by express enactment;⁶ and the ninth part, or prayer for process, is also omitted: the writ of *subpoena* to appear and answer the bill having been abolished.⁷ The prayer for an injunction, or a *ne exeat regno*, or that certain formal parties may be bound upon being served with a copy of the bill, is inserted when it forms part of the relief adapted to the circumstances of the case; but then it properly forms a portion of the eighth part.⁸

*The attention of the reader will, therefore, be confined to the *357 four parts above enumerated, as the distinct parts of which a bill now consists.

¹ This is still so, Ord. X. 11; see *post*, Chap. VII. § 1, *Service of a copy of the bill on Formal Defendants*.

² *Ante*, p. 313.

³ See Statutes of Iowa, Revision of 1860, Pt. 3, c. 122, § 2875, § 9, p. 510.

⁴ 15 & 16 Vic. c. 86, § 10; and see form of bill, as given by Ord. IX. 2, and Sched. A., *post*, Vol. III. The present form of bill appears to be a return to the more ancient form; see *Partridge v. Haycraft*, 11 Ves. 574. The fact that the frame of a bill is unusual, and without a precedent, does not alone con-

stitute an objection to the relief sought, if it can be supported upon principle. *Yauger v. Skinner*, 1 McCarter (N. J.), 389, 395.

⁵ See *Mansell v. Feeney*, 2 J. & H. 313, 318.

⁶ 15 & 16 Vic. c. 86, § 10.

⁷ *Ib.* § 2.

⁸ Every bill is intitled "in Chancery," marked with the name of the judge before whom it is intended to be set down, and headed with the names of the parties as plaintiffs and defendants; see *post*, § 7, *Printing and filing the bill*.

1. Address of the Bill.

Every bill must be addressed to the person or persons who have the actual custody of the Great Seal at the time of its being filed;¹ unless the seals are in the Queen's own hand, in which case the bill must be addressed "*To the Queen's Most Excellent Majesty in her High Court of Chancery.*"²

If the Lord Chancellor or Lord Keeper himself be a party, the bill must, in like manner, be addressed to the Queen;³ but in all other cases, including a case where the Master of the Rolls is a party,⁴ the bill must be directed to the Lord Chancellor, or other person having the custody of the Great Seal.

Upon every change in the custody of the Great Seal, or alteration in the style of the person holding it, notice of the form in which bills are to be addressed is put up in the Record and Writ Clerks' Office.

2. Names and Addresses of the Plaintiffs.

It is not only necessary that the names of the several plaintiffs in a bill should be correctly stated, but the description and place of abode of each plaintiff must be set out, in order that the Court and the defendants may know where to resort to compel obedience to any order or process of the Court, and particularly for the payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit.⁵

*358 *It seems that a demurrer will lie to a bill which does not state

¹ In the United States the address of the bill is to the Court from which it seeks relief, by its appropriate and technical description, and the address must be varied accordingly. Story Eq. Pl. § 26. In the Circuit Courts of the United States bills are addressed "To the Judges of the Circuit Court of the United States for the District of," &c. U. States Court Equity Rule, 20; Story Eq. Pl. § 26. In Massachusetts and Maine the bill is addressed "To the Honorable the Justices of the Supreme Judicial Court." In New Hampshire, the address is: "R— ss. To the Supreme Judicial Court." Chancery Rule, 2. In New Jersey, "To the Honorable A. O. Z., Chancellor of the State of New Jersey." In Vermont, "To the Honorable A. B., Chancellor of the First (or Second, &c.) Judicial Circuit." [See Code of Tenn. § 4312.]
² West. Symb. 194, b. For forms of address, see Vol. III.

³ 4 Vin. Ab. 385; Leg. Jud. in Ch. 44, 258; Jud. Auth. M. R. 179, 182; Ld. Red. 7; Coop. Eq. Pl. 23. Braithwaite's Pr. 20. In 1 Prax. Alm. 463, is a precedent of a bill by Lord Chancellor Jeffries, addressed to the King's Most Excellent Majesty, and praying his Majesty to grant the usual process of *Subpœna*; and in Vol. II of the same book, 310, is to be found an answer to the same

bill. The final decree in such cases is, "*By the Queen's Most Excellent Majesty, in her High Court of Chancery,*" and is signed by her. Leg. Jud. in Ch. 254, 256. In Lord Keeper v. Wyld, 1 Vern. 139, where Lord Keeper Guilford and others were plaintiffs, the Master of the Rolls and one of the Chief Justices sat to decide the cause. Coop. Eq. Pl. 23.

⁴ See Leg. Jud. in Ch. 44, where it is stated that in the bundle of Chancery parchments in the Tower, there is a bill by Moreton, Keeper of the Rolls, directed to the Right Rev. Father in God, Robert, Bishop of Bath and Wells. Coop. Eq. Pl. 23, n. (p).

⁵ Ld. Red. 42; and see, as to what is a sufficient description, Griffith v. Ricketts, 5 Hare, 195; Silberring v. Earl of Balcarras, 1 De G. & S. 683; 12 Jur. 108. In the United States Courts, every bill in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants, by and against whom the bill is brought. Thus: "A. B., of —, and a citizen of the State of —, brings this, his bill, against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And," &c. Equity Rule, 20. See Story, Eq. Pl. § 26; Dodge v. Perkins, 4 Mason, 435. It is indispensable in all cases where

the place of abode of the plaintiff;¹ and that if the bill describes the plaintiff as residing at a wrong place, the fact may be taken advantage of by plea: though a defendant cannot put in such a plea, after a demurrer, upon the same ground, has been overruled, without leave of the Court.²

The modern practice, however, in such cases, is not to demur, or plead to the bill, but to apply by special motion or summons,³ on notice to the plaintiff, that he may give security for costs, and that in the mean time proceedings in the suit may be stayed.⁴ Thus, in *Simpson v. Barton*,⁵ Lord Langdale M. R. said: "There can be no doubt, that it is the duty of a plaintiff to state his place of residence, truly and accurately at the time he files his bill; and if, for the purpose of avoiding all access to him, he wilfully misrepresents his residence, he will be ordered to give security for costs. I do not think the rule extends to a case where he has done so innocently, and from mere error."⁶ It is to be observed that, in this case, all the plaintiffs were incorrectly described in the bill; but there does not appear to be any decision upon the point, where there have been several plaintiffs, one or more of whom are correctly *described, and the rest not so. It is presumed, *359 however, from analogy to the practice where there are several plaintiffs, one only of whom is resident abroad,¹ that the Court would not, in such case, require those plaintiffs who are not properly described to give security.

Where a bill is filed on behalf of an infant, or person of unsound

the right to bring the suit in the Courts of the United States is founded on the fact, that the plaintiffs and defendants are citizens of different States, to allege that fact distinctly in the bill. See *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Peters, 148. In New Hampshire, "every bill in the introductory part shall contain the names, places of abode, and proper description of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form in substance shall be as follows: 'A. B., of, &c., complains against C. D., of, &c., and E. F., of, &c., and says,' &c. Chancery Rule, 2 38 N. H. 605. A demurrer will be sustained to a bill in Equity where one of the parties is stated to be a private corporation, if it is not described in substance as a corporation established by law in some State, and transacting its business in some place, but the defect may be amended. The *Winnipegsee Lake Co. v. Young*, 40 N. H. 420. [An objection, raised by demurrer, to a bill filed by a corporation, that it does not aver that the complainant is a corporation, is an objection of form which cannot be raised under a general demurrer for want of equity, and the averment is, moreover, unnecessary. *German Reformed Church v. Von Puechelstein*, 12 C. E. Green, 30.]

¹ *Winnipegsee Lake Co. v. Worster*, 29 N. H. 443; *Winnipegsee Lake Co. v. Young*, 40 N. H. 420.

² *Rowley v. Eccles*, 1 S. & S. 511; *Smith v. Smith*, Kay Ap. 22. In *Bainbridge v. Orton*, 20 Beav. 28, however, Sir John Romilly M. R. appears to have doubted whether such a plea can be maintained; and if such a plea is bad, so, it is apprehended, would a demurrer be, where no address is stated. It is to be observed that, in *Rowley v. Eccles*, the demurrer was overruled, and in *Smith v. Smith* the plea disallowed. See, however, *Sibbering v. Earl of Balcarra*, *ubi sup.*

³ *Tynte v. Hodge*, 2 J. & H. 692.

⁴ *Sandys v. Long*, 2 M. & K. 487; see also *Bailey v. Gundry*, 1 Keen, 53; *Campbell v. Andrews*, 12 Sim. 578; *Bainbridge v. Orton*, 20 Beav. 28; *Hutchinson v. Swift*, 13 W. R. 532, L. J.J.; *Howe v. Harvey*, 8 Paige, 73. For forms of notice of motion and summons, see Vol. III.

⁵ 1 Beav. 556.

⁶ See also *Watts v. Kelly*, 6 W. R. 206, V. C. W.; *Smith v. Cornfoot*, 1 De G. & S. 684; 12 Jur. 260; *Griffith v. Ricketts*, 5 Hare, 195; *Player v. Anderson*, 15 Sim. 104; *Manby v. Bowicke*, 8 De G., M. & G. 468; 2 Jur. N. S. 671; *Kerr v. Gillespie*, 7 Beav. 269; *Knight v. Cory*, 9 Jur. N. S. 491; 11 W. R. 254, V. C. W.; *Dick v. Munder*, 11 Jur. N. S. 819; 13 W. R. 1013, M. R., where the plaintiff was allowed to amend, instead of giving security.

¹ See *ante*, p. 23.

mind not so found, it is not necessary or usual to describe the plaintiff by his place of abode;² because an infant or person of unsound mind is not responsible either for costs or for the conduct of the suit; the description and place of abode of the next friend must, however, be set out.³ In the case of a married woman suing by her next friend, it is usual, but not essential, to set out the address of the married woman, but the address of the next friend must be stated;⁴ and where a married woman sues as a *feme sole*, that fact must be stated in this part of the bill.

The address of a peer of the realm or of a corporate body, suing as plaintiff, need not be stated in the bill.⁵

A plaintiff in a cross-bill is not required to give security for costs on the ground of insufficient description of residence.⁶

The defendant should apply that the plaintiff may give security for costs as soon as he becomes aware of the fact that the plaintiff's address is incorrectly stated in the bill; and if the defendant takes any active steps in the cause after he becomes so aware, and before applying, it will be a waiver of his right to security.⁷

The Order,⁸ by which the penal sum in the bond to be given by the plaintiff by way of security for costs is increased from 40*l.* to 100*l.*, only speaks of cases where the plaintiff is out of the jurisdiction. It has, however, been decided that it applies to the case now under consideration, and to all other cases where security for costs is required.⁹

Where a plaintiff sues as executor or administrator, it is not necessary so to describe himself in this part of the bill: though, as we have seen before, it is necessary that it should appear in the stating part that he has duly proved the will or obtained administration, as the case may be.¹⁰

*360 * Where a plaintiff sues on behalf of himself and of others of a similar class, it should be so stated in this part of the bill; and the omission of such a statement will, in many cases, render a bill liable to objection for want of parties,¹ and in other cases will deprive the plaintiff of his right to the whole of the relief which he seeks to obtain. Thus, in the case of a single-bond creditor suing for satisfaction of his debt out of the personal and real estate of his debtor, and not stating that he sues "on behalf of himself and the other specialty

² Braithwaite's Pr. 25; see forms in Vol. III.

³ This is not altered by the change in practice, which requires a written authority from the next friend to be filed with the bill. *Major v. Arnott*, 2 Jur. N. S. 80, V. C. K.

⁴ Braithwaite's Pr. 21, 25. If the next friend of a plaintiff be undescribed in the bill, he may, on special application by motion or summons, be ordered to give security for costs; see *Kerr v. Gillespie*, and *Watts v. Kelly*, *ubi sup.* For forms of notice of motion and summons, see Vol. III.

⁵ Braithwaite's Pr. 25.

⁶ *Wild v. Murray*, 18 Jur. 892, V. C. W.;

see also *Vincent v. Hunter*, 5 Hare, 320; *Watteu v. Billam*, 3 De G. & S. 516; 14 Jur. 165; *Sloggett v. Viant*, 13 Sim. 187.

⁷ *Swanzy v. Swanzy*, 4 K. & J. 237; 4 Jur. N. S. 1013.

⁸ Ord. XL. 6.

⁹ *Bailey v. Gundry*, 1 Keen, 53, 57; but see *Atkins v. Cook*, 3 Jur. N. S. 283, V. C. K.; *Partington v. Reynolds*, 6 W. R. 307, V. C. K., where it was held that, in the case of a petition, 40*l.* is the proper amount. For more on the subject of security for costs, see *ante*, pp. 27-37.

¹⁰ *Ante*, pp. 318, 319.

¹ *Ante*, p. 237.

creditors," he can only have a decree for satisfaction out of the personal estate in a due course of administration, and not for satisfaction out of the real estate.²

3. *Stating Part.*

With respect to the manner in which the plaintiff's case should be presented to the Court, it is to be observed, that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively:³ and it has been determined, upon demurrer, that it is not a sufficient averment of a fact, in a bill, to state that a plaintiff "is so informed;"⁴ or to say that one defendant alleges, and the plaintiff believes, a statement to be true;⁵ nor is an allegation, that the defendant sets up certain pretences, followed by a charge that the contrary of such pretences is the truth, a sufficient allegation or averment of facts which make up the counter statement.⁶

The claims of a defendant may be stated in general terms, and if a matter essential to the determination of the plaintiff's claim is charged to rest within the knowledge of a defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought, a precise allegation is not required.⁷

* In general, however, a plaintiff must state upon his bill a case *361 upon which, if admitted by the answer, or proved at the hearing, the Court could make a decree;¹ and, therefore, where a bill was filed

² Bedford v. Leigh, 2 Dick. 707; May v. Selby, 1 Y. & C. C. 235; Connolly v. M'Dermott, 3 Jo. & Lat. 260; Ponsford v. Hartley, 2 J. & H. 736; Johnson v. Compton, 4 Sim. 47; ante, p. 235. If, however, a defect of this description appear at the hearing, the Court will allow the case to stand over, with liberty to the plaintiff to amend, *ibid.*; Biscoe v. Waring, Rolls, 7 Aug., 1835, MS.; Casby v. Wickliffe, 7 B. Mon. 120. Or the bill may be ordered to be taken as a bill on behalf of the other creditors. Woods v. Sowerby, 14 W. R. 9, V. C. W.

³ Ld. Red. 41; Darthez v. Clemens, 6 Beav. 165, 169; Munday v. Knight, 3 Hare, 497, 502; Padwick v. Hurst, 18 Beav. 575; 18 Jur. 763; Bainbridge v. Moss, 3 Jur. N. S. 58, V. C. W.; Duckworth v. Duckworth, 35 Ala. 70; Moran v. Palmer, 13 Mich. 367; McIntyre v. Wright, 6 Paige, 239; [Rice v. Hosier Co., 56 N. H. 114. An assertion of a claim by way of inference from a recital of a master's finding on an *ex parte* petition of complainant, is insufficient. Search v. Search, 12 C. E. Green, 137. *A fortiori*, where there is no averment of title at all. Phillips v. Schooley, 12 C. E. Green, 410.] An allegation in a bill that the plaintiff "has been informed and believes, and therefore avers," is a sufficiently positive averment. Wells v. Bridgeport, &c. Co., 30 Conn. 316. The pleader should aver the fact on his information and belief, and not his information and belief that the fact exists. Nix v. Winter, 35 Ala. 309.

⁴ Lord Uxbridge v. Staveland, 1 Ves. S. 56; Lucas v. Oliver, 34 Ala. 626; Cameron v. Abbott, 30 Ala. 46; Jones v. Cowles, 26 Ala. 612; [Quinn v. Leake, 1 Tenn. Ch. 71. Such an averment simply puts in issue the complainant's information and belief, not the truth or falsehood of the facts about which he is informed. *Ex parte Reid*, 50 Ala. 439.]

⁵ Egremont v. Cowell, 5 Beav. 620, 622; Hodgson v. Espinasse, 10 Beav. 473; Nix v. Winter, 35 Ala. 309.

⁶ Flint v. Field, 2 Anst. 543; Houghton v. Reynolds, 2 Hare, 267; 7 Jur. 414.

⁷ Ld. Red. 42; Aikin v. Ballard, Rice Ch. 13; Story Eq. Pl. § 255. [It may be stated upon information and belief followed by the averment that he, therefore, charges the fact to be true. Campbell v. Paris, &c. R. Co., 71 Ill. 611.] A bill in Equity, brought by a partner against his copartner, for an account, &c., wherein it is averred that the defendant has all the partnership books and papers in his possession, or under his control, and refuses to permit the plaintiff to examine them, need not contain such certainty and particularity of statement as would be held necessary if the plaintiff had access to those books and papers. Towle v. Pierce, 12 Met. 324; Crockett v. Lee, 7 Wheat. 522; Knox v. Smith, 4 How. U. S. 298; Capel v. McCollum, 27 Ala. 461; Miller v. Thatcher, 9 Texas, 482; Jones v. Brinker, 29 Mis. 65 Bennett 87.

¹ Perry v. Carr, 41 N. H. 371. Care must be taken that every averment necessary to entitle the plaintiff to the relief prayed

to restrain a defendant from setting up outstanding terms, in bar of the plaintiff's right at Law: not stating that there were any outstanding terms or estates, but merely alleging that the defendant threatened to set up some outstanding term, or other legal estate, Sir Lancelot Shadwell V. C. allowed a demurrer, on the *ground that the bill ought to have stated what the outstanding term or estate was.¹

Although the rules of pleading in Courts of Equity, especially in the case of bills, are not so strict as those adopted in Courts of Law, yet, in framing pleadings in Equity, the draftsman will do well to adhere as closely as he can to the general rules laid down in the books which treat of Common Law pleadings, whenever such rules are applicable to the case which he is called upon to present to the Court: ² for there can be no doubt, that the stated forms of description and allega-

for, should be contained in the stating part of the bill. *White v. Yaw*, 7 Vt. 357; *Kunkel v. Markell*, 26 Md. 408. This part of the bill should be full and accurate, for if a plea is put in, the validity of the plea will be decided with reference to the stating part of the bill, and not with reference to the interrogatory part, if it varies from it. *Story Eq. Pl. § 27*; see *Macnamara v. Sweetman*, 1 Hogan, 29; *Mechanics' Bank v. Levy*, 3 Paige, 606; *Coles v. Buchanan*, 3 Ired. Ch. 374. Where the stating part does not show the equity of the plaintiff's case, the defect cannot be supplied by inference, or by reference to averments in other parts of the bill. *Wright v. Dame*, 22 Pick. 55; see to the same point, *Harrison v. Nixon*, 9 Peters, 503; *Shepard v. Shepard*, 6 Conn. 57; *Duckworth v. Duckworth*, 35 Ala. 70; *Mason v. Foster*, 3 J. J. Marsh. 284; *Lecraft v. Dempsey*, 15 Wend. 83; *Yancy v. Fenwick*, 4 Hen. & M. 423; *Mitchell v. Maupin*, 3 Monroe, 88; *Crocker v. Higgins*, 7 Conn. 342; *Hobart v. Frisbie*, 5 Conn. 592; *Blake v. Hinkle*, 10 Yerger, 218; *Taliaferro v. Foot*, 3 Leigh, 58; *Hood v. Inman*, 4 John. Ch. 437; *Chambers v. Chambers*, 4 Gill & J. 420; *Estep v. Watkins*, 1 Bland, 486; *Townshend v. Duncan*, 2 Bland, 45; *Watkins v. Stockett*, 6 Harr. & J. 445; *Timms v. Shannon*, 19 Md. 312. [The stating part of a bill cannot be enlarged by the terms of the prayer for relief. *Bushnell v. Avery*, 121 Mass. 148. But a statement in the form of a charge intended as an averment is sufficient on demurrer. *Johnson v. Helmstaedter*, 3 Stew. Eq. 124.] The plaintiff will not be permitted to offer or require evidence of any material fact not distinctly stated in the premises. See *Story Eq. Pl. §§ 28, 257*; *Rowan v. Bowles*, 21 Ill. 17; *Sprigg v. Albin*, 6 J. J. Marsh. 158; *Skinner v. Bailey*, 7 Conn. 496. He cannot recover on a case different from that alleged. *Sanborn v. Kittredge*, 20 Vt. 632; *Gibson v. Carson*, 3 Ala. 421; *Harding v. Handy*, 11 Wheat. 103; *Jackson v. Ashton*, 11 Peters, 229. [Neither allegations without proof, nor proof without allegations, nor allegations and proof which do not substantially correspond, will entitle complainant to relief, unless the defect be remedied by amendment. *Alexander v.*

Taylor, 56 Ala. 60. And see *Floyd v. Ritter*, 56 Ala. 356; *Meadors v. Askew*, 56 Ala. 584; *Lehigh, &c. R. Co. v. McFarlan*, 3 Stew. Eq. 180.] A general statement or charge, however, of the matter-of-fact, is sufficient; and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs. *Nesmith v. Calvert*, 1 Wood. & M. 34; *Lovell v. Farrington*, 50 Maine, 239; *Rogers v. Ward*, 8 Allen, 387. On the other hand, the charge may be substantially made by stating the facts from which the fraud or mistake would be necessarily implied. Courts of Equity derive their jurisdiction from the facts alleged, not from the terms used in setting them out. *Grove v. Rentch*, 26 Md. 367, 377; see further to these points, *Dilly v. Heckrott*, 8 Gill & J. 171; *Morrison v. Hart*, 2 Bibb, 4; *Lemaster v. Burkhardt*, 2 Bibb, 26; *Buck v. McCaughtry*, 5 Monroe, 220; *Bank of United States v. Shultz*, 3 Ohio, 62; *Anthony v. Leftwich*, 3 Rand. 263; *Boone v. Chiles*, 10 Peters, 177; *Jackson v. Cartwright*, 5 Munf. 314; *Aikens v. Bullard*, 1 Rice Eq. 13; *Bishop v. Bishop*, 13 Ala. 475; *White v. Yaw*, 7 Vt. 357; *The Camden and Amboy R. R. Co. v. Stewart*, 4 C. E. Green (N. J.), 343. But where the facts stated in the bill are disproved, or are defectively stated, relief may be granted upon the facts stated in the answer. *Maury v. Lewis*, 10 Yerger, 115; *Rose v. Mynatt*, 7 Yerger, 30; *M'Laughlin v. Daniel*, 8 Dana, 184; *Dealty v. Murphy*, 3 A. K. Marsh. 474; but see *Thomas v. Warner*, 15 Vt. 110; *West v. Hall*, 3 Harr. & J. 221; *Edwards v. Massey*, 1 Hawks. 359. [And see as to variance, 860, 861.]

¹ *Stansbury v. Arkwright*, 6 Sim. 481, 485; see also *Jones v. Jones*, 3 Mer. 161, 175; *Barber v. Hunter*, cited *ib.* 170, 173; *Frietas v. Dos Santos*, 1 Y. & J. 574. If the bill founds the right against the defendant upon the fact of his having notice, it should charge such notice directly, otherwise it is not matter in issue on which the Court can act. *Story Eq. Pl. § 263*, and cases in note.

² See *The Camden and Amboy R.R. Co. v. Stewart*, 4 C. E. Green (N. J.), 343, 346.

tion which are adopted in pleadings at Law have all been duly debated under every possible consideration, and settled upon solemn deliberation, and that, having been established by long usage, experience has shown them to be preferable to all others for conveying distinct and clear notions of the subject to be submitted to the Court; and if this be so at Law, there appears to be no reason why they should not be considered as equally applicable to pleadings in Courts of Equity, in cases where the object of the pleader is to convey the same meaning as that affixed to the same terms in the ordinary Courts. Thus, as at Law, if a man intends to allege a title in himself to the inheritance or freehold of lands or tenements in possession, he ought regularly to say that he is *seised*; or, if he allege possession of a term of years, or other chattel real, that he is *possessed*; ³ if he allege seisin of things *manurable*, as of lands, tenements, rents, &c., he should say that he was *seised in his demesne as of fee*; and if of things not manurable, as of an advowson, he should allege that he is *seised as of fee and right*, omitting the words *in his demesne*, ⁴ so that there seems to be no reason why the same forms of expression should not be equally proper in stating the same estates in Equity. It is, indeed, the general practice, in all well-drawn pleadings, to insert them, although they are frequently accompanied with other words, which are sometimes added by way of enlarging their meaning, and of extending them to other than mere legal estates. Thus, in stating a seisin in fee, the words "*or otherwise well entitled to*," are frequently added: although it would seem that, in some cases, the addition of these words would be incorrect, and might render the allegation too uncertain. ⁵

In recommending the use, in pleadings in Equity, of such technical expressions as have been adopted in pleadings at Common *Law, it is not intended to suggest that, in Equity, the use of *363 any particular form of words is absolutely necessary, or that the same thing may not be expressed in any terms which the draftsman may select as proper to convey his meaning, provided they are adequate for that purpose. ¹ All that is contended for is, that notwithstanding the looseness with which pleadings in Courts of Equity may, consistently with the principles of those Courts, be worded, yet, where it is intended to express things for which adequate legal or technical expressions have been adopted in pleadings at Law, the use of such expressions will be desirable, as best conducing to brevity and clearness. Assuming, therefore, that even in pleadings in Equity the same form of words as are used in pleadings at Law may generally be introduced with advantage, the reader's attention will here be directed to some of the rules adopted in legal pleadings, which may with good effect be adopted in Equity.

³ Stephen on Pl. 233, 242; Whitworth Eq. Prec. 162, n. *et seq.*

⁴ *Ibid.*

⁵ Baring v. Nash, 1 V. & B. 551.

¹ See Ridgely v. Bond, 18 Md. 433; Bolgiano v. Cooke, 19 Md. 375; Grove v. Bentch, 26 Md. 367, 377.

Thus, it is a rule in pleading, at Common Law, that the nature of a conveyance or alienation should be stated according to its legal effect, rather than its form of words;² and this is in substance enjoined by the General Order,³ which directs "that deeds, writings, or records be not unnecessarily set out in pleadings *in hæc verba*, but that so much of them only as is pertinent and material be set out or stated, or the effect and substance of so much of these only as is pertinent and material be given, as counsel may deem advisable, without needless prolixity."⁴

It may be observed, however, that although it is desirable, in stating instruments, that the above Order should be adhered to, and that the substance only of such instruments as are necessary to be set out should be stated, without repeating them *in hæc verba*, yet cases may arise in which it is convenient to state written documents in their very words. This occurs, whenever any question in the cause is likely to turn upon the precise words of the instrument, as in the case of bills filed for the establishment of a particular construction of a will which is informally or inartificially worded: in such bills, the words which are the subject of the discussion ought to be accurately set out, in order more specifically to point the attention of the Court to them. Indeed, wherever informal instruments are insisted on, upon the construction

of which any difficulty is likely to arise, as is frequently the case *364 in agreements * reduced into writing by persons who have not been professionally educated, or which are insisted on as resulting from a written correspondence: in all such cases, the written instruments relied on, or at least the material parts of them, should be set out *in hæc verba*. So also, in bills filed for the purpose of carrying into effect written articles, upon the construction of which, although they are formally drawn, questions are likely to arise, such articles or so much of them as are likely to give rise to questions, should be accurately stated. In many cases also, the expressions of an instrument or writing are such that any attempt to state their substance, without introducing the very words in which they are expressed, would be ineffectual: in such cases, also, it is best that they should be set forth; and where a deed or agreement, or other instrument relied upon by the plaintiff has been lost or mislaid, and is not forthcoming, it may be useful, if it can be done, to set out the contents of the instrument at length, in order to obtain an admission of the contents from the defendant in his answer.

It may be observed here that, according to the old practice of the

² Stephen on Pl. 237; see 1 Chitty Pl. (9th Am. ed.) 305; *Andrews v. Williams*, 11 Conn. 326; *Morris v. Fort*, 2 McCord, 398; *Lent v. Padelford*, 10 Mass. 230; *Hopkins v. Young*, 11 Mass. 307; *Walsh v. Gilmer*, 3 Harr. & J. 407; *Grannis v. Clark*, 8 Cowen, 36; *Ridgley v. Riggs*, 4 Harr. & J. 363; *Silver v. Kendrick*, 2 N. H. 160; *Osborne v. Lawrence*, 9 Wend. 135;

Crocker v. Whitney, 10 Mass. 320; *Goodrich v. Rodney*, 1 Min. 195.

³ Ord. VIII. 2.

⁴ See 26th U. States Equity Rule; *Goodrich v. Rodney*, 1 Min. 195; Rule 49 of New Jersey Revised Chancery Rules; *The Camden and Amboy R. R. Co. v. Stewart*, 4 C. E. Green (N. J.), 343.

Court, when a plaintiff wished to obtain from a defendant an admission as to a particular deed or instrument in his, the plaintiff's own possession, it was usual to leave the deed or other instrument in the hands of the plaintiff's clerk in Court, and, having stated that fact in the bill, to pray that the defendant might inspect it, and after inspection answer the interrogatories applicable to the subject.¹ This practice, however, has been for a long time discontinued; and it is now considered sufficient to state upon the bill the date, parties' names, and substance of the deed or instrument relied upon by the plaintiff, and then, by interrogatory, to require the defendant to set forth whether a deed, of the nature of that set forth, was not duly executed by and between the parties stated, or some, or one, or which of them, and whether the deed does not bear the date, and is not to the purport or effect before set out, or of some, and what other date, or to some, and what other purport and effect. This form of statement and interrogatory is calculated to draw from the defendant, either an admission or denial of the deed, and of all knowledge of it, or of its execution, date, and contents; or else a statement of the defendant's knowledge or belief of the parties by whom it was executed, and of its date, tenor, and effect.

With reference to the subject of stating written instruments, it may be observed, that it is a rule in pleading at Law, that where the nature of a conveyance is such that it would, at Common Law, * be valid *365 without deed or writing, there no deed nor writing need be averred, though such document may in fact exist; but where the nature of the conveyance requires, at Common Law, a deed or other written instrument, such instrument must be alleged.¹ The same rule has, it would seem, been adopted with respect to pleadings in Equity; thus, in stating a conveyance by bargain and sale, it is not essential to state that it was enrolled: for though such a process is rendered necessary by statute, it was not so at Common Law.²

In a bill for specific performance of an agreement relating to land, it is, however, necessary to allege that the agreement is in writing: ³ other-

¹ Per Lord Eldon, in the *Princess of Wales v. The Earl of Liverpool*, 1 Swanst. 123. Maps, plans, trade-marks, &c., may, however, still be deposited at the Record and Writ Clerks' office, and referred to in the bill. Braithwaite's Pr. 25.

² Stephen on Pl. 238, 287, 288.

³ See *Harrison v. Hogg*, 2 Ves. J. 327, where it is alleged that a mortgagee "by his assignment in writing on said deed, sealed with his seal" (date and consideration stated), "conveyed and assigned to the plaintiff all his right, title, and interest, in the same, together with the debt secured thereby, and all his claims in and to the mortgage, all which will more fully appear by said deed and assignment when produced in Court," it was held sufficient, on demurrer, although there was no allegation in the bill that the assignment was acknowledged and recorded. *Lovell v. Farrington*, 50 Maine, 239.

³ *Redding v. Wilkes*, 3 Bro. C. C. 400; *Barkworth v. Young*, 4 Drew. 1; *Wood v. Midgeley*, 5 De G., M. & G. 41; see *Piercy v. Adams*, 22 Geo. 109. [But the Statute of Frauds did not alter the forms of pleading either at Law or in Equity, and, therefore, if the bill do not show that the contract is in parol, it will be presumed to be in writing, and a demurrer will not lie; *aliter*, where the bill shows a contract by parol. *Cozine v. Graham*, 2 Paige, 177; *Champlin v. Parrish*, 11 Paige, 405; *Switzer v. Skiles*, 3 Gilman, 529; *Dudley v. Bachelder*, 53 Me. 403; *Macey v. Childress*, 2 Tenn. Ch. 442; *infra*, 561, n. 2; 655, n. 9.] Part-performance of a contract within the Statute of Frauds must, in order to entitle a party to relief, be expressly stated in the bill. See *Meach v. Stone*, 1 D. Chip. 182.

As to the effect of part-performance, and what will amount to a part-performance, suf-

wise, the bill will be demurrable; but it is not necessary to allege that it has been signed:⁴ because, from the statement that it is in writing, it is necessarily to be inferred that it has been signed.⁵

It may be noticed, in this place, that where an agreement relied upon in a bill is to be collected from the letters between the parties, the letters may be stated in the bill, either as constituting the alleged agreement, or as evidence of an alleged parol agreement. In the first case, the defendant may insist that they do not make out a concluded agreement, and that no intrinsic evidence can be received; in the latter, he may plead the Statute of Frauds.⁶

It is upon the principle above referred to, that although stamp-
*366 ing is, by sundry Acts of Parliament, rendered necessary to the *va-
lidity of a variety of instruments, it is not necessary, nor is it even usual, in pleadings, to aver that such instruments have been duly stamped.

It is to be observed, also, that the rule of pleading above referred to applies only to cases in which the necessity for a conveyance or agreement being in writing, is superadded by statute to things which at Common Law might have been by parol; but where a thing is originally created by Act of Parliament, and required to be in writing, it must then be stated, with all the circumstances required by the Act. Thus, it was necessary to allege that a devise of lands (which at Common Law is not valid, and was first authorized by the statutes 32 Hen. VIII. c. 1, and 34 Hen. VIII. c. 5) had been made in writing, which is the only form in which those statutes authorize it to be made.¹

It seems, however, that it is sufficient, under the present Wills Act,² to allege, that a will has been duly made, or duly made in writing; and that it is not necessary to allege the signature and attestation, as required by the Act.³

Some doubt appears to be entertained whether, in suits under the 8 Geo. II. c. 13, and 7 Geo. III. c. 38,⁴ by which the property in certain prints is vested in the inventors for a certain number of years from

sufficient to take a case out of the statute, see *Whitchurch v. Beavis*, 2 Bro. C. C. (Perkins's ed.) 566, note (a), and cases cited; *Whitebread v. Brockhurst*, 1 *id.* 404, and cases cited in notes; 2 Story Eq. Jur. §§ 759-767; *Newton v. Swasey*, 8 N. H. 9. A trust need not be alleged to be in writing, but it is sufficient if the trust is proved by writing at the hearing; see *Davies v. Ottý*, 33 Beav. 540; 2 De G., J. & S. 238; and see *Forster v. Hale*, 3 Ves. 696; *Randall v. Morgan*, 12 Ves. 74, and comp. the 4th and 7th sections of Stat. of Frauds. *Peasley v. Barney*, 1 D. Chip. 333; see *Coquillard v. Suydam*, 8 Blackf. 24.

⁴ *Rist v. Hobson*, 1 S. & S. 543; *Coles v. Boone*, 10 Paige, 535; *Ontario Bank v. Root*, 3 Paige, 478; *Hobart v. Andrews*, 21 Pick. 534; *Richards v. Richards*, 9 Gray, 314; *Stern v. Drinker*, 2 E. D. Smith (N. Y.), 401; *Nel-*

son v. Dubois, 13 John. 177; *Cleaves v. Foss*, 4 Greenl. 1; *Wallis v. Frazier*, 2 Nott & McC. 180. [Where the agreement had been entered into by an agent for the plaintiff, an allegation that the plaintiff has been informed by his agent that a written agreement was executed, followed by statements of the agreement, will be sufficient. *Heerd v. Pilley*, L. R. 4 Ch. App. 548.]

⁵ *Barkworth v. Young*, *ubi sup.*

⁶ *Birce v. Bletchley*, 6 Mad. 17; *Skinner v. M'Douall*, 2 De G. & S. 265.

¹ *Stephen* on Pl. 239.

² 7 Will. IV. & 1 Vic. c. 26.

³ *Hyde v. Edwards*, 12 Beav. 160; 13 Jur. 757.

⁴ These Acts are amended and explained by 17 Geo. III. c. 57; 6 & 7 Will. IV. c. 59, Ir.; 15 & 16 Vic. c. 12; see *Phillips* on Copyright, Chap. VIII.

the day of publishing, it is necessary to state that the name of the engraver and date of the print have been engraved on the print, as required by the first-mentioned Act. In *Blackwell v. Harper*,⁵ Lord Hardwicke was of opinion, that the clause in the Act was only directory, and that the property was vested absolutely in the engraver, so as to entitle him to sue, although the day of publication was not mentioned, and compared it to the clause under the statute of Anne,⁶ which required entry at Stationers' Hall: upon the construction of which it had been determined that the property vests, although the direction had not been complied with. Lord Ellenborough also held, at *nisi prius*,⁷ that an action might be maintained, although the proprietor's name was not inscribed; observing, that the interest was vested by the statute, and that the Common Law gave the remedy.⁸ On the other hand, it appears to have been taken for granted by the Court of King's Bench, in the case of *Thompson v. Symonds*,⁹ though it became unnecessary to decide the point, that both the name and the date should appear; and in *Harrison v. Hogg*,¹⁰ Lord Alvanley M. R. * stated that he inclined to differ *367 from Lord Hardwicke, and that it was his opinion that the insertion of the name and date was essential to the plaintiff's right.

It has been before stated, that it is a rule in pleading, that whenever at Common Law a written instrument was not necessary to complete a conveyance, it is not necessary in pleading to aver it, although such an instrument has been rendered necessary by statute, and has been executed. The converse of this is also a rule, so that, whenever a deed in writing is necessary by Common Law, it must be shown in pleading; therefore, if a conveyance by way of grant be pleaded, a deed must be alleged: because matters that "lie in grant," according to the legal phrase, can pass by deed only.¹ Thus in *Henning v. Willis*,² where the plaintiff filed a bill for tithes, and set up by way of title a parol demise by the impropiator for one year, the defendant demurred for want of title in the plaintiff, and the plaintiff submitted to the demurrer. Upon the same ground, in *Jackson v. Benson*,³ where the bill prayed an account of tithes, and merely stated that the impropriate rector demised the tithes to him, a demurrer, put in by the defendant, was considered to be well founded; and in *Williams v. Jones*,⁴ the same objection was taken at the hearing, and would have prevailed, had it not appeared that the impropiators had originally been made parties to the suit, but

⁵ 2 Atk. 93, 95; Barn. 210, 213.

⁶ 8 Anne, c. 19, repealed by 5 & 6 Vic. c. 45.

⁷ Beckford v. Hood, 7 T. R. 620; and see Buller v. Walker, cited 2 Atk. 94.

⁸ Roworth v. Wilkes, 1 Campb. 94.

⁹ 5 T. R. 41.

¹⁰ 2 Ves. J. 327. The Copyright Act of 5 & 6 Vic. c. 45, as to Books, has been held to include Engravings in Books; so that the provisions of 8 Geo. II. c. 13, need not, in

such case, be complied with. *Bogue v. Houlston*, 5 De G. & S. 267; 16 Jur. 372. Under this Act, however, payment for an article written for a periodical must be alleged. *Richardson v. Gilbert*, 1 Sim. N. S. 336; 15 Jur. 389; but see Phillips on Copyright, 176.

¹ Stephen on Pl. 239.

² 3 Wood, 29; 2 E. & Y. 188.

³ M'Clel. 62; 13 Pri. 131.

⁴ Younge, 252.

had been dismissed in consequence of their having disclaimed all interest in the tithes in question.⁵

It may be noticed here that in stating deeds or other written instruments in a bill, it is usual to refer to the instrument itself, in some such words as the following, *viz.*, “*as by the said indenture, when produced, will appear.*” The effect of such a reference is to make the whole document referred to part of the record. It is to be observed, that it does not make it evidence: in order to make a document evidence, it must, if not admitted, be proved in the usual way; but the effect of referring to it is to enable the plaintiff to rely upon every part of the instrument, and to prevent his being precluded from availing himself, at the hearing,⁶ of any portion, either of its recital or operative part, which may not be inserted in the bill, or which may be inaccurately set out. Thus, it seems that a plaintiff may, by his bill, state simply the date and general

*368 purport of any particular deed or instrument under which he claims, and that such statement, provided it is accompanied by *a reference to the deed itself, will be sufficient. As in *Pouncefort v. Lord Lincoln*,¹ where the plaintiff's claims were founded on a variety of deeds, wills, and other instruments; but to avoid expense, or for some other purpose, the dates and general purport only of such instruments were stated in the bill, with reference to them. This manner of stating the case does not appear to have been considered as a ground of objection to the bill; but when the cause was brought to a hearing, Sir Thomas Clarke M.R. referred it to the Master to state the rights claimed by the plaintiff under the several instruments mentioned in the bill, and reserved costs and further directions until after the report, and the cause was afterwards heard, and a decree made, on the report, which stated the instruments. It is obvious that the method of stating the plaintiff's title adopted in the above-mentioned case, was one of great inconvenience; and although it has been referred to here, it is by no means from a wish to recommend its adoption as a precedent. It is always necessary, in drawing bills, to state the case of the plaintiff clearly, though succinctly, upon the record; and in doing this, care should be taken to set out precisely those deeds which are relied upon, and those parts of the deeds which are most important to the case.²

Although the same precision of statement is not required in bills in Equity as in pleadings at Law, yet it is absolutely necessary that such a convenient degree of certainty should be adopted, as may serve to give the defendant full information of the case which he is called upon

⁵ Younge, 255; and see *ante*, p. 211.

⁶ But on the argument of a demurrer, he cannot avail himself of the portion not set out. *Harmer v. Gooding*, 3 De G. & S. 407, 410; *Cudston v. Tite*, 1 Giff. 395; 4 Jur. N. S. 579.

[Exhibits are no part of the pleading, and a defect in matter of substance cannot be supplied by reference to an exhibit attached

to, and made a part of, the complaint. *Stilwell v. Adams*, 29 Ark. 346; *City of Los Angeles v. Signoret*, 59 Cal. 298. But see *Howard Man. Co. v. Water Lot Co.*, 53 Ga. 689. See also *Moses v. Brodie*, 1 Tenn. Ch. 397.]

¹ 1 Dick. 362.

² *Martin v. McBryde*, 3 Ired. Eq. 531; *King v. Trice*, 3 Ired. Eq. 568.

to answer.³ In *Cresset v. Milton*,⁴ Lord Thurlow observed, "special pleading depends upon the good sense of the thing, and so does pleading here; and though pleadings in this Court run into a great deal of unnecessary verbiage, yet there must be something substantial;" and in Lord Redesdale's Treatise it is said, that the rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly, yet succinctly, alleged.⁵ And, in several cases, demurrers have been allowed to bills on the ground of the vagueness and uncertainty of their statements.⁶ Upon the same principle, a mere allegation that the *defendant is a trustee for the plaintiff, not supported by *369 the facts stated, will not prevent a demurrer;¹ and so, a statement that a defendant claimed an interest as purchaser under an alleged agreement, but that such agreement, if any, had been long since abandoned and waived, was held insufficient to prevent a demurrer by that defendant.² However, where in a bill for specific performance of an agreement to take an assignment of a lease, the plaintiff stated a covenant in the lease not to assign without license of the lessor, and did not aver that the plaintiff had or could obtain such a license: there being no statement of a proviso for re-entry on default, the Court overruled the demurrer, and, at the hearing, directed a reference to inquire whether the plaintiff could make a good title.³

With respect to the allegation of time, it is to be observed that, where it is material,⁴ it ought to be alleged with such a degree of accuracy, as

³ See *Kunkel v. Markell*, 26 Md. 408; *Drouillard v. Baxter*, 1 Seam. 192; *Rogers v. Ward*, 8 Allen, 387; *Chapman v. Hunt*, 1 McCarter (N. J.), 149; *White v. Empire Ass. Corp.*, L. R. 6 Eq. 23; *Story Eq. Pl. § 240 et seq.* General certainty is sufficient in pleadings in Equity. *Story Eq. Pl. § 253; ante*, 360-362, notes; *Prescott v. Everts*, 4 Wis. 314; *Paterson & Hud. R. R. Co. v. Jersey City*, 1 Stockt. (N. J.) 434; *Randolph v. Daly*, 1 C. E. Green (N. J.), 313, 318. [But less certainty is required, where the object of the bill is the discovery of material facts alleged to be entirely in the defendant's knowledge. *Watson v. Murray*, 8 C. E. Green, 257.]

⁴ 1 Ves. J. 450; 3 Bro. C. C. 482.

⁵ Ld. Red. 41.

⁶ *Wormald v. De Lisle*, 3 Beav. 18; *Boyd v. Moyle*, 2 Coll. 316, 323; *Kelly v. Rogers*, 1 Jur. N. S. 514, V. C. W.; see also *Vernon v. Vernon*, 2 M. & C. 145, 171; *Reed v. O'Brien*, 7 Beav. 32, 37, 39; *Darthez v. Clemens*, 6 Beav. 165, 169; *Parker v. Nickson*, 4 Giff. 306; 9 Jur. N. S. 196; *Affid. ib.* 451; 1 De G., J. & S. 177; but see *Chouteau v. Rice*, 1 Min. 106.

¹ *Jackson v. The North Wales Railway Company*, 6 Rail. Ca. 112; 13 Jur. 69; *Steedman v. Marsh*, 2 Jur. N. S. 391, V. C. W.; [*Murray v. Lord Clarendon*, L. R. 9 Eq. 11.]

² *Hodgson v. Espinasse*, 10 Beav. 473, 477.

³ *Smith v. Capron*, 7 Hare, 185.

⁴ On the subject of the materiality of time, see *Seton v. Slade*, 7 Sumner's Vesey, 265, Perkins's note; *Marquis of Hertford v. Boore*, 5 *id.* 719, note (a), and cases cited; 2 *Story Eq. Jur. § 776*, and notes; *Richmond v. Gray*, 3 Allen, 25.

In Equity, time is often regarded as not of the essence of a contract. *Snowman v. Harford*, 55 Maine, 197; *Hull v. Noble*, 40 Maine, 459; *Rogers v. Saunders*, 16 Maine, 92; but where it is of the essence, it will be insisted on as well in Equity as at Law. *Merritt v. Brown*, 4 C. E. Green (N. J.), 233. It is of the essence of a contract, either when, from the nature or subject-matter of the contract, it is material that it should be performed at the time, or when the contract by express stipulations, makes it of the essence, and releases the other party upon failure to comply within the time. *Fry Specif. Perf. §§ 711, 713*; *Benedick v. Lynch*, 1 John. Ch. 370; *Wells v. Smith*, 7 Paige, 22; *Grigg v. Landis*, 4 C. E. Green (N. J.), 353, 354; *Pickering v. Pickering*, 38 N. H. 400; *Pennock v. Ela*, 189, 191. In all cases of an agreement to convey lands, where the value of the property concerned has materially changed, or where great financial changes have materially altered the relative value of money and land, time will be considered material, and a party will not be allowed to lie by until the change sets in his favor, and then ask for specific performance. *Young v. Rathbone*, 1 C. E. Green (N. J.), 224.

may prevent any possibility of doubt as to the period intended to be defined.⁵ Thus, in prescribing for a *modus* in a bill, it is necessary that a time for the payment of it should be mentioned; ⁶ and, formerly, it appears to have been considered, that not only the day of payment should be mentioned, but that laying the day of payment on or about a particular day was too uncertain.⁷ It has, however, been decided that, in ordinary cases, the laying of an event on or about a certain day of a certain month or year, is a sufficient specification of time. In the case of *Leigh v. Leigh*,⁸ the bill prayed that the defendant might be restrained from setting up a term of 500 years, in bar of an action of ejectment which the plaintiff had brought against the present *370 *possessor, and alleged that the plaintiff's title accrued on the death of an individual named, which happened on or about the 2d July, 1806. The defendant demurred, on the ground that the period alleged in the bill, as the time of the death of the individual named, was more than twenty years (the period required by the Stat. 3 & 4 Will. IV. c. 27, §§ 2 and 24, to bar suits) before the filing of the bill, which took place in 1834. When the demurrer was first argued, Sir Lancelot Shadwell V. C. was of opinion that the words, on or about the 2d July, 1806, did not fix any precise date, and that it might mean many years before or many years after that time; and overruled the demurrer. Upon appeal, however, the Lords Commissioners, Pepys and Bosanquet, reversed the decision: being of opinion, that from the known and accepted use of the expression, "on or about," in all the ordinary transactions of life, it was sufficiently definite for all the purposes of demurrer, and did satisfactorily set out the fact, that the person named died in the year 1806.¹

With respect to the certainty required, in setting out the other incidents in the plaintiff's case, the following cases will serve to show what degree of it is required under the circumstances to which they refer. In the case of *Cresset v. Milton*,² before alluded to, a bill had been filed to perpetuate testimony to a right of common and of way, and it stated "that the tenants, owners, and occupiers of the said lands, messuages, tenements, and hereditaments, in right thereof or otherwise, have, from time whereof the memory of man is not to the contrary, had, and of right ought to have," &c. To this bill a demurrer was put in: one of the grounds for which was, that it was not stated as to what messuages in particular the rights of common and of way were claimed; and, in allowing the demurrer, Lord Thurlow said, "you have not stated whether the right of way and common is appurtenant and appendant to the land, that you hold; and you state it loosely that you

⁵ See *Saum v. Stingley*, 3 Clarke (Iowa), 514.

⁶ *Goddard v. Keeble*, Bunb. 105; *Phillips v. Symes*, *ib.* 171.

⁷ *Blacket v. Pinney*, *ib.* 198.

⁸ Before the Lords Commissioners, Aug. 6 and 8, 1835.

¹ See also *Richards v. Evans*, 1 Ves. S. 39; *Roberts v. Williams*, 12 East, 33; see, as to words "shortly after," *Baker v. Wetton*, 14 Sim. 426; 9 Jur. 98; and as to words "soon after," *Edsell v. Buchanan*, 4 Bro. C. C. 254.

² 3 Bro. C. C. 481; 1 Ves. J. 449.

have such right as belonging to your estate, or otherwise, so that your bill is to have a commission to try any right of common and way whatever." The same doctrine appears to have been held by Lord Keeper North, in *Gell v. Hayward*,³ who, upon a bill to perpetuate the testimony of witnesses touching a right of way, held, that in such a bill the way ought to be laid exactly *per et trans*, as in a declaration at Law. And so, in *Ryees v. Ryees*,⁴ where a bill was filed for a discovery of title deeds, relating to lands in the *possession of the defend- *371 ant, and for the delivery of the possession of such lands to the plaintiff, upon a loose allegation that, under some deeds in the custody of the defendants, the plaintiff was entitled to some interest in some estates in their possession, but without stating what the deeds were, or what the property was to which they applied, a demurrer was allowed.

The principle which requires a sufficient degree of certainty in the statement of a bill, has been further illustrated in the case of *Stansbury v. Arkwright*,¹ before referred to, where a bill to restrain a defendant from setting up outstanding terms in bar to the plaintiff's claim at Law, was held to be demurrable, on the ground that it did not allege what sort of term or estate was outstanding.

The rule which prescribes that a plaintiff cannot sustain a bill, unless he has employed such a degree of certainty in setting out his case as may enable the defendant to ascertain the precise grounds upon which it is filed, applies to all cases in which a person comes to a Court of Equity for relief upon a general allegation of error, without specifying particulars;² and if a person, seeking to open a settled account, files his bill without such a specification of errors, he will not be permitted to prove them at the hearing, even though the settlement of the account is expressed to be, errors excepted: which is the usual form observed in settling accounts.³ And it should be noticed, that where a plaintiff files a bill for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill: because a stated account is *prima facie* a bar till the particular errors in it are assigned.⁴ Upon

¹ 1 Vern. 312.

² 3 Ves. 343; see also *Loker v. Rolle*, *ib.* 4, 7; *East India Company v. Henchman*, 1 Ves. J. 287, 290; and see *Houghton v. Reynolds*, 2 Hare, 264; 7 Jur. 414; *Munday v. Knight*, 3 Hare, 497, and reporter's note, *ib.* 501; S. C. 8 Jur. 904.

³ 6 Sim. 481, 485.

⁴ *Taylor v. Haylin*, 2 Bro. C. C. 310; 1 Cox, 435; *Johnson v. Curtis*, 3 Bro. C. C. 266; *Cockrell v. Gurley*, 26 Ala. 405; *Prestidge v. Pendleton*, 24 Miss. 80; *Caton v. Willis*, 5 Ired. Eq. 335; *Prescott v. Everts*, 4 Wis. 314; *Dennis v. Dennis*, 15 Md. 73; *Meshaw v. Meshaw*, 2 Md. Ch. Dec. 12; *Walton v. Cody*, 1 Wis. 420; *Connors v. Connors*, 4 Wis. 112; *Badger v. Badger*, 2 Wallace U. S. 87; [*Threldkeld v. Dobbins*, 45 Ga. 144.]

⁵ *Johnson v. Curtis*, *ubi sup.*; 1 Story Eq. Jur. § 523, 527; *Story Eq. Pl.* § 251, 800; *Calvit v. Markham*, 3 How. (Miss.) 343;

Mebane v. Mebane, 1 Ired. Eq. 403; *De Montmorency v. Devereux*, 1 Dru. & W. 119; *Leayeraft v. Dempsey*, 15 Wend. 83; *Baker v. Biddle*, 1 Bald. 394, 418; *Bainbridge v. Wilcocks*, *ib.* 536, 540; *Consequa v. Fanning*, 3 John. Ch. 587; S. C. 17 John. 511; *Taylor v. Haylin*, 2 Bro. C. C. (Perkins's ed.) 511, note (a), and cases cited; *Brownell v. Brownell*, 2 *id.* 63, note (a); [*Preston v. Stuart*, 29 Gratt. 289;] but see *Shugart v. Thompson*, 10 Leigh, 434.

⁶ *Dawson v. Dawson*, 1 Atk. 1; *Brown v. Vandyke*, 4 Halst. Ch. (N. J.) 795; [*McClelland v. West*, 70 Pa. St. 183.] This rule supposes that an account has been given by the defendant. *Vandyke v. Brown*, 4 Halst. Ch. (N. J.) 657. [As to what is a sufficient allegation of an account stated. *McFarland v. Gutter*, 1 Mon. T. 383; *Bonslog v. Garrett*, 39 Ind. 338. And what is an account stated. *Stanton v. Jerome*, 54 N. Y. 480.] As to what

the same ground it has been held, that an award is a bar to a bill brought for any of the matters intended to be bound by it; and that if a bill is filed to set aside the award as not being final, the specific objections to it must be stated upon the bill.⁵

It is to be remarked, that in most of the cases above cited, *372 the *question has come before the Court upon demurrer, which seems to be the proper way in which a defendant ought to take the objection that a bill is deficient in certainty: if he neglects to do so, it seems that he cannot avail himself of the objection at the hearing.¹

As a general rule, conclusions of law need not be averred; but where certain facts are stated from which it is intended to draw a conclusion of law, the bill ought to be so framed as to give notice to the defendant of the plaintiff's intention to insist on such conclusion: otherwise, he will not be allowed to do so. Thus, in a bill for specific performance of an agreement to sell a leasehold, the plaintiff was not allowed to insist that the defendant had waived his right to inquire into the landlord's title: because, although he had stated in his bill facts from which the waiver might be inferred, he had not alleged the waiver.²

4. Charge of Confederacy.

It was formerly customary in almost every bill to introduce a general charge of confederacy against the defendants.³ There is no such statement in the model of a bill given by the General Orders, and it is scarcely necessary to say that such a charge would now, except under very special circumstances, be deemed idle and impertinent.

are settled accounts, see *Croft v. Graham*, 9 Jur. N. S. 1032, V. C. S.; 9 L. T. N. S. 589, L. J.J.; 2 De G., J. & S. 155. [And see as to how far stated accounts are binding on the party making them. *Schletter v. Smith*, 34 N. Y. Sup. Crt. 17; *White v. Campbell*, 21 Mich. 463. And defendant in an action on an account stated may plead and prove that the whole claim was founded upon an illegal transaction. *Dunbar v. Johnson*, 108 Mass. 119.]

⁵ *Routh v. Peach*, 2 Anst. 519.

¹ *Carew v. Johnston*, 2 Sch. & Lef. 280.

² *Clive v. Beaumont*, 1 De G. & S. 397; 13 Jur. 226; *Gaston v. Frankum*, 2 De G. & S. 561; 16 Jur. 607.

³ See *Barton*, 33, note (1); *Cooper Eq. Pl.* 10; 1 Hoff. Ch. Pr. 41. The general charge of fraudulent combination, &c., is not sufficient to charge fraud; there must be a specific allegation of fraud, stating the facts. *Lewis v. Lewis*, 9 Missou. 183; but see *Farnham v. Brooks*, 9 Pick. 212, 219. Although the charge of confederacy is now usually, but not invariably, inserted in bills, yet it is treated as mere surplusage; so much so, that it

is said, that the general charge of combination need not be (although it usually is) denied or responded to in the answer, when charged in the bill: for it is mere impertinence. *Story Eq. Pl.* § 29. By the 21st Equity Rule of the Supreme Court of the United States, January Term, 1842, it is provided, that the plaintiff shall be at liberty to omit at his option the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff. By the 7th Chancery Rule in Massachusetts, it is provided, that the common charge of fraud or combination shall be omitted, except in cases where it is intended to charge fraud and combination specifically. See *Adams v. Porter*, 1 Cush. 170. And in New Hampshire, it is held that the allegation of confederacy is not essential, except where it is intended to charge fraud and combination specifically. *Stone v. Anderson*, 26 N. H. 506. And by rule of Court in that State, the charge of confederacy may be omitted. Rule in Chancery, 3, 38 N. H. 605, Appx. In Maine it must be omitted. Chancery Rule 1, 37 Maine, 581.

5. *Charging Part.*⁴

It was formerly the practice of pleaders in Equity to state the plaintiff's case in the bill very concisely, and then if any matter was introduced into the defendant's plea or answer, which made it necessary for the plaintiff to put in issue, on his part, some additional *fact in avoidance of such new matter, such new fact was placed *373 upon the record by means of a special replication. In order to avoid the inconvenience, delay, and unnecessary length of pleading, arising from this course of proceeding, the practice grew up when the plaintiff was aware at the time of filing his bill of any defence which might be made to it, and had any matter to allege which might avoid the effect of such defence, to insert an allegation that the defendants pretend, or set up such and such allegations by way of defence, and then to aver the matter used to avoid it in the form of charge. This was commonly called the charging part of the bill, and its introduction into practice, in all probability, led to the discontinuance of special replications, by enabling the plaintiff to state his case, and to bring forward the matter to be alleged in reply to the defence at the same time, and that without making any admission, on the part of the plaintiff, of the truth of the defendant's case. Thus, if a bill were filed on any equitable ground, by an heir who apprehended his ancestor had made a will, he might state his title as heir, and alleging the will by way of pretence on the part of the defendants claiming under it, make it a part of his case without admitting it.

Such was the origin of what was called the charging part in a bill, and there is no doubt that in many cases it is still convenient, and may be made the means of enabling the plaintiff to state his answer to some anticipated defence, or to guard his statement by allegations which could not conveniently be inserted in the text. The model of a bill,¹ it will be observed, contains no charging part, and such a mode of statement can never be said to be absolutely necessary;² but there are cases where it may still be useful, though the comparative simplicity of modern pleading will diminish most materially the occasions for its use.³

⁴ The form of such a charge is given in Van Heythuysen's Equity Draftsman, p. 5, and in Barton, p. 34; Story Eq. Pl. §§ 31, 33, and notes.

¹ Vol. III.

² Story Eq. Pl. §§ 32, 32 a, 33, and note. By the Equity Rules of the Supreme Court of the United States, the plaintiff is at liberty to omit, at his option, what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up, by way of defence to the bill. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes

will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. Rule 21. So in New Hampshire. Rule in Chancery, 3, 38 N. H. 605.

Rule 7, of Chancery practice in Massachusetts, provides that the plaintiff, when his case requires it, may allege by way of charge, any particular fact, for the purpose of putting it in issue.

³ See Aiken v. Ballard, Rice Eq. 13; M'Crea v. Purnmort, 16 Wend. 460; Hawley v. Wolverton, 5 Paige, 522; Mechanics' Bank v. Levy, 3 Paige, 606; Stafford v. Brown, 4 Paige, 88; Story Eq. Pl. § 31; Parker v. Carter, 4 Munf. 273; 1 Hoff. Ch. Pr.

*374 * Bills used formerly to contain a precise averment of jurisdiction in the Court. This is now obsolete, and was never absolutely requisite.¹

6. Interrogating Part.

The interrogating part of a bill was an almost invariable accompaniment to a bill, until the recent statute to amend the practice of the Court of Chancery.² It will be recollected that it is now precisely enacted, "that the bill of complaint shall not contain any interrogatories for the examination of the defendant."³

It will be convenient here to set forth the statutory rules and the regulations of the Court on this subject.

By 15 & 16 Vic. c. 86, § 12, it is enacted, that "within a time to be limited by a General Order of the Lord Chancellor in that behalf, the plaintiff in any suit in the said Court commenced by bill may, if he requires an answer from any defendant thereto, file in the Record Office of the said Court interrogatories for the examination of the defendant or defendants, or such of them from whom he shall require an answer,

42. If the plaintiff wishes to obtain a discovery of facts to anticipate and rebut the defence which may be set up by the defendant, he should, in the charging part of the bill, state the anticipated defence as a pretence of the defendant, and then charge the real facts to lay a foundation for the discovery which is sought. *Stafford v. Brown*, 4 Paige, 88.

"Another very important rule," says Mr. Justice Story, "as to the frame of bills, seems now established in England; and that is, if the bill means to rely upon any confessions, conversations, or admissions of the defendant, either written or oral, as proof of any fact charged in the bill (as, for example, of fraud), the bill must expressly charge what such confessions, conversations, or admissions are, and to whom made; otherwise no evidence thereof will be admitted at the hearing." "Whether the like rule will be allowed to prevail in America, may be deemed open to much doubt." See Story Eq. Pl. § 265 a, and the cases cited in notes, for a more full statement of the rule and the reasons of it. In *Smith v. Burnham*, 2 Sumner, 612, it was held that the confessions, admissions, and conversations of the defendant need not be expressly charged in a bill in Equity, in order to entitle the plaintiff to use them in proof of facts charged, and in issue therein. See *Bishop v. Bishop*, 13 Ala. 475.

If the bill is sworn to, it is perjury for the plaintiff knowingly to make a false charge or averment in the charging, as much as if he makes a false statement in the stating part. *Smith v. Clark*, 4 Paige, 368.

¹ See Story Eq. Pl. § 34; *Botsford v. Burr*, 11 Conn. 369. By the 21st Equity Rule of the Supreme Court of the United States, Jan. Term, 1842, the plaintiff, in his bill, shall be at liberty to omit, at his option, what is commonly called the jurisdiction clause of the

bill, viz, "that the acts complained of are contrary to Equity," &c. So in New Hampshire. Rule in Chancery, 3, 38 N. H. 605, Appx. In all bills in Equity in the Courts of the United States, the citizenship should appear on the face of the bill, to entitle the Court to take jurisdiction; otherwise the bill will be dismissed. *Dodge v. Perkins*, 4 Mass. 435; *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Peters, 148; *Vose v. Philbrook*, 3 Story, 335; see *Louisville and N. R. R. Co. v. Stetson*, 2 How. U. S. 497; *Winipiseogee Lake Co. v. Worster*, 29 N. H. 433, 443, 444. For a form of the averment of jurisdiction, see Story Eq. Pl. § 34, in note.

² A bill which wholly omits the interrogatory part, is said to be defective in *Shedd v. Garfield*, 5 Vt. 39. But it is not regarded as absolutely necessary by Mr. Justice Story, Eq. Pl. § 38, though often highly useful to sift the conscience of the defendant, and almost universal in practice. *Ibid.* See also *Eberly v. Gross*, 21 Penn. 251. By Rule 7. of Chancery Practice in Massachusetts, the plaintiff, when his case requires it, may propose specific interrogatories. See *Belknap v. Stone*, 1 Allen, 572. In New Hampshire, "the prayer for an answer and for answers to interrogatories, except where the plaintiff relies on the discovery of the defendant, may be omitted." Rule of Chancery, 3, 38 N. H. 605, Appx. In Maine, "a general interrogatory only shall be introduced, and it shall be sufficient to require a full answer to all the matters alleged." Rule 1, 37 Maine, 581, Appx. As to what is, or amounts to, the general interrogatory, see *Ames v. King*, 9 Allen, 258.

[Interrogatories appended to the bill, based on the statements therein made, will be regarded as incorporated in the bill. *Romaine v. Hendrickson*, 9 C. E. Green, 231.]

³ *Ante*, p. 319.

and deliver to the defendant or defendants so required to answer, or to his or their solicitor,⁴ a * copy of such interrogatories, or of such of them as shall be applicable to the particular defendant or defendants; and no defendant shall be called upon or required to put in any answer to a bill unless interrogatories shall have been so filed, and a copy thereof delivered to him or his solicitor, within the time so to be limited, or within such further time as the Court shall think fit to direct.”

By the 15th and following General Orders of the 7th of August, 1852, it is directed that, —

“The interrogatories for the examination of the defendant to a bill may be in a form similar to the form set out in Schedule (C.) to these Orders, with such variations as the nature and circumstances of each particular case may require.

“In cases in which the plaintiff requires an answer to any bill from any defendant or defendants thereto, the interrogatories for the examination of such defendant or defendants are to be filed within eight days after the time limited for the appearance of such defendant or defendants.

“If the defendant appear in person, or by his own solicitor, within the time limited for that purpose by the rules of the Court, the plaintiff is, within eight days after the time allowed for such appearance, to deliver to the defendant or defendants so required to answer, or to his or their solicitor or solicitors, a copy of the interrogatories so filed as aforesaid, or of such of them as the particular defendant or defendants shall be required to answer. And the copy so to be delivered is to be examined with the original, and the number of folios counted by the Clerks of Records and Writs, who, on finding that such copy is duly stamped and properly written, are to mark the same as an office copy.

“If any defendant to a suit commenced by bill do not appear in person, or by his own solicitor, within the time allowed for that purpose by the rules of the Court, and the plaintiff has filed interrogatories for his examination, the plaintiff may deliver a copy of such interrogatories so examined and marked as aforesaid, to the defendant, at any time after the time allowed to such defendant to appear and before his appearance in person or by his own solicitor; or the plaintiff may deliver a copy of such interrogatories, so examined and marked as aforesaid, to the defendant or his solicitor, after the appearance of such defendant in person or by his own solicitor, but within eight days after such appearance.

“A defendant required to answer a bill must put in his plea, answer, or demurrer thereto, not demurring alone, within fourteen days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer; but the Court shall have full power to enlarge

⁴ It will be sufficient if the interrogatories delivered to him personally. *Bowen v. Price*, 2 De G., M. & G. 899.

the time, from time to time, upon application being made to the Court for that purpose.

*376 * “After the time allowed by Order 16, for filing interrogatories for the examination of any defendant, no interrogatories are to be filed for the examination of such defendant, without special leave of the Court, to be applied for upon notice of motion.”

The form of interrogatories referred to in the 15th Order, is as follows :—

“In Chancery.

John Lee	Plaintiff.
James Styles)	
and)	
Henry Jones.)	Defendants.

Interrogatories for the Examination of the above-named Defendants in answer to the Plaintiff's Bill of Complaint.

“1. Does not the defendant Henry Jones claim to have some charge upon the farm and premises comprised in the indenture of mortgage of the first of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned?

“2. What are the particulars of such charge, if any, the date, nature, and short effect of the security, and what is due thereon?

“3. Are there or is there any other mortgages or mortgage, charges or charge, incumbrances or incumbrance, in any and what manner affecting the aforesaid premises, or any part thereof?

“4. Set forth the particulars of such mortgages or mortgage, charges or charge, incumbrances or incumbrance; the date, nature, and short effect of the security; what is now due thereon; and who is or are entitled thereto respectively; and when and by whom, and in what manner, every such mortgage, charge, or incumbrance was created.

“The defendant James Styles is required to answer all these interrogatories.

“The defendant Henry Jones is required to answer the interrogatories numbered 1 and 2.¹

“Y. Y.”

(name of counsel.)

¹ By the former English practice the interrogatories, which each defendant was required to answer, were specified in a note at the foot of the bill, and such is the rule adopted by the Supreme Court of the United States: 41st Equity Rule of the Supreme Court of the United States, January Term, 1842; Story Eq. Pl. § 847, note. The 98th, 41st, 42d, 43d, and 44th of said Equity Rules declare, “that it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the

plaintiff desires to do so to obtain a discovery,” in which case “the interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively, 1, 2, 3, &c., and the interrogatories which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form and to the effect following; that is to say, The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.; and the office

*The form of interrogatories given is so precise, that it is scarcely necessary to refer to the former practice on the subject. Of course a defendant is not bound to answer any thing in the bill to which he is not precisely interrogated.¹ It was always the rule that the interrogatories must in all cases be confined to the substantive charge or allegation, and that the plaintiff cannot extend his interrogatories in such a manner as to compel a discovery of a distinct matter not included in the allegation or charge;² and there is nothing in the present Orders to affect that principle.

7. *The Prayer for Relief.*

The prayer for relief is generally divided into two parts: *viz.*, the prayer for specific relief, and the prayer for general relief.³

*Although there is no doubt but that a mere prayer for

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copy of the bill taken by each defendant shall not contain any interrogatories, except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill."—"The note at the foot of the bill, specifying the interrogatories, which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill."—"Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words, To the end, therefore, there shall hereafter be used words in the form and to the effect following: To the end, therefore, that the said defendants may, if they can, show why your orator (the plaintiff) should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer; that is to say, '1. Whether, &c.; 2. Whether, &c.'"—"A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer." These rules are borrowed from the former English Rules in Chancery upon the same subject. Story Eq. Pl. § 847, note.

¹ In Massachusetts Chancery Practice, under Rule 4, when the case requires it, the plaintiff may propose specific interrogatories. Rule 8 provides that the defendant shall be required to answer fully, directly, and particularly to every material allegation in the bill, as if he had been thereto particularly in-

terrogated. See Methodist Episcopal Church v. Jaques, 1 John. Ch. 65. The practice in New Hampshire conforms with the above rule in Massachusetts. Miles v. Miles, 27 N. H. 440, and such is understood to be the practice where there is no rule on the subject. *Ib.* 445; see Story Eq. Pl. § 38; Hagthorp v. Hook, 1 Gill & J. 270; Salmon v. Claggett, 3 Bland, 125. The general interrogatory is in substance as follows; *viz.*: "That the defendant may full answer make, to all and singular the premises, fully and particularly, as though the same were repeated and he specially interrogated," &c. See Ames v. King, 9 Allen, 258.

² James v. M'Kernon, 6 John. 543; Woodcock v. Bennett, 1 Cowen, 734; Mechanics' Bank v. Levy, 3 Paige, 606; Consequa v. Fanning, 3 John. Ch. 596; Kisor v. Stancifer, Wright, 323. But a variety of questions may be founded on a single charge, if they are relevant to it. Story Eq. Pl. § 37. It may be noticed here, that in Attorney-General v. Whorwood, 1 Vesey, 524, where interrogatories in a bill were directed to particular facts which were not charged in the preceding part, and the defendant, though not bound to answer them, did so, and the answer was replied to; Lord Hardwicke held that the informality in the manner of charging was supplied by the answer, and that the facts were properly put in issue; "for a matter may be put in issue by the answer as well as by the bill, and, if replied to, either party may examine to it." 1 Vesey, 538; Story Eq. Pl. § 36.

³ The latter can never be properly and safely omitted; because, if the plaintiff should mistake the relief, to which he is entitled, in his special prayer, the Court may yet afford him the relief to which he has a right, under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill. *Ld. Red. 39, 45; Coop. Eq. Pl. 13, 14; English v. Foxall, 2 Peters, 595; Colton v. Ross, 2 Paige, 396; Driver v. Fortner, 5 Porter, 10; Thomason v. Smithson, 7 Porter, 144; Peck v. Peck, 9 Yerger, 301; Isaacs v.*

general relief was formerly, in most cases, sufficient to enable the plaintiff to obtain such a decree as his case entitled him to,¹ yet it was the usual practice to precede the request for relief generally, by a statement of the specific nature of the decree which the plaintiff considered himself entitled to, under the circumstances of his case; and now, the plaintiff must specifically pray for the relief to which he may conceive himself entitled, as well as for general relief;² and where he is entitled to no other relief against any defendant, he must pray for costs:³ with the one exception, that he may make the servant of a corporation a defendant, for the purpose of discovery.⁴

This part of the bill, therefore, should contain an accurate specification of the matters to be decreed; and, in complicated cases, the framing of it requires great care and attention: for, although where the prayer does not extend to embrace all the relief to which the plaintiff may at the hearing show a right, the deficient relief may be supplied under the general prayer, yet such relief must be consistent with that specifically prayed, as well as with the case made by the bill: for the Court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the prayer he has made, and take another decree, even though it be according to the case made *379 by his bill.⁵ Therefore, in *Soden v. Soden*,¹ where a bill was

Steel, 3 Scam. 104; *Strange v. Watson*, 11 Ala. 324; *Jordan v. Clarke*, 1 C. E. Green (N. J.), 243; *Simplot v. Simplot*, 14 Iowa, 449; *Wilson v. Horr*, 15 Iowa, 499; *Espinola v. Blasco*, 15 La. Ann. 426; *Vandant v. Allmon*, 23 Ill. 30; *Graham v. Berryman*, 4 C. E. Green (N. J.), 29, 34; *Read v. Cramer*, 1 Green Ch. 277; *Landis v. Olds*, 9 Min. 90; [*Lee v. Boutwell*, 44 Tex. 151.] Relief not specifically prayed, is within the general relief. *Beaumont v. Boulton*, 5 Sumner's Vesey, 485. If there is no prayer of general relief, then if the plaintiff should mistake the relief to which he is entitled, no other relief can be granted to him, and his suit must fail, at least unless an amendment of the prayer is obtained. *Driver v. Fortner*, 5 Porter, 10; *Morrison v. Bowman*, 29 Cal. 337; *Thomason v. Smithson*, 7 Porter, 144; *Peck v. Peck*, 9 Yerger, 301; *Halsted v. Meeker*, 3 C. E. Green (N. J.), 136. For a form of prayer for relief in a bill, see Story Eq. Pl. § 40 note, 41 note. [If a cause is properly brought for relief which equity can give, the Court will, under the prayer for general relief, grant other relief appropriate to the facts, although such relief could be had at Law. *Bullock v. Adams*, 5 C. E. Green, 367. And the general prayer will enable the Court to grant any specific relief to which the complainant may appear entitled. *McGlothlin v. Hemery*, 44 Mo. 350; *Kirksey v. Means*, 42 Ala. 426; *Moore v. Mitchell*, 2 Woods, 483. And if the facts be all stated upon which the right to specific relief arises, that relief will be granted, although the bill be not framed with a view to it. *McNairy v. Eastland*, 10 Yerger, 310. So, where relief is granted on the state-

ments of the answer. *Shannon v. Erwin*, 11 Heisk. 337.]

In a bill between partners, a prayer that the defendant may be held to render an account of all moneys and effects of the firm received by him, and of all other matters relating to the concern, is equivalent to a prayer for general relief. *Miller v. Lord*, 11 Pick. 11.

In Indiana, the Court will grant any relief called for by the case, and the issue made, without regard to the prayer. *Hunter v. McCoy*, 14 Ind. 528.

¹ *Cook v. Martyn*, 2 Atk. 2, 3; *Grimes v. French*, *ib.* 141; *Partridge v. Havcroft*, 11 Ves. 570, 574; *Wilkinson v. Beal*, 4 Mad. 408.

² 15 & 16 Vic. c. 86, § 10; see form of bill, Vol. III.

³ *Beadles v. Burch*, 10 Sim. 332, 337; 4 Jur. 189; *Bowles v. Stewart*, 1 Sch. & Lef. 227.

⁴ *Dummer v. Corporation of Chippenham*. 14 Ves. 245; *Le Texier v. Margravine of Anspach*, 15 Ves. 164; *Ld. Red. 188; ante*, pp. 142, 143, 296, 322.

⁵ *Landis v. Olds*, 9 Min. 90. A particular prayer for relief, although very proper and convenient, is not essential, since under a general prayer for relief a plaintiff may pray at the bar a specific relief not particularly prayed for in the bill, if otherwise entitled to the same. *Wilkinson v. Beal*, 4 Mad. 408; *Cook v. Martyn*, 2 Atk. 2; *Grimes v. French*, 2 Atk. 141; *Colton v. Ross*, 2

¹ Cited by Lord Eldon, in *Hiern v. Mill*, 13 Ves. 119.

filed against a woman to compel her to elect between the provision made for her by a will, and that to which she was entitled under a settlement, and the case made by the bill was solely calculated to call upon her to elect, Lord Eldon held, that a declaration that she had elected, so as to conclude her, could not be maintained under the prayer for general relief: being inconsistent both with the case made by the bill, and with the specific prayer that she should make her election. And so, where a bill² was filed by a person in the character of mortgagee, praying a sale under a trust, to which it appeared he was not entitled, the Court would not permit him, under the general prayer, to take a decree that the defendant might redeem or be foreclosed; although it was the relief which properly belonged to his case.³ And in like manner, where a bill was brought for an *annuity *380 or rent-charge under a will, and the counsel for the plaintiff prayed at the bar that they might drop the demand for the annuity, and insist upon the land itself, Lord Hardwicke denied it: because it came within the rule before laid down.¹ Upon the same principle, where a vendor filed a bill for a specific performance against a purchaser, who had been in possession, under the contract, for several years, but failed to establish his right in consequence of a defect in his

Paige, 396; *Lloyd v. Brewster*, 4 Paige, 537; *Lingan v. Henderson*, 1 Bland, 252; *Driver v. Forner*, 5 Porter, 10; *Peck v. Peck*, 9 Yerger, 301; *Wilkin v. Wilkin*, 1 John. Ch. 111; *Cook v. Mancius*, 5 John. Ch. 89; *Brown v. McDonald*, 1 Hill, 302; *Marine and Fire Ins. &c. v. Early*, R. M. Charl. 279; *Reppier v. Buck*, 5 B. Mon. 96, 98; *Thomas v. Hite*, 5 B. Mon. 593. The relief given under the general prayer must be agreeable to the case made by the bill. *Chalmers v. Chambers*, 6 Harr. & J. 29; *Hobson v. McArthur*, 16 Peters, 182; *Read v. Cramer*, 1 Green Ch. 277; *Franklin v. Osgood*, 14 John. 527; *English v. Foxall*, 2 Peters, 595; *Kibler v. Whiteman*, 2 Har. 401; *Pennock v. Ela*, 41 N. H. 189, 192; *Cassady v. Woodbury*, 13 Iowa, 113. For the Court will grant such relief only as the case stated will justify, and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially, if the defendant may be surprised or prejudiced thereby. And where there is no obstruction to the particular relief prayed, the plaintiff cannot abandon that, and ask a different decree under the general prayer. *Allen v. Coffman*, 1 Bibb, 469; *Pillow v. Pillow*, 5 Yerger, 420; *Thomason v. Smithson*, 7 Porter, 144; *Foster v. Cooke*, 1 Hawks, 509; *Chalmers v. Chambers*, 6 Harr. & J. 29; *Gibson v. McCormick*, 10 Gill & J. 66; *Townsend v. Duncan*, 2 Bland, 45; *King v. Rossett*, 2 Y. & J. 33; see *Baily v. Benton*, 8 Wend. 339; 1 Hoff. Ch. Fr. 49, and note; *Pleasant v. Glasscock*, 1 Sm. & M. Ch. 17. [See *Hayward v. National Bank*, 96 U. S. 615.]

In *Treadwell v. Brown*, 44 N. H. 551, it was held, that under the prayer for general

relief, the plaintiff may have such relief as he is entitled to, without regard to any defect in the prayer for special relief, 26 Law Rep. 48; *Franklin v. Greene*, 2 Allen, 519; *Danforth v. Smith*, 23 Vt. 247; provided it does not conflict with that specifically prayed for. *Stone v. Anderson*, 26 N. H. 506; *Hilleary v. Hurdle*, 6 Gill, 105. Where the bill sets forth two grounds for relief, and prays for special relief on one ground, and also for general relief, but the parties are not sufficient for any other than the special relief, the bill is not bad for multifariousness, but the special relief will be granted. *Mayne v. Griswold*, 3 Sandf. S. C. 463.

In a foreclosure suit, if the mortgage is forfeited, and the plaintiff entitled to a decree of foreclosure at the time of the commencement of the suit, a decree for the whole amount due upon the mortgage, whether it becomes due before or after the filing of the bill, is strictly within the prayer for relief, and such as the case stated will justify. *Jordan v. Clarke*, 1 C. E. Green (N. J.), 243.

² *Peck v. Lord Clinton*, 12 Ves. 48, 57; see also *Jones v. Jones*, 3 Atk. 110, 111; *Chapman v. Chapman*, 13 Beav. 308; 15 Jur. 265; *Johnson v. Fessenden*, 25 Beav. 88, 96; 3 De G. & J. 13; *Story Eq. Pl. § 42*.

³ A bill was filed to have a mortgage deed recorded, which had been omitted to be recorded within six months, in which was a general prayer for relief. A decree of sale of the mortgaged premises was held not to be within the relief prayed by the bill. *Chalmers v. Chambers*, 6 Harr. & J. 29; see *Chambers v. Chalmers*, 4 Gill & J. 420.

¹ *Grimes v. French*, 2 Atk. 141.

title, the Court refused, under the prayer for general relief, to direct an account of the rents and profits against the purchaser, although he had stated by his answer that he was willing to pay a fair rent.² And so, where a bill was filed for the specific performance of a written agreement, and parol evidence was read to prove a variation from it, the bill was dismissed with costs: the plaintiff not being allowed to resort to the substantial agreement proved on the part of the defendant.³ But though, in general, a plaintiff can only obtain the decree he seeks by his bill, the case of a plaintiff in a suit for tithes is different: for there, though a plaintiff may fail in establishing his right to tithes in kind, he may yet have a decree for a modus admitted by the defendant's answer.⁴

The rule, with regard to the nature of the relief which a plaintiff may have under the prayer for general relief, was laid down by Lord Eldon, in *Hiern v. Mill*.⁵ His Lordship there said, that, as to this point, "the rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain, under the general prayer; but he cannot desert specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief."⁶ In that case, a bill had been filed by an equitable mortgagee against the mortgagor, and a person who had purchased from him with notice of the incumbrance, and it prayed an account, and in default of payment a conveyance of the estate; and although it charged the purchaser with notice, it did not pray any specific relief against him individually. *Lord Eldon, however, thought that the relief asked against him at the hearing was consistent with the case made by the bill, and accordingly decreed an account to be taken of what was due to the plaintiff by the mortgagor: to be paid by the purchaser, who was to have his election to pay the money and keep the estate.¹ And so, in *Taylor v. Tabrum*,² where a bill was filed against two trustees, alleging that only one of them had acted in the trusts, and praying relief against that trustee only, to which the two trustees put in an answer, admitting that they had both acted in the trusts, Sir Lancelot

² *Williams v. Shaw*, 3 Russ. 178, n.

³ *Legal v. Miller*, 2 Ves. S. 249; see also *Mortimer v. Orchard*, 2 Ves. J. 243; *Lekh v. Havertield*, 5 Ves. 452, 457; *Hanbury v. Litchfield*, 2 M. & K. 629, 633. [But see *Smith v. Wheatecroft*, 9 Ch. Div. 223.] Although, in such a case, the plaintiff cannot have a decree for a different agreement from that set up by his bill, the defendant may have a decree on the agreement, such as he has proved it to be. *Fife v. Clayton*, 13 Ves. 546; 1 C. P. Coop. t. Cott. 351. The old course required a cross-bill, but the practice now is to decree a specific performance at the instance of the defendant, upon the offer by the plaintiff in his bill to perform the

agreement specifically on his part. *Ibid.* See also *Gwynn v. Lethbrigg*, 14 Ves. 585.

⁴ *Cart v. Ball*, 1 Ves. S. 3.

⁵ 13 Ves. 119; see also *Brown v. Sewell*, 11 Hare, 49, more fully reported on this point, 17 Jur. 708; and *Brooks v. Boucher*, 3 N. R. 279, M. R., where relief was granted under the general prayer; and *Hill v. Great Northern Railway Company*, 5 De G., M. & G. 66; 18 Jur. 685, where it was refused.

⁶ See *Cassady v. Woodbury*, 13 Iowa, 113; [Hall v. Fowlkes, 9 Heisk. 745; Lee v. Cone, 4 Coldw. 392; Miller v. Jamison, 9 C. E. Green, 41; Shannon v. Erwin, 11 Heisk. 337.]

¹ 13 Ves. 114, 123.

² 6 Sim. 281.

Shadwell V. C. made a decree against the two, charging them both with the loss occasioned by the breach of trust. It is to be observed that, in order to entitle a plaintiff to a decree, under the general prayer, different from that specifically prayed, the allegations relied upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed: otherwise, the Court would take the defendant by surprise, which is contrary to its principles.³ Therefore, where a vendor filed a bill for a specific performance, but, owing to his not being able to make out a title to some part of the property, was unable to obtain a decree for that purpose, it was held, that he could not, under the prayer for general relief, obtain an inquiry into the management of the property during the time it was in the vendee's possession, although the bill did contain charges of mismanagement: which, however, had been introduced, not with the view to obtain compensation, but to establish the fact of acceptance of the title by the defendant.⁴

The principle upon which the Court acts, under these circumstances, receives considerable illustration from what fell from Lord Redesdale, in *Roche v. Morgell*.⁵ The bill in that case stated various dealings between the plaintiff and defendant, imputing fraud and unfair dealing, and various usurious charges, overcharges and mistakes in accounts delivered, and prayed a discovery of the several transactions, and a general account, and also general relief. To this bill the defendant pleaded a release made by the plaintiff; *and a question *382 arose, whether, if the release appeared to be founded on a vicious consideration, and was in itself void, the Court could set it aside, there being no specific prayer for that purpose; and Lord Redesdale, in delivering his opinion in the House of Lords upon the point, expressed himself as follows: "It has been objected that the bill does not state the release, and pray that it may be set aside. It seems doubtful whether the release has been put in issue by the bill; but whether it is so or not, if the release appears to be founded on a vicious consideration, it is in itself void, and the Court need not set it aside, but may act as if it did not exist. The bill prays the general account, and all the relief necessary for the purpose of obtaining that account. This prayer is sufficient. It never was thought of that a bill for an account of fraudulent dealings must specially pray that every bond, every in-

³ See the remarks of Sir W. Page Wood V. C. (Lord Hatherley) in *Other v. Smurthwaite*, L. R. 5 Eq. 437, 441, quoted *ante*, 307, note; *Landis v. Olds*, 9 Min. 90.

⁴ *Stevens v. Guppy*, 3 Russ. 171, 185; see also *Ferraby v. Hobson*, 2 Phil. 255, 257; *Chapman v. Chapman*, 13 Beav. 308; 15 Jur. 265. So where a bill was filed for the specific execution of a contract for the purchase of land alleged to be evidenced by a written

memorandum, and that allegation was not sustained by the proof, it was held, that the plaintiff could not, under the prayer for general relief, obtain compensation for improvements upon the lands. *Smith v. Smith*, 1 Ired. Eq. 83. On a bill to rescind a contract, the Court cannot decree a specific execution. *Rochester v. Anderson*, Litt. Sel. Ca. 146.

⁵ 2 Sch. & Lef. 721, 729.

strument taken by the defendant without sufficient consideration, should be set aside. The prayer for general relief is sufficient for the purpose; and upon that prayer, the Court may give every relief consistent with the case made by the bill, and continually does give relief in the manner specifically prayed by the bill, and sought for only by the prayer for general relief."

The rule, that the Court will only grant such relief as the plaintiff is entitled to, upon the case made by the bill, is most strictly enforced in those cases where the plaintiff relies upon fraud. Accordingly, it has been laid down, that where the plaintiff has rested his case in the bill upon imputations of direct personal misrepresentation and fraud, he cannot be permitted to support it upon any other ground;¹ but if other matters be alleged in the bill, which will give the Court jurisdiction as the foundation of a decree, the proper course is to dismiss only so much of the bill as relates to the case of fraud, and to give so much relief as under the circumstances the plaintiff may be entitled to.²

It is to be observed that the Court will not, in general, decree interest upon a balance, unless where it is specifically asked for by the bill.³ Where, however, from peculiar circumstances, interest was not properly due at the time the bill was filed, and a right to interest has subsequently accrued, the Court has directed interest to be computed, although there was no prayer to that effect in the bill. Thus, in *383 *Turner v. Turner*,⁴ interest was, by order on * further directions, directed to be computed upon the balance in executors' hands, although not prayed by the bill: because, at the time the bill was filed, there did not appear to have been any money in their hands, and the bill could not advert to those circumstances which arose subsequently.

Upon the principle that the Court will not grant a different relief from that prayed by the bill, it was held by Sir John Leach V. C. that where a bill merely prayed a commission to examine witnesses abroad, in aid of an action at Law, the Court could not grant a motion that the plaintiff might be at liberty to examine one of the witnesses, who had

¹ *Wilde v. Gibson*, 1 H. L. Ca. 605; *Glascott v. Lang*, 2 Phil. 310, 322; *Parr v. Jewell*, 1 K. & J. 671; *Luff v. Lord*, 11 Jur. N. S. 50, L. C. [*Hickson v. Lombard*, L. R. 1 H. L. 324; *Eyre v. Potter*, 5 How. 342; *Hoyt v. Hoyt*, 12 C. E. Green, 399. *Ante*, 328, n. 2.] The use of the word "fraud" does not bring the case within this rule, unless the case alleged is one of fraud properly so called. *Marshall v. Sladden*, 7 Hare, 428, 443; 14 Jur. 106, 109; *McAlmont v. Rankin*, 8 Hare, 116; 14 Jur. 475. [See *ante*, 324, n. 8.]

² *Archbold v. Commissioners of Charitable Bequests for Ireland*, 2 H. L. Ca. 440, 459; *Harrison v. Guest*, 6 De G., M. & G. 424, 438; 2 Jur. N. S. 911. In *Read v. Cramer*, 1 Green Ch. 277, a bill was filed for relief on the ground of fraud, and relief was granted

on the ground of mistake. [And see *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572; *Hilliard v. Eiffe*, L. R. 7 H. L. 39; *Voorheez v. Bonesteel*, 16 Wall. 16; *Martin v. Lutkewitte*, 50 Me. 58.]

³ *Weymouth v. Boyer*, 1 Ves. J. 416, 426.

⁴ 1 J. & W. 39, 53, and see *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Davenport v. Stafford*, *ib.* 319, 334; 2 De G., M. & G. 901; *Johnson v. Prendergast*, 28 Beav. 480; see also *Lloyd v. Jones*, 12 Sim. 491; *Fry v. Fry*, 10 Jur. N. S. 983, V. C. S.; and *post*, Chap. XXX., *Further Consideration*. [See *Smith v. Smith*, 4 John. Ch. 448; *Benzein v. Robinett*, 2 Dev. Eq. 67; *Smith v. Godbold*, 4 Strobh. Eq. 186; *Lee v. Pindle*, 12 Gill & J. 288; *Burts v. Beard*, 11 Heisk. 472; *Shepard v. Akers*, 2 Tenn. Ch. 627. *Infra*, 1368, n. 10.]

come to this country and was about to go away again, *de bene esse*, but said that the bill might be amended for that purpose.¹

But although the Court will not, under the general prayer, grant a different relief from that prayed by the bill, yet, when it appears that the plaintiff is entitled to relief, although it be different from that which he has specifically prayed, it will sometimes allow the cause to stand over, with liberty to the plaintiff to amend his bill.² This point was decided by Lord Rosslyn, in *Beaumont v. Boulbee*,³ in which case it appears that, after publication had passed, the relief prayed for specifically was thought not to be that to which the plaintiff was entitled; he therefore applied for liberty to amend, by adding an additional prayer for relief, which was resisted upon the ground that the answer put in was applicable to the specific relief already prayed; but, after much discussion, Lord Rosslyn determined that it was competent to the plaintiff to amend, by adding the additional prayer. In *Palk v. Lord Clinton*,⁴ above referred to, it appeared at the hearing that the plaintiff was not entitled to the specific relief prayed for, and that, in order to enable the Court to grant the relief upon the case made by his bill, which might, properly, be given, *viz.*, a foreclosure of a mortgage, it would be necessary to bring an additional party before the Court: an order was accordingly made giving the plaintiff leave to amend his bill by adding parties and praying such relief as he might be advised.

The instances, however, in which this will be done are confined to those where it appears, from the case made by the bill, that the plaintiff is entitled to relief, although different from that sought

* by the specific prayer: where the object of the proposed amend- *384
ment is to make a new case, it will not be permitted. Thus, where a bill was filed for the specific performance of an agreement for a lease to the plaintiff alone, and it was stated, by the defendant's answer, that the agreement had been to let to the plaintiff and another person jointly, but the plaintiff nevertheless replied to the answer, and proceeded to establish a case of letting to himself alone, in which he failed: Lord Redesdale, upon application being made to him to let the cause stand over, with liberty to the plaintiff to amend, by adding the other lessee as a party, said that such a proceeding would be extremely improper; it was not like letting a case stand over to add a party against whom a decree in a plain case could be made, but for the purpose of making a new case; for a new case it would be if founded on a new agreement.¹ In that case, his Lordship stated that the ordinary practice, where a party has mistaken his case, and brings the cause to a hearing

¹ *Atkins v. Palmer*, 5 Mad. 19.

² See *Pennock v. Ela*, 41 N. H. 189. Where the facts set forth in the bill would not authorize other relief than that specially prayed for, the prayer will not be amended. *Hulsted v. Meeker*, 3 C. E. Green (N. J.), 136, 139.

³ 5 Ves 485, 495; 7 Ves. 599, on a rehearing by Lord Eldon; stated on this point,

arg. in *Palk v. Lord Clinton*, 12 Ves. 63; see also *Cook v. Martyn*, 2 Atk. 2.

⁴ 12 Ves. 48, 64, 66.

¹ *Deniston v. Little*, 2 Sch. & Lef. 11, n.; *Watts v. Hyde*, 2 Phil. 406; 11 Jur. 979; see also *Griggs v. Staplee*, 2 De G. & S. 572; 13 Jur. 29; *Phelps v. Prothero*, 2 De G. & S. 274; 12 Jur. 733.

under such mistake, is to dismiss the bill, without prejudice to a new bill; and this practice was adopted by him in *Lindsay v. Lytch*,² and is in accordance with the decree of Sir William Grant M. R. in *Woollman v. Hearn*,³ and has been subsequently followed by Lord Lyndhurst, in *Stevens v. Guppy*.⁴

But although the Court is thus strict in requiring that, where the plaintiff prays specific relief, it must be such as he is entitled to from the nature of the case made by the bill, yet where infants are concerned this strictness is relaxed; and it has been determined, that an infant plaintiff may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned or insisted upon it, or prayed it by his bill.⁵

In cases of charities, likewise, the Court will give the proper directions, without any regard to the propriety or impropriety in the prayer of the information.⁶

It sometimes happens that the plaintiff, or those who advise him, are not certain of his title to the specific relief he wishes to pray for; it is, therefore, not unusual so to frame the prayer that, if one species of relief sought is denied, another may be granted. Bills with a prayer of this description, framed in the alternative, are called bills with *385 a double aspect.⁷ But, it seems that the alternative *prayer must not be founded on inconsistent titles; thus, a plaintiff cannot assert a will to be invalid, and at the same time claim to take a benefit on the assumption of its validity.¹

² 2 Sch. & Lef. 1.

³ 7 Ves. 211, 222.

⁴ 3 Russ. 171, 186.

⁵ *Stapilton v. Stapilton*, 1 Atk. 6; see *ante*, p. 77.

⁶ *Attorney-General v. Jeanes*, 1 Atk. 355; see *ante*, p. 14.

⁷ *Bennet v. Wade*, 2 Atk. 325; *Ld. Red. 39*; *Story Eq. Pl. § 40*, and cases in note. [There is no inconsistency in the alternative claim to rescind an agreement of partnership because of misrepresentation, and if this cannot be done, for a dissolution of the partnership and settlement thereof. *Bagot v. Easton*, 7 Ch. Div. 1. An alternative prayer does not render a bill multifarious. *Kilgour v. New Orleans Gas Light Co.*, 2 Woods. 144.] If the plaintiff doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so that, if the Court should decide against him in one view of the case, it may yet afford him assistance in another. *Colton v. Ross*, 2 Paige, 396; *Lloyd v. Brewster*, 4 Paige, 537; *Cooper Eq. Pl. 14*; *M'Connell v. M'Connell*, 11 Vt. 290; *Strange v. Watson*, 11 Ala. 324; *Shields v. Barrow*, 17 How. U. S. 130; *Gerrish v. Towne*, 3 Gray, 86, 87; *Murphy v. Clark*, 1 Sm. & M. Ch. 221; *Stein v. Robertson*, 30 Ala. 286; *Walker v. Devereaux*, 4 Paige, 229; *Foster v. Cook*, 1 Hawks, 509; *Lingan v. Henderson*, 1 Bland, 252; *Pleasants v. Glasscock*, 1 Sm. & M. 17, 24, 25; *Kibler v. Whiteman*, 2 Harr. 401; *Foulkes v. Davies*, L. R. 7 Eq.

42. The alternative case stated must, however, be the foundation for precisely the same relief. When the prayer of a bill is that the Court will set aside a contract on the ground of fraud, the plaintiff cannot amend by substituting a prayer, that the Court would either set it aside on the ground of fraud, or, if it was valid, would enforce its specific performance. *Shields v. Barrow*, 17 How. U. S. 130; see *Pensemeau v. Pensemeau*, 22 Miss. 27.

[See, as to the limitations which apply to a bill with a double aspect. *Lloyd v. Brewster*, 4 Paige, 537; *Wilkinson v. Dobbie*, 12 Blatchf. 258, 302; *Collins v. Knight*, 3 Tenn. Ch. 183; *Terry v. Rosell*, 32 Ark. 478, 492; *Polhemus v. Emson*, 29 N. J. Eq. 583; *Micou v. Ashurst*, 55 Ala. 607.]

A prayer, assigning several reasons for vacating a deed, is considered as so many separate prayers, and if one reason be valid, it is error to reject the whole prayer. *American Exchange Bank v. Inloes*, 7 Md. 380. In New York, legal redress and equitable relief may be demanded in the same complaint; and either, or both, if the circumstances of the case permit, may be afforded by the Court. *New York Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357; but, in order to entitle a party to one or the other, he must ask it specifically in his complaint. *Stevenson v. Buxton*, 15 Ab. Pr. 355.

¹ *Wright v. Wilkin*, 4 De G. & J. 141; see also *Rawlings v. Lambert*, 1 J. & H. 458;

It is a principle of Equity, that a person seeking relief in Equity must himself do what is equitable;² it is therefore required, in many cases, that a plaintiff should, by his bill, offer to do whatever the Court may consider necessary to be done on his part towards making the decree which he seeks just and equitable, with regard to the other parties to the suit. Upon this principle, where a bill is filed to compel the specific performance of a contract by a defendant, the plaintiff ought by his bill to submit to perform the contract on his part; and it is to be observed, that the effect of such submission will be to entitle a defendant to a decree, even though the plaintiff should not be able to make out his own title to relief, in the form prayed by his bill.³

Upon the same principle, it was formerly required, that a bill for an account should contain an offer on the part of the plaintiff to pay the balance, if found against him; but it seems that such an offer is not now considered necessary.⁴ And so, where a surety brought an action upon an indemnity bond against his principal, to recover moneys which he had been compelled to pay on his account, and the principal filed a bill in Equity for an injunction, and to have the bond delivered up to be cancelled, suggesting *fraud, but without offering to *386 indemnify the defendant, the Court of Exchequer thought, that the want of an offer in the bill to make satisfaction, was fatal to the bill, and allowed a demurrer, which had been put in by the defendant.¹

In like manner it has been held, that a mortgagor cannot make a mortgagee a party to a bill in respect of his mortgage estate, without offering to redeem him.²

It is upon the same ground that Courts of Equity, in cases where a contract is rendered void by a statute, require that a bill to set aside such contract should contain an offer on the part of the plaintiff to pay to the defendant what is justly due to him. Thus, where a bill was filed, praying that an instrument or security given for an usurious consideration (and void under the usury laws then in force) might be delivered up to be cancelled, the only terms upon which a Court of

Marsh v. Keith, 1 Dr. & S. 342; *Thomas v. Hobler*, 8 Jur. N. S. 125, L. C.; *Lett v. Parry*, 1 H. & M. 517; *Onions v. Cohen*, 13 W. R. 426, V. C. W.; *Davies v. Ottv*, 2 De G., J. & S. 238. [Nor file a bill asking the cancellation of a mortgage, or to redeem. *Micou v. Ashurst*, 55 Ala. 607.] Alternative relief cannot be obtained against another defendant. *Clark v. Lord Rivers*, L. R. 5 Eq. 91. [But see now, under Judicature Act and Rules of Court of 1875, *Child v. Stenning*, 7 Ch. Div. 413.]

² *Bates v. Wheeler*, 1 Scam. 54; *Cooper v. Brown*, 2 M'Lean, 495; *Dougherty v. Humpson*, 2 Blackf. 273.

³ *Fife v. Clayton*, 13 Ves. 546; 1 C. P. Coop. t. Cott. 351; *Green v. Covillaud*, 10 Cal. 317; *McKleroy v. Tulane*, 34 Ala. 78; *Bell v. Thompson*, 34 Ala. 633; *Oliver v.*

Palmer, 11 Gill & J. 426; *Hatcher v. Hatcher*, 1 McMullan Ch. 311.

⁴ *Columbian Government v. Rothschild*, 1 Sim. 94, 103; *Clarke v. Tipping*, 4 Beav. 588, 593; *Barker v. Walters*, 8 Beav. 92, 96; *Toulmin v. Reid*, 14 Beav. 499, 505; *Inman v. Wearing*, 3 De G. & S. 729, 733; *Wells v. Strange*, 5 Geo. 22.

¹ *Godbolt v. Watts*, 2 Anst. 543.

² *Dalton v. Hayter*, 7 Beav. 343, 349; *Inman v. Wearing*, 3 De G. & S. 729; *Attorney-General v. Hardy*, 1 Sim. N. S. 338, 355; 15 Jur. 441; *Knebell v. White*, 2 Y. & C. Ex. 15, 20. If the bill does not contain an offer to account, and the decree does not direct plaintiff to pay what may be due to defendant, the Court cannot at the further hearing make such an order. *Hollis v. Bulpett*, 13 W. R. 492, V. C. K.

Equity would interfere were those of the plaintiff paying to the defendant what was *bonâ fide* due to him,³ and where the plaintiff did not offer to do so by his bill, a demurrer was allowed.⁴ It seems that there is no difference, in this respect, between a cross-bill and an original bill.⁵ The course of proceeding in bankruptcy, however, differs from that in Courts of Equity; for the rule in bankruptcy is, that a debt made void by statute is void altogether, and cannot be proved: because the creditor has no legal remedy by which he can recover; and unless the assignees and creditors voluntarily consent to the payment of what is really due, neither the Court of Bankruptcy nor the Lord Chancellor, or Lords Justices, have power to order it; and applications of this nature have frequently been refused.⁶

It is a rule in Equity, that no person can be compelled to make a discovery which may expose him to a penalty, or to any thing *387 * in the nature of a forfeiture. As, however, the plaintiff is, in many cases, himself the only person who would benefit by the penalty or forfeiture, he may, if he pleases to waive that benefit, have the discovery he seeks.¹ The effect of the waiver, in such cases, is to entitle the defendant (in case the plaintiff should proceed upon the discovery which he has elicited by his bill, to enforce the penalty or forfeiture) to come to a Court of Equity for an injunction: which he could not do without such an express waiver.²

It is usual to insert this waiver in the prayer of the bill, and if it is omitted the bill will be liable to demurrer. Upon this ground, where an information was filed by the Attorney-General, to discover copyhold lands, and what timber had been cut down and waste committed, and the defendant demurred, because, although the discovery would have exposed the defendant to a forfeiture of the place wasted and treble damages, the Attorney-General had not waived the forfeitures, the de-

³ It is against conscience that the borrower should have full relief, and at the same time pocket the money, which may have been granted at his own mere solicitation. He who seeks equity at the hands of a Court of Equity, may well be required to do equity. 1 Story Eq. Jur. § 301; Fonb. Eq. B. 1, ch. 1, § 3, note (h); Jordon v. Trumbo, 6 Gill & J. 103; Crawford v. Harvey, 1 Blackf. 382; M'Daniells v. Barnum, 5 Vt. 279; Fanning v. Dunham, 5 John. Ch. 142, 143, 144; Campbell v. Morrison, 7 Paige, 158; Judd v. Seaver, 8 Paige, 548; Cole v. Savage, 1 Clarke, 482. A Court of Equity will not aid a plea of usury, at Law, by compelling a discovery, unless the debtor, in his bill, tenders the sum actually borrowed. Tupper v. Powell, 1 John. Ch. 439; Rogers v. Rathbun, 1 John. Ch. 367. So the Court will not allow an answer to be amended for the purpose of setting up the defence of usury, unless the defendant consents to pay the amount actually due. Fulton Bank v. Beach, 1 Paige, 429.

⁴ Mason v. Gardiner, 4 Bro. C. C. 436; 56.

Scott v. Nesbit, 2 Bro. C. C. 641, 649; 2 Cox, 183; Whitmore v. Francis, 8 Pri. 616. [Where the plaintiff was unable to fulfil an offer upon which the decree had been founded, the bill was dismissed, but without prejudice. Langton v. Waite, L. R. 4 Ch. App. 402. And see where the bill is filed after judgment at Law for a reduction of the usury. Chester v. Apperson, 4 Heisk. 639, 653.]

⁵ Mason v. Gardiner, 4 Bro. C. C. ed. Belt, 438, n.; Story Eq. Pl. § 630.

⁶ *Ex parte* Thompson, 1 Atk. 125; *Ex parte* Skip, 2 Ves. S. 489; *Ex parte* Mather 3 Ves. 373; *Ex parte* Scrivener, 3 V. & B. 14; Archbold's Bankruptcy, 110.

¹ In Mason v. Lake, 2 Bro. P. C. ed. Toml. 495, 497, leave appears to have been given to amend a bill, by waiving penalties and forfeitures, after a demurrer upon that ground allowed. See United States of America v. McKae, L. R. 4 Eq. 327, 333, 338-340; S. C. L. R. 3 Ch. Ap. 79; Attorney-General v. Vincent, Bunb. 192.

² Lord Uxbridge v. Staveland, 1 Ves. S.

murrer was allowed.³ And so it has been held, that a demurrer will lie to a bill by reversioner, for a discovery of an assignment of a lease without license, if it does not expressly waive the forfeiture.⁴ Upon the same principle, if a rector or impropriator, or a vicar, file a bill for tithes, he must waive the penalty of the treble value, to which he is entitled by the statute of 2 & 3 Edward VI.: otherwise, his bill will be liable to demurrer.⁵ It seems, however, that if the bill pray an account of the single value of the tithes only, such a prayer will amount to an implied waiver of the treble value, and that an injunction may be granted against suing for the penalty of the treble value, as well upon this implied waiver as upon the most express.⁶ It is to be observed also, that if the executor or administrator of a parson bring a bill for tithes, he need not offer to accept the single value, as the statute of Edward VI. does not give to such persons a right to the treble value.⁷

And it seems, that if a plaintiff has made a gratuitous offer by his bill, he cannot afterwards withdraw it;⁸ but it is in the discretion of the Court whether or not to enforce it.⁹

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, who is not an infant, this portion * of the bill may also contain a prayer that such party, upon *388 being served with a copy of the bill, may be bound by all the proceedings in the cause.¹

For the purpose of preserving the property in dispute pending a suit, or to prevent evasion of justice, the Court either makes a special order on the subject, or issues a provisional writ: such as, the writ of injunction to restrain the defendant from proceeding at Common Law against the plaintiff, or from committing waste, or doing any injurious act; the writ of *ne exeat regno*, to restrain the defendant from avoiding the plaintiff's demands by quitting the kingdom; or other writ of a similar nature. When a bill seeks to obtain the special order of the Court, or a provisional writ for any of these purposes, a prayer for the order or particular writ which the case requires should be inserted, and the bill is then commonly named from the writ so prayed: as, an injunction bill, or a bill for a writ of *ne exeat regno*.²

As a general rule, the Court will not grant an injunction, unless expressly prayed by the bill.³ A prayer for general relief will not be sufficient to authorize it:⁴ for, as against the general words, the defendant might make a different case than he would against a prayer for an

³ Attorney-General v. Vincent, Bunb. 192.

⁴ Lord Uxbridge v. Staveland, 1 Ves. S.

56.

⁵ Ld. Red. 195; Anon., 1 Vern. 60.

⁶ Wools v. Walley, 1 Anst. 100.

⁷ Anon., 1 Vern. 60; see also Attorney-General v. Vincent, *ubi sup.*

⁸ Pelly v. Wathen, 7 Hare, 371; 14 Jur. 9, 13; Potter v. Waller, 2 De G. & S. 410,

420; Kendall v. Marsters, 2 De G., F. & J. 200.

⁹ Knight v. Bowyer, 2 De G. & J. 421, 447; 4 Jur. N. S. 569.

¹ Order X. 11; see *post*, Chap. VII. § 1.

² Ld. Red. 46.

³ Savory v. Dyer, Amb. 70; Walker v. Devereaux, 4 Paige, 248; Lewiston Falls Manuf. Co. v. Franklin Co., 54 Maine, 402.

⁴ Wright v. Atkyns, 1 V. & B. 313, 314.

injunction.⁵ It seems, however, that there are exceptions to this rule; and that, in some cases, the Court will grant an injunction, though not prayed for.⁶

It is to be observed, that the rule not to grant an injunction, unless especially prayed, applies only to cases where it is required, provisionally, until the hearing; but that after decree, the Court will interpose by injunction, although it is not asked for by the bill.⁷

Where an injunction is sought, not as a provisional remedy merely, but as a continued protection to the rights of the plaintiff, the prayer of the bill must be framed accordingly.⁸

The prayer for *ne exeat regno* resembles *mutatis mutandis*, that for an injunction.⁹ But, though it is usual, it is not necessary that the *389 bill should pray the writ, as the intention to go abroad may * arise in the progress of the cause; and if, when the bill is filed, the defendant does not intend to leave the kingdom, it would be highly improper to pray the writ: as a groundless suggestion that the defendant means to abscond would press too harshly, and would also operate to create the very mischief which the Court, in permitting the motion for it to be made without notice, means to prevent.¹ In the case, however, of *Sharp v. Taylor*,² where the plaintiff knew, at the time of the filing of the bill, that the defendant was going abroad, Sir Lancelot Shadwell V. C. refused to grant a writ of *ne exeat regno*, in consequence of its not having been prayed for by the bill.³

In addition to the particulars already mentioned as necessary parts of a bill, the bill should also, in the heading, be expressed to be between the intended plaintiffs and defendants; the names of the defendants should be repeated at the end, as defendants to the bill;⁴ and a note should be appended of the name and address of the plaintiff's solicitor and agent, or of the plaintiff's name and place of abode, where he sues in person.⁵

⁵ *Savory v. Dyer*, *ubi sup.* In cases where the writ of injunction is sought, it should not only be included in the prayer for relief, but also in the prayer for process. *Wood v. Bradell*, 3 Sim. 273; *Union Bank v. Kerr*, 2 Md. Ch. 460.

⁶ *Blomfield v. Eyre*, 8 Beav. 250, 259. [And the bill may be amended by adding the necessary prayer. *Jacob v. Hall*, 12 Ves. 458; *Wood v. Beadell*, 3 Sim. 273.]

⁷ *Wright v. Atkyns*, *ubi sup.*; *Paxton v. Douglas*, 8 Ves. 520; *Jackson v. Leaf*, 1 J. & W. 229, 232; *Clarke v. Earl of Ormond*, Jac. 122; *Reynell v. Sprye*, 1 De G., M. & G. 600, 690; and see *post*, Chap. XXXVI. *Injunctions*.

⁸ *Ld. Red. 47*; and see *post*, Chap. XXXVI. § 3. [But the omission of the proper prayer is matter of form, and may be amended at the hearing. *African Methodist Episcopal Church v. Conover*, 12 C. E. Green, 157. And, perhaps, a final injunction may be obtained under the prayer for general relief. *Walker v. Devereaux*, 4 Paige, 229, 248.]

⁹ Upon the same bill, a *ne exeat*, as well as an injunction, may be granted. *Bryson v. Petty*, 1 Bland, 182.

¹ *Collinson v. —*, 18 Ves. 353; *Moore v. Hudson*, 6 Mad. 218; *Barned v. Laing*, 13 Sim. 255; 6 Jur. 1050; 7 Jur. 383; *Howkins v. Howkins*, 1 Dr. & S. 75; 6 Jur. N. S. 490.

² 11 Sim. 50; and see remarks on that case in *Barned v. Laing*, *ubi sup.*

³ *Ld. Red. 46, 47*; *Story Eq. Pl. § 43*, and notes; see *Darley v. Nicholson*, 1 Dr. & War. 66; 2 Dr. & War. 86; 1 Con. & L. 207, for the principles upon which the Court acts in granting writs of *ne exeat regno*; and see *post*, Chap. XXXVIII. *Writ of ne exeat*.

⁴ The words, "out of the jurisdiction," or "to be bound upon service of a copy of the bill," should be added after the name of a defendant who is abroad, or who is merely a formal party.

⁵ Ord. IX. 2, and Sched. A.; see also Ord. III. 2, 3, 5, and *post*, p. 397. For forms, see Vol. III.

The branch of the Court to which the cause is to be attached, must also be marked on the bill, previous to its being filed.⁶

8. *Prayer for Process.*⁷

The next part of the bill consists of the prayer for process:⁸ it has before been stated that where no account, payment, conveyance, or other direct relief is sought against a party to a suit, who is not an infant, the plaintiff is now enabled, if he thinks fit, to pray by his bill that such a party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause;⁹ but with respect to all other defendants the process prayed, in ordinary cases, is a writ of *subpœna*; and this part of the prayer is *commonly as fol- *390 lows: "May it please your Lordship, the premises considered, to grant unto your orator his Majesty's most gracious writ [or writs] of *subpœna*, to be directed to the said —, and to the rest of the confederates, when discovered, thereby commanding them, and every of them, at a certain day, and under a pain therein to be limited, personally¹ to be and appear before your Lordship in this honorable Court; and then and there, full, true, direct, and perfect answer make to all and singular the premises; and further to stand to, perform, and abide such further order, direction, and decree therein, as to your Lordship shall seem meet. And your orator shall ever pray," &c.²

It is to be observed, that the above words are not usually inserted in the draft by the draftsman who prepares the bill, although they must be added when the bill is engrossed. The draftsman, however, generally writes a direction, in the margin of the draft, for the insertion of this prayer, specifying the names of the persons against whom process is to be prayed; and care must be taken in so doing to insert the names of all the persons who are intended to be made defendants; because it has been held that the mere naming of a party in a bill, without praying process against him as a defendant, is not to be considered as making him a party,³ even where he is out of the jurisdiction of the

⁶ Ord. VI. 1; see *post*, p. 397; and form of bill, Vol. III.

⁷ The bill used to conclude in England with an elaborate prayer for process; but all that is now required in the present English practice is, that the names of the defendants should be set forth, and a note appended with the names of the solicitors for the plaintiff. In New Hampshire, the prayer for process, unless some special process or order shall be required, may be omitted. Rule of Chancery, 3, 38 N. H. 605. The want of a prayer for process renders the bill defective in New Jersey. *Wright v. Wright*, 4 Halst. Ch. (N. J.) 153; see *Segee v. Thomas*, 3 Blatchf. C. C. 11.

⁸ See *Belknap v. Stone*, 1 Allen, 572.

⁹ Order, 23d August, 1841.

¹ In the case of a corporation a proper form would omit the word "personally," and after the word "appear," in this line, insert "according to law." 1 Hoff. Ch. 53.

² Hind. 17.

³ Story Eq. Pl. § 44. A person whom the bill prays to be made a party, does not thereby become a party: to make him such, process must be issued and served upon him. *Bond v. Hendricks*, 1 A. K. Marsh. 594; see *Huston v. McCarty*, 3 Litt. 274; *Verplanck v. Merc. Ins. Co.*, 2 Paige, 438; *Lyle v. Bradford*, 7 Monroe, 113; [*Windsor v. Windsor*, 2 Dick. 707; *Fawkes v. Pratt*, 1 P. W. 593; *Hoyle v. Moore*, 4 Ired. Eq. 175; *Doherty v. Stevenson*, 1 Tenn. Ch. 518. And if it is sought to sue a party as an individual and in a representative capacity, the bill should state the facts, and pray process against the defendant in both capacities, otherwise he will be held to be a party only in the character in which process was prayed against him. *Carter v. Ingraham*, 43 Ala. 78. A demurrer will lie to a bill containing no prayer for process. *Wright v. Wright*, 4 Halst. Ch.

Court.⁴ Some doubt appears to have been thrown upon the last proposition by the decision of Sir J. Leach V. C. in *Haddoch v. Thomlinson*,⁵ in which his Honor expressed an opinion that where a party interested in the subject of a suit is charged by the bill to be out of the jurisdiction of the Court, but is not named in the prayer for process, the omission will not render the record defective; although it is usual and convenient that process should be prayed against them, in order that if they come within the jurisdiction, process may issue against them without amending the bill. In a subsequent case, however, before Sir C. Pepys M. R. the point again came under the notice of the Court, when his Honor, — after referring to a manuscript report of another case before Sir J. Leach,⁶ in which that learned Judge had

said, that it was not enough to state that persons who, in respect
*391 of interest, were necessary parties, * were out of the jurisdiction,

but that the bill must go on to pray process against them, — said that he was of opinion that the principle of the manuscript case ought to be followed, and therefore allowed a demurrer which had been taken *ore tenus* for want of a necessary party, who had been charged to be out of the jurisdiction, but against whom no process had been prayed when he should come within it.¹

If the defendant be a peer of the realm, or entitled to the privilege of peerage, he has a right before a *subpœna* is issued against him, to be informed, by letter from the Lord Chancellor, of the bill having been filed; this letter is called a letter missive, and must be accompanied by a copy of the bill. In consequence of this privilege of peerage, the practice is, that in all cases, where peers are defendants, the usual prayer for process is preceded by a prayer for a letter missive, in the following words: "May it please your Lordship to grant unto your orator your Lordship's letter missive, to be directed to the said Earl of —, directing him to appear and answer your orator's

143. But not a general demurrer. *Boon v. Pierpont*, 1 Stew. Eq. 7.] By the former practice in New York, parties might be treated as defendants, by a clear statement in the bill to that effect, without praying the *subpœna*. The reason given was, that in that State the *subpœna* was issued of course, and that a formal prayer was unnecessary to entitle the plaintiff to process. *Brasher v. Van Cortlandt*, 2 John. Ch. 245; *Elnendorf v. Delancy*, 1 Hopk. 555. [*Ante* 286, n. 4 and 5.]

⁴ *Windsor v. Windsor*, 2 Dick. 707.

⁵ 2 S. & S. 219.

⁶ *Manos v. De Tastet*.

¹ *Taylor v. Fisher*, Roll's Sittings after Hil. Term, 1835, MS.; see Story Eq. Pl. § 44 and note; Mitford Eq. Pl. by Jeremy, 165; *Milligan v. Milledge*, 3 Cranch, 220; *Lavihart v. Reilly*, 3 Desaus. 590. The 22d Equity Rule of the Supreme Court of the United States, January Term, 1842, has provided, that "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made

parties, by showing them to be without the jurisdiction of the Court, or that they cannot be joined without ousting the jurisdiction of the Court as to the other parties. And as to persons who are without the jurisdiction, and may probably be made parties, the bill may pray, that process may issue to make them parties to the bill, if they should come within the jurisdiction." The 23d Rule is as follows: "The prayer for process of *subpœna* in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the Court may take order thereon as justice may require, upon the return of the process. If an injunction, or writ of *ne exeat regno*, or any other special order pending the suit is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process." Provision is made for service of notice on defendants residing out of the Commonwealth, in the rules for the Reg. of Prac. in Chan., in Massachusetts, Rule 5.

said bill, or in default thereof, his Majesty's most gracious writ of *subpœna*," &c.²

When the Attorney-General is made a defendant to a suit, as he is always supposed to be in Court, the bill does not pray any *subpœna* against him, but merely that, upon being attended with a copy of the bill, he may appear and put in an answer thereto.³

* SECTION VI. — *In what Cases the Bill must be accompanied by an Affidavit.* *392

There are certain cases in which it is necessary that the bill should be accompanied by an affidavit, to be filed with it, and in which the omission of such accompaniment will render the bill liable to demurrer.¹ Thus, when a bill is filed to obtain the benefit of an instrument upon which an action at Law would lie, upon the ground that it is lost, and that the plaintiff in Equity cannot therefore have any relief at Law, the Court requires that the bill should be accompanied by an affidavit of the loss of the instrument.² If, however, the objection is not taken by demurrer, but the cause proceeds to a hearing, and the answer of the defendant admits the loss or destruction of the instrument, then the Court has jurisdiction, and the objection for want of the affidavit will be overruled.³ So, in suits for the discovery of deeds and writings, and for relief founded upon such instruments, if the relief prayed be such as might be obtained at Law, on the production of deeds or writings, the plaintiff must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant.⁴

² Hind. 18. In the case of corporations aggregate, the process of *subpœna* is the same as in ordinary cases; but the bill sometimes prays, that in case of their default to appear and answer the bill, the writ of *distringas* may issue to compel them to do so. Coop. Eq. Pl. 16, 17; Harvey v. East Ind. Co., 2 Vern. 396; 1 Harris. Ch. Pr. 149; Story Eq. Pl. § 44.

³ Ld. Red. 46.

¹ Where no preliminary order is required it is not generally necessary that bills should be sworn to, although the answer under oath is not waived. Atwater v. Kinman, Harring. Ch. 243; Jerome v. Jerome, 5 Conn. 352. A bill in Equity to redeem mortgaged premises need not be verified by affidavit. Hilton v. Lothrop, 46 Maine, 297; Dinsmore v. Crossman, 53 Maine, 441. A bill need not be sworn to in Massachusetts. Burns v. Lynde, 6 Allen, 306. In North Carolina, "an affidavit of the truth of the matters contained in his bill" was necessary to give jurisdiction to the Court of Equity, under the Statute (Rev. Code, c. 7), and the want of such affidavit was a good ground for a general demurrer. Barringer v. Andrews, 5 Jones Eq. (N. C.) 348. There is no rule in the United States Circuit Court for Massachusetts,

requiring an oath to be filed with the bill. Woodworth v. Edwards, 3 Wood. & M. 120.

² Ld. Red. 124; Walmsley v. Child, 1 Ves. S. 341; Wright v. Lord Maidstone, 1 K. & J. 701; 1 Jur. N. S. 1013; Whitechurch v. Golding, 2 P. Wms. 541; [March v. Davison, 9 Paige, 580; Staev v. Pearson, 3 Rich. Eq. 148; Parson v. Wilson, 2 Tenn. 260;] Pennington v. Governor, 1 Blackf. 78; Taliaferro v. Foote, 3 Leigh, 58; Peart v. Taylor, 2 Bibb 556; Story Eq. Pl. § 288; Ld. Red. 123, 224; Livingston v. Livingston, 4 John. Ch. 294. Le Roy v. Veeder, 1 John. Ch. 417; Mundav v. Shatzell, Litt. Sel. Ca. 373; Lynch v. Willard, 6 John. Ch. 342, 346. For the reason of the rule, see post 394, 395, note. In Thornton v. Stewart, 7 Leigh, 128, it was held that, although regularly an affidavit of the loss of the bond, &c., ought to be filed with a bill for relief upon a lost bond, yet if such affidavit is not so filed, but is filed afterwards in the progress of the cause, this is sufficient. See Cabell v. Megginson, 6 Munf. 202; Jerome v. Jerome, 5 Conn. 352; Bennett v. Waller, 23 Ill. 97.

³ Crosse v. Bedingfield, 12 Sim. 35; 5 Jur. 836; Bennett v. Waller, 23 Ill. 97.

⁴ McElwee v. Sutton, 1 Hill Ch. 33; Story Eq. Pl. §§ 288, 313; Findley v. Hinde, 1

But a bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, *393 does *not require such an affidavit.¹ It was decided, in *King v. King*,² that an affidavit is also unnecessary in the case of a bill for discovery of an instrument which has been fraudulently cancelled by the defendant, and to have another deed executed: for, in such a case, if the plaintiff had the cancelled instrument in his hands he could make no use of it at Law, and, indeed, the relief prayed is such as a Court of Equity only can give; but, in *Rootham v. Dawson*,³ the authority of *King v. King* appears to have been questioned, and a different decision come to. In that case, the bill was filed for the discovery of the contents of a bond which had been given to the plaintiffs, as parish officers, as an indemnification for the expense of a bastard child, and which was alleged in the bill to have been defaced and cancelled by tearing off the signature of the obligor, so that the bond was no longer in force; the bill also prayed an account and payment of what was due on the bond, as well as the execution of a new one for the future indemnification of the trustees. To this bill the defendant demurred: "for that the plaintiffs ought, according to the rules of the Court, to have made an affidavit of the bond being defaced and avoided, as stated in the bill;" and the demurrer was allowed. It is to be observed, that the L. C. B. Macdonald, in his judgment, appears to have proceeded upon the ground that the plaintiffs had not confined themselves to seeking a discovery and re-execution of the bond, but had gone on to pray for payment of the sum already due: though, certainly, that distinction does not appear to have been recognized by the learned Baron Thompson, who delivered his opinion upon the occasion. It is, however, submitted that the reason given for the decision in *King v. King* is quite satisfactory: for, as the ground for the interference of a Court of Equity in such a case is not the loss, but the cancellation of the instrument, so as to render it impossible to use it at Law, no relief will be granted by the Court until it is satisfied that the cancellation has taken place, by the production of the cancelled instrument; whereas, in the case of the loss of a document, the Court has, in general, no means of satisfying itself that the document has been lost but the assertion of the party himself: which it consequently requires should be made upon oath.

Another case, in which it was required that the bill should be accompanied by an affidavit, was, where a bill was filed under the stat. 53

Peters, 244; *Livingston v. Livingston*, 4 John. Ch. 294; *Campbell v. Sheldon*, 13 Pick. 8, 18 to 20, per Shaw C. J. For form of affidavit, see Vol. III., and for form of demurrer, for want of it, see 2 Van Hey. 76.

¹ Ld. Red. 54; see 1 Ves. S. 341, 344; *Whitchurch v. Golding*, 2 P. Wms. 541; *Anon.*, 3 Atk. 17; *Dormer v. Fortescue*, *ib.* 132; [*Caton v. Coles*, L. R. 1 Eq. 581]; *McElwee*

v. Sutton, 1 Hill Ch. 33; Story Eq. Pl. § 288. Where the subject-matter of the writing is properly cognizable in Equity, an affidavit of the loss is not necessary. *Peart v. Taylor*, 2 Bibb, 566; Ld. Red. 124; *Laight v. Morgan*, 1 Caines Ca. Er. 345; S. C. 1 John. Ch. 9; *Campbell v. Sheldon*, 13 Pick. 18 to 20.

² Mos. 192; and see Ld. Red. 124.

³ Aust. 859.

Geo. III. c. 159, which was passed for the purpose of limiting the responsibility of ship-owners in certain cases. This Act is *expressly repealed by the 17 & 18 Vic. c. 120, § 4; and *394 as the Acts now in force¹ for the above purpose contain no provision similar to that contained in the Act of Geo. III., with reference to an affidavit accompanying the bill, it is to be assumed that such an affidavit is no longer necessary.

Even in cases in which the legislature has expressly directed that the affidavit should be "annexed to the bill," it is not necessary that the affidavit should be sworn at the same time as the bill is filed: but it is the usual practice, in all cases in which an affidavit is necessary, to have it sworn a day or two before the bill is filed.²

The other cases, in which bills are required to be accompanied by an affidavit, may be mentioned here, although they do not come within the description of bills which are now the subject of discussion. These are: bills for the purpose of perpetuating the testimony of witnesses, where, from circumstances, such as the age or infirmity of witnesses, or their intention of leaving the country, it is probable the plaintiff would lose the benefit of their testimony: in which case, an affidavit of the circumstances, by means of which the testimony may probably be lost, must be annexed to the bill:³ and bills of interpleader, which also, to avoid a demurrer, must be accompanied by an affidavit by the plaintiff that there is no collusion between him and any of the parties.⁴

¹ "The Merchant Shipping Act, 1854" (17 & 18 Vic. c. 104), Part IX. §§ 504, 514; "The Merchant Shipping Amendment Act, 1862" (25 & 26 Vic. c. 63), § 64.

² Walker v. Fletcher, 1 Phil. 115; 12 Sim. 420, 422; 6 Jur. 4; but see Francome v. Francome, 13 W. R. 355, L. C.; 11 Jur. N. S. 123. The affidavit is usually, but need not be, attached to the bill. Jones v. Shepherd, 29 Beav. 293; 7 Jur. N. S. 250. Affirmed by L. C. 7 Jur. N. S. 228; *sub nom.* Shepherd v. Jones, 3 De G., F. & J. 56. It may be made an exhibit to the bill. See forms of affidavit in Vol. III.

³ Ld. Red. 150; Phillips v. Carew, 1 P. Wms. 116; Laight v. Morgan, 1 Caines's Cas. in Error, 344; S. C. 1 John. Ch. 429; Story Eq. Pl. § § 304, 309. The reason given for requiring the affidavit is, that the proceeding has a tendency to change the jurisdiction of the subject-matter from a Court of Law to a Court of Equity. Ld. Red. 150, 151; Story Eq. Pl. 309. "This reason," says Mr. Justice Story, "is perhaps not quite satisfactory."—"A better ground would seem to be that the bill has a tendency to create delays, and may be used as an instrument unduly to retard the trial; and, therefore, an affidavit, that the bill is well founded, is required. The affidavit should be positive as to the material facts." Story Eq. Pl. § 309; and see *post*, Chap. XXXIV. § 4, *Bills to Perpetuate Testimony*. For form of demurrer for want of such affidavit, 2 Van Hey. 78.

⁴ Ld. Red. 49; Bignold v. Audland, 11 Sim. 23; Hamilton v. Marks, 5 De G. & S. 638. In Larabrie v. Brown, 1 De G. & J. 204; 23 Beav. 607, leave was given to file an interpleader bill *quantum voluit*, on affidavit of the plaintiffs' solicitor, the plaintiffs being abroad, and time pressing; but the affidavit of the plaintiffs was afterwards, by leave of the Court, filed and annexed to the bill, *nunc pro tunc*. Braithwaite's Pr. 27. Where there were several plaintiffs residing in distant places, leave was given, on a like affidavit, and an injunction granted for a limited time, on an undertaking to file the usual affidavit. Nelson v. Barter, 10 Jur. N. S. 611; 12 W. R. 857, V. C. W.; 2 H. & M. 334; and see *post*, Chap. XXXIV. § 3, *Bills of Interpleader*; see Wood v. Lym, 4 De G. & Sm. 16; Edrington v. All-brooks, 21 Texas, 186; Eden Inj. (2d Am. ed.) 401, 402; Shaw v. Coster, 8 Paige, 339; Tobin v. Wilson, 3 J. J. Marsh. 67; Manks v. Holbrod, 1 Cowen, 691; Ld. Red. 143. Such an affidavit is not necessary in Connecticut. Nash v. Smith, 6 Conn. 421; see Jerome v. Jerome, 5 Conn. 352. For form of affidavit, see Vol. III. For form of demurrer for want of such an affidavit, Willis, 442; Equity Drafts (2d Am. ed.), 77.

A bill praying for an injunction, generally requires a special affidavit to support it. Eden Inj. (2d Am. ed.) 380, 381; 1 Barb. Ch. Pr. 43, 44, 617; 1 Hoff. Ch. Pr. 78;

*395 * It is to be observed that, in cases of this nature, advantage can only be taken of the omission of an affidavit, by demurrer; and where a plaintiff, instead of demurring on this ground in the first instance, put in a plea to the whole bill, which was overruled, he was not allowed to demur, *ore tenus*, on the ground that the necessary affidavit was not annexed.¹

Hatch v. Eustaphieve, 1 Clarke (N. Y.), 63; Hammersley v. Wyckoff, 8 Paige, 72; Holdrege v. Gwynne, 3 C. E. Green (N. J.), 26, 32; Perkins v. Collins, 2 Green Ch. 482; Bogert v. Haight, 9 Paige, 297; see Woodworth v. Edwards, 3 Wood. & M. 120. It may be verified by an attorney. Edrington v. Allsbrooks, 21 Texas, 186; Youngblood v. Schamp, 2 McCarter (N. J.), 42.

[An affidavit of a person other than the plaintiff, that "each and every allegation contained in the bill are true so far as they are known to him personally, and so far as he has heard he believes them to be true," is insufficient to sustain an injunction. Chesapeake, &c. R. Co. v. Huse, 5 W. Va. 579. And so is the oath of an attorney that statements "are true when made on his own knowledge, and when made upon information of others he believes them to be true," where it does not appear from the bill or petition that any of the statements were made upon the knowledge of the affiant or information of others. Pullen v. Baker, 41 Texas, 419. And see Smith v. Republic Life Ins. Co., 2 Tenn. Ch. 631. If, however, the bill has been actually sworn to, the injunction will not be dissolved because the Master has omitted to sign the jurat. Capner v. President, &c. of Flemington Co., 2 Green Ch. 467.]

In Maine, "bills of discovery, and those praying for an injunction, must be verified by oath." Chan. Rule 1, 37 Maine, 581. This rule relates to the pure and simple bill of discovery. Dinsmore v. Crossman, 53 Maine, 441; Hilton v. Lothrop, 46 Maine, 297.

Where the facts, on which the claim for an injunction is made, are not within the knowledge of the plaintiff, he should state the facts in his bill as upon his information and belief, and annex the affidavit of the person from whom he obtained the information, or some other person who can swear positively to the truth of the material allegations in the bill. Campbell v. Morrison, 7 Paige, 157; Bank of Orleans v. Skinner, 9 Paige, 305. But in bills charging fraud, and praying a discovery, or in any case, where, in the nature of things, positive proof cannot be expected, the additional verification may be dispensed with, and the injunction may issue on the affidavit of the plaintiff founded on belief alone. Youngblood v. Schamp, 2 McCarter (N. J.), 42; Attorney-General v. Bank of Columbia, 1 Paige, 511; Campbell v. Morrison, 7 Paige, 157. In New Jersey, the affidavits of the plaintiff, made after filing the bill, are not competent to be read upon a motion for an injunction and the appointment of receivers. Such affidavits should be

subjoined to the bill, and filed with it. Branded v. Paterson Machine Shop, 3 Green Ch. 294, 309. In Delaware, a creditor's bill must contain the averments required by the 109th Rule, and those averments must be sworn to in the *jurat*. Clark v. Davis, Haring. Ch. 227.

When a writ of *ne exeat regno* is asked for, an affidavit is necessary as a foundation for obtaining it. Rice v. Hale, 5 Cush. 238; Porter v. Spencer, 2 John. Ch. 169; Seymour v. Hazard, 1 John. Ch. 1; Thorne v. Halsey, 7 John. Ch. 191; Gernoe v. Bocaline, 2 Wash. C. C. 130; Gilbert v. Colt, 1 Hopk. 500; Mattocks v. Tremaine, 3 John. Ch. 75.

When a corporation aggregate is plaintiff, the bill, from the necessity of the case, must be verified by some officer or agent of the corporation, and the bill should be signed by the officer making the oath. Bank of Orleans v. Skinner, 9 Paige, 305; Youngblood v. Schamp, 2 McCarter (N. J.), 42, 43. And the oath of the agent or attorney verifying the bill, should state that the agent has read the bill, or heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the plaintiff, and that as to those matters the deponent believes it to be true. Bank of Orleans v. Skinner, 9 Paige, 305; Justices v. Cosby, 5 Jones Eq. (N. C.) 254. Where it is necessary that a bill should be sworn to for the purpose of calling for an answer on oath, it is not necessary that the allegations of the bill, verified by oath merely for that purpose, should be sworn to positively. It is sufficient that the person verifying the bill swears to his belief of the charges contained in it. Veeder v. Moritz, 9 Paige, 371; Triebert v. Burgess, 11 Md. 452.

An affidavit to a bill, *quia timet*, stating that the facts in the bill relating to the plaintiff's own acts are true, and those relating to others, he believes to be true, is sufficient. Collins v. Barksdale, 23 Geo. 602. And generally, in all bills which are to be verified by affidavit, as well as in answers and petitions, the several matters stated, charged, averred, admitted, or denied, are required to be stated positively, or upon information and belief only, according to the fact. Marsh v. Marsh, 1 C. E. Green (N. J.), 396, 397.

¹ Hook v. Dorman, 1 S. & S. 227, 231; Crosse v. Bedingfield, 12 Sim. 35; 5 Jur. 836; Allen v. State Bank, 1 Dev. & Batt. Eq. 6; Findley v. Hind, 1 Peters, 244; Woodworth v. Edwards, 3 Wood. & M. 120. For the form of demurrer in such cases, see Willis, 431. The affidavit may be amended by leave of the Court. Hamilton v. Marks, 5 De G. & S. 638.

* If there are several plaintiffs, all must join in the affidavit, *396 unless a satisfactory explanation be given for their non-joinder.¹

If a corporation is plaintiff, the affidavit may be made by the secretary or other responsible officer. The affidavit may be written or printed; and a copy of it, but not necessarily an office copy, should be sealed at the Record and Writ Clerks' Office, and annexed to each copy of the bill sealed there for service,² and served therewith.

SECTION VII. — *Printing and Filing the Bill.*

After a bill has been drawn or perused, and signed by counsel, it must (except in the cases mentioned below) be printed on cream-wove, machine-drawn, foolscap folio paper, 19 lbs. per mill ream, in pica type, leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide.³ Dates and sums, occurring in the bill, are to be expressed by figures.⁴

Where a bill prays a writ of injunction,⁵ or *ne exeat regno*, or is filed for the purpose of making an infant a ward of Court, but in no other cases,⁶ a written bill may be filed, upon the undertaking of the plaintiff, or his solicitor,⁷ to file a printed copy within fourteen days.⁸ Written bills must be written upon paper of the same description and size as that on which bills are printed;⁹ and the costs of a written bill will not be allowed, unless specially directed by the Court in disposing of the costs of the cause.¹⁰

If the printed bill be not duly filed, the Record and Writ Clerk is to take the written copy off the file;¹¹ and the plaintiff or his solicitor, who has personally undertaken to file such printed copy * is *397 to pay to the defendant all his costs of the suit, such costs to be taxed and recoverable without further order; and the certificate of the

¹ Braithwaite's Pr. 27, and Gibbs v. Gibbs, there cited; and for form of affidavit in that case, see Vol. III.

² Braithwaite's Pr. 27. No fee is payable on filing an affidavit with, or annexed to, a bill. *Ibid.*

³ 15 & 16 Vic. c. 86, § 1, but see § 9, Ord. IX. 3. It is the business of the plaintiff to get the bill printed, by such printer as he may select. The proof of the bill should be very carefully examined and corrected (for which a fee of 2*l.* per folio is allowed by the Regul. to Ord. 2d Sch.), as no bill will be filed as a printed bill, unless alterations (if any) are made in type. Braithwaite's Pr. 25. But a printed bill with written alterations may be filed as a written bill, where a written bill could be filed. *Ibid.* Some directions as to the manner in which the proof should be corrected will be found in Vol. III.

⁴ Ord. IX. 3.

⁵ Falkland Islands Co. v. Lafone, 3 W. R. 561, L. JJ.

⁶ Yate v. Lighthhead, 16 Jur. 964, V. C. T.

⁷ For form of undertaking, see Vol. III. The undertaking may be either indorsed on the copy bill intended to be filed, or be written on a separate paper, to be filed therewith. Braithwaite's Pr. 23.

⁸ 15 & 16 Vic. c. 86, § 6. The printed copy must, of course, be a copy of the written bill as it stands at the time the printed copy is filed. Braithwaite's Pr. 24. The written and printed copies will remain together on the file. *Ibid.*

⁹ Ord. 6 March, 1860, r. 16.

¹⁰ Ord. XI. 18; see *Ell v. Burial Board of Islington*, 2 W. R. 584, V. C. W. Costs of written bill allowed on subsequent application; direction having been accidentally omitted; but without costs of application. *Hewitt v. White*, 12 Jur. N. S. 46; 14 W. R. 220, V. C. K.

¹¹ The practice of the office is to take the written bill off the file on the fifteenth day, but it is not destroyed. Braithwaite's Pr. 24.

Record and Writ Clerk of the non-filing of the printed bill is to be sufficient authority to the taxing master to tax the costs.¹

The Court has a discretionary power, in a proper case, to allow the written bill to be restored and a printed bill to be filed after the expiration of the fourteen days,² on an application, by motion, to the Judge to whose Court the cause is attached. If none of the defendants have entered an appearance, the application may, it is conceived, be made *ex parte*: otherwise, notice of the motion must be served on such of them as have appeared,³ and be supported by an affidavit accounting for the delay;⁴ and the defendants will be entitled to their costs of appearing on the motion.⁵

If a printed bill be filed, and there is a discrepancy between it and the written bill, the defendant may move, on notice, that both bills be taken off the file.⁶

The solicitor, or the plaintiff suing in person, must cause to be printed or written upon the bill, his name and place of business, or residence, and also, if his place of business (or residence) shall be more than three miles from the Record and Writ Clerks' Office, another proper place, to be called his address for service (which must not be more than three miles from that office), where writs, notices, orders, summonses, and other written communications may be left for him; and where any such solicitor shall only be the agent of any other solicitor, he must add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.⁷

Every original bill⁸ must, at the option of the plaintiff, be distinctly marked, at or near the top or upper part thereof, either with the words "Lord Chancellor," or with the words "Master of the Rolls;" and if with the words "Lord Chancellor," then also with the name of one of the Vice Chancellors, at the plaintiff's option; and the Record and Writ Clerks are not to file any bill which is not marked as above.⁹

*398 *When the bill has been marked with the name of a Judge, the cause is attached to his Court;¹ and except in the case of orders made in vacation,² or of orders of course,³ all further proceedings

¹ Ord. IX. 4. When proceedings were stayed, however, the written bill was ordered to be retained on the file. *Lord Abingdon v. Thornhill*, 3 W. R. 615, V. C. W. And so where, after an *interim* order, the suit was arranged. *Garland v. Riordan*, 33 Beav. 448.

² *Ferrand v. Corporation of Bradford*, 8 De G., M. & G. 93: 2 Jur. N. S. 360; affirming 21 Beav. 422; 2 Jur. N. S. 175.

³ *Moss v. Syers*, 9 Jur. N. S. 1219; 11 W. R. 1047, V. C. K.

⁴ For form of order, see Seton, 1242, No. 1. An indorsement, signed by the Registrar, on the printed bill intended to be filed, is sufficient, without drawing up a formal order, where no direction as to costs is given; see *Bank of Hindustan v. Hodgson*, 1864, H., No. 275; *Bank of Hindustan v. Robinson*, 1864, H., No. 272. For forms of motion paper, and notice of motion, see Vol. III.

⁵ *Moss v. Syers*, *ubi sup.*

⁶ *Falkland Island Co. v. Lafone*, 3 W. R. 561, L. J. For form of notice of motion, see Vol. III.

⁷ Ord. III. 2, 5. For forms, see Vol. III. ⁸ The word "bill" includes information. Cons. Ord. Prel. Ord. 10 (4).

⁹ Ord. VI. 1. The Judge's name may be added in writing to a printed bill, if inadvertently omitted. *Braithwaite's Pr.* 25.

¹ Ord. VI. 1.

² Ord. VI. 11; see *Man v. Rickets*, 9 Beav. 4; *Holloway v. Phillips*, 17 Jur. 875, V. C. W.; *Price v. Gardner*, 1 Jur. N. S. 975, V. C. W.; *Bean v. Griffiths*, *ib.* 1045, V. C. W. [*Warrick v. Queen's College*, L. R. 3 Ch. App. 815.]

³ Ord. VI. 9; 13 & 14 Vic. c. 35, § 29; *Magan v. Magan*, 16 Jur. 587, V. C. K.

in the cause,⁴ and rehearings otherwise than by way of appeal, must be had before him, unless the cause or proceeding is removed from his Court by any special order of the Lord Chancellor, or the Lords Justices.⁵

An order for the transfer of a cause from one branch of the Court to another will be made, whenever there is a probability of convenience from so doing.⁶ The order is made upon motion,⁷ with notice;⁸ but the consent of the Judges, from whom and to whom the cause is to be transferred, and the leave of the Lord Chancellor, or the Lords Justices, to give notice of the motion, must be first obtained; the consent and leave are usually given as a matter of course, on the *ex parte* application of counsel.⁹ If leave is given, the motion will be placed in the Court paper for the day appointed for the hearing.¹⁰ If one of the causes is attached to the Rolls Court, the order of transfer must be made by the Master of the Rolls, as well as the Lord Chancellor or the Lords Justices.¹¹ The order of transfer, when passed and entered, should be left with the Record and Writ Clerk, for entry in his cause book.¹²

The copy of the bill being thus prepared, it is delivered to the Clerk of Records and Writs, who thereupon writes thereon the date on which it is brought into his office, numbers it, and receives it into his custody. The bill is then said to be filed, and of record; * but *399 before this process is completed it is not of any effect in Court.¹

⁴ But see Ord. XXXV. 59.

⁵ Ord. VI. 5; see *Earl of Shrewsbury v. Trappes*, 2 De G., F. & J. 172; *Foxwell v. Bostock*, 12 W. R. 723, L. C. Upon any Vice-Chancellor ceasing to hold office, the cause, unless removed by any special order of the Lord Chancellor, or Lords Justices, is thenceforward attached to the Court of his successor. Ord. VI. 7. As to the power of a Judge to make an order affecting a fund standing to the credit of a cause attached to another branch of the Court, see *Wright v. Irving*, 10 Sim. 625; *Bryson v. Warwick Canal Company*, 18 Jur. 893, V.C.W.; *Weeding v. Weeding*, 1 J. & H. 424.

⁶ *Curlewis v. Whidborne*, 10 W. R. 261, L. JJ.; *Sidebottom v. Sidebottom*, 14 W. R. 507, L. JJ.; see *ante*, p. 70; and *post*, Chap. XIX. § 1, *Dismissing Bills*.

⁷ For forms of notice of motion, see Vol. III.

⁸ *Bond v. Barnes*, 2 De G., F. & J. 387.

⁹ For form of motion paper, see Vol. III.

¹⁰ As to service of the notice of motion and the hearing, see *post*, Chap. XXXV. § 2, *Motions*. The party giving the notice must be provided, at the hearing, with copies of it for the use of the Court.

¹¹ See 5 Vic. c. 5, § 30; *Seton*, 1268; and *ante*, p. 70, note. For forms of order for the transfer of causes, see *Seton* 1268, Nos. 1-4. The retransfer of a cause which has been transferred under a General Order is obtained in the manner above explained: as to such retransfer, see *Sidebottom v. Sidebottom*, 7 W. R. 104, L. C.; *Tiffin v. Parker*, 12 W.

R. 698, L. C.; *Platt v. Walter*, L. R. 1 Ch. Ap. 471, L. JJ.; *Pietroni v. Transatlantic Company*, 14 W. R. 783, L. C.; *Whittaker v. Fox*, *ibid.*; *Betts v. Rimmel*, *ibid.* *Semble*, the order is in the nature of an order *nisi*, and notice of the application need not be given. *Wilson v. Gray*, *ibid.* For form of order for retransfer, see *Seton*, 1269, No. 5. The order, in such case, can only be made by the Lord Chancellor, or Lords Justices, *ibid.* For form of notice of motion, see Vol. III.

¹² *Braithwaite's Pr.* 566.

¹ Ord. I. 35, 45, 48; Ord. VIII. 3. The fee on filing the bill is 20s. higher scale, and 10s. lower scale; and is paid by Chancery Fee Fund Stamps, affixed to the bill. Where a written bill has been filed, no fee is payable on filing the printed bill. *Jones v. Batten*, 9 Hare Ap. 57; 2 De G., M. & G. 111. As to using several stamps, see *Brain v. Brain*, 9 Hare Ap. 90, and Ord. XXXIX. 7.

In Massachusetts, the plaintiff must file his bill before or at the time of taking out the *subpoena*; and no injunction or other proceeding shall be ordered until the bill is filed, unless for good cause shown. Rule 2 of the Rules for Practice in Chancery. In Vermont, no injunction shall be issued in any case until the bill shall have been filed. *Genl. Sts. c. 29*, §§ 55, 56; *Howe v. Willard*, 40 Vt. 654. The cause is, in fact, pending in the Court from the time the Chancellor makes the order for issuing the injunction. *Howe v. Willard*, *supra*.

A suit in Equity is commenced, it seems,

If the bill has been inadvertently filed without the signature of counsel, an order as of course may be obtained, on motion or petition, giving leave to amend by adding such signature ;² but any defendant who has appeared may, before such amendment is made, take advantage of the irregularity by demurrer, or by special motion to take the bill off the file.³

The copy of an information intended to be filed must bear the signature of the Attorney-General.⁴ To obtain this, a copy of the draft is left with him, together with a certificate of the counsel who settled it, that it is proper for his sanction, and also a certificate of the solicitor for the relator that he is a proper person to be relator, and is able to pay costs ;⁵ and if the Attorney-General approves of the draft, he will then, on the copy to be filed being left with him, together with a certificate that it is a true copy of the draft as settled by counsel,⁶ affix his signature thereto. The information, so signed, is then filed, in the same manner as a bill.

The bill being thus filed, the defendant is entitled, after appearance, to demand from the plaintiff any number of printed copies not exceeding ten,⁷ on payment for the same at the rate of one half-penny per folio⁸ of seventy-two words.⁹

[A bill may be ordered to be taken from the files if vexatious ; as where it was filed after four previous bills for substantially the same matter had been successfully demurred to.¹⁰ So, if it is illusory, the plaintiff being indemnified by, and being the puppet of, some other person who has instituted the suit for the purpose of annoyance and vexation.¹¹]

*400 * The 2 & 3 Vic. c. 11, § 7, provides, that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute¹ containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court of Equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the Senior

when the bill is filed. *McLin v. McNamara*, 2 Dev. & Bat. Ch. 82; *Aston v. Galloway*, 3 Ired. Ch. 126.

By Chancery Rule 40, in New Jersey, the clerk of the Court of Chancery is required to keep in his office a docket, in which he shall enter the titles of all suits brought in the Court, and a memorandum of every paper filed in the same, under the title of the suit, with the time of filing and the name of the solicitor of each party, and also an alphabetical index to the same; and the said docket shall be, at all proper hours, accessible to the bar. By the 16th Equity Rule of the United States Courts, upon the return of the *subpoena*, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the Court, and shall state the time of the entry.

² Braithwaite's Pr. 23; and see *Coppeard v. Mayhew*, 22 L. J. Ch. 408, M. R.

³ *Ante*, p. 312.

⁴ Braithwaite's Pr. 25.

⁵ For forms of these certificates, see Vol. III.

⁶ *Ibid*.

⁷ 15 & 16 Vic. c. 86, § 7; Ord. IX. 5. For form of application, see Vol. III.

⁸ Ord. XL. 19.

⁹ Regul. to Ord. IV. 4.

¹⁰ *Mortlock v. Mortlock*, 20 L. T. N. S. 773, V. C. S.; but see *Seaton v. Grant*, L. R. 2 Ch. App. 459, 464.]

¹¹ [*Robson v. Dodd*, L. R. 8 Eq. 301; but see *Fisher v. London Offices Co.* W. N. (1870) 113, M. R.]

¹ For form of memorandum, see Vol. III.

Master of the Court of Common Pleas: who is required by the Act forthwith to enter the same in a book, provided for that purpose, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*.²

The memorandum or minute, containing the particulars required by the Act, must, by the regulations of the office, be on parchment and a separate memorandum is required for every defendant or other person in whose name the registry is proposed to be made.³

The plaintiff's solicitor, or other person leaving this memorandum with the Senior Master, is required to sign an admission of having left it, and to take a receipt for it.⁴

The Act above cited also provides, that such *lis pendens* shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the Senior Master within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any purchaser, or mortgagee for valuable consideration, or, as to creditors, within five years before the right of such creditors accrued; and so *toties quoties* at the expiration of every succeeding five years;⁵ and the Senior Master is forthwith to re-enter the same, in like manner as the same was originally entered.⁶

Until recently, no provision was made by statute for the discharge of a *lis pendens*;⁷ but by the 23 & 24 Vic. c. 115, § 2, * it *401 is now enacted, that the Senior Master, upon the filing with him of an acknowledgment by the plaintiff in the form or to the effect therein mentioned,¹ shall be at liberty to enter a satisfaction or discharge as to any registered pending suit or *lis pendens*; and he may issue certificates of the entry of any satisfaction or discharge.² The practice which prevailed prior to this Act, and which may still be resorted to, for the purpose of getting the registry of a *lis pendens* discharged, is to obtain an order in the cause, as of course, at the Rolls, on a petition presented by

² As to the doctrine of *lis pendens*, independently of the Act, see Sugd. V. & P. 758, and cases cited; Shelford's R. P. Acts, 594; and since the Act, *ibid.*; Bellamy v. Sabine, 1 De G. & J. 566; 3 Jur. N. S. 943; Tyler v. Thomas, 25 Beav. 47; Nortcliffe v. Warburton, 8 Jur. N. S. 353, V. C. S.; *ib.* 854, L. C.; [4 De G. F. & J. 449. And see *ante*, 280, notes 5 and 7.]

³ Pask's Pr. 12.

⁴ *Ibid.* A fee of 2s. 6d. is payable for each entry. 2 & 3 Vic. c. 11, § 7.

⁵ By the 18 & 19 Vic. c. 15, § 6, it is sufficient if the memorandum is left with the Senior Master, for re-registry of judgments, decrees, orders, or rules, within five years before the execution of the conveyance, &c., or,

as to creditors, within five years before their rights accrued; although more than five years have elapsed since the last previous registration before such memorandum is left; and so *toties quoties* upon every re-registry. As to whether this provision applies to a *lis pendens*, see 2 & 3 Vic. c. 11, § 7; Sugd. V. & P. 543.

⁶ 2 & 3 Vic. c. 11, §§ 4, 7. For each re-entry the fee is 1s.; see §§ 4, 7. For form of memorandum to be used on a re-registry, see Vol. III.

⁷ Pask's Pr. 117.

¹ For the form of such acknowledgment, see Vol. III.

² The fee for entering satisfaction is 2s. 6d., and for the certificate 1s. 23 & 24 Vic. c. 115, § 2.

the plaintiff,³ or by a defendant or other person interested, with the consent of the plaintiff's solicitor subscribed to the petition;⁴ or, where the plaintiff will not consent, by a special petition or summons⁵ in the cause, which must be served on the plaintiff's solicitor, and be supported by evidence showing that the purposes for which the suit was registered have been satisfied. This order is filed with the Senior Master: and the person leaving it is required to sign an admission of having left it, and to take a receipt for it. The officer will thereupon enter on the register a memorandum of the date of the order, and affix thereto a stamp, bearing the word "satisfied."⁶

SECTION VIII. — *Amending the Bill.*

When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties, as are necessary to enable the Court to do complete justice, he may alter it, by inserting new matter,⁷ or by adding such persons as shall be deemed necessary parties; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to the plaintiff's case, or to name as parties persons who may be dispensed with, the same may be struck out; the original bill, thus added to or altered, is termed an amended bill.⁸

*402 * But, although it is the practice to call a bill thus altered

³ For form of petition, see Vol. III.; and for form of order, see Pask's Pr. 123.

⁴ For form of consent, see Vol. III.

⁵ *Fowler v. Liles*, V. C. S., in Chambers, 15 June, 1855, Reg. Lib. A. 1037.

⁶ See Pask's Pr. 117.

⁷ If at the time of filing the bill the plaintiff had no title to the relief prayed, he cannot make out a title by introducing by amendment facts which have subsequently occurred. *Attorney-General v. Portreeve of Avon*, 11 W. R. 1051, L. J.J.; see also *Godfrey v. Tucker*, 33 Beav. 280; 9 Jur. N. S. 1188; cases cited, 33 Beav. 285 n.; *Beardmore v. Gregory*, 2 H. & M. 491; 11 Jur. N. S. 363. [*Evans v. Bagshaw*, L. R. 8 Eq. 469; affirmed, L. R. 5 Ch. App. 340.] *Contra*, *Talbot v. Lord Radnor*, 3 M. & K. 252. [*Dell v. Griffiths*, 16 W. R. 30.]

⁸ *Hinde*, 21. A written bill may be thus amended, as well as a printed bill; see *McDougald v. Williford*, 14 Geo. 665; *post*, 411 to 413, note, and Rules of the Courts of the United States, Massachusetts, and New Hampshire, there stated. Amendments can only be granted where the bill is defective in parties, or in prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor repugnant thereto. The latter part of this principle applies to all pleadings in Equity, as well as to bills. *Verplanck v. Merct. Ins. Co.*, 1 Edw. Ch. 46; *Lyon v. Tallmadge*, 1 John.

Ch. 184; *Rogers v. Rogers*, 1 Paige, 424; *Bowen v. Cross*, 4 John. Ch. 375; *Renwick v. Wilson*, 6 John. Ch. 81; *Belknap v. Stone*, 1 Allen, 572; *Carey v. Smith*, 11 Geo. 539; *Larkins v. Biddle*, 21 Ala. 252. Being regarded only with reference to the furtherance of justice, amendments, as a general rule, are in the discretion of the Court, especially in matters of mere form. *Smith v. Babcock*, 3 Sumner, 410; *Garlick v. Strong*, 3 Paige, 440; *McElwain v. Willis*, 3 Paige, 505; *Howell v. Sebring*, 1 McCarter (N. J.), 84. Amendments are, therefore, always allowed with great liberality, until the proofs are closed, *Cock v. Evans*, 9 Yerger, 287, except where the bill is upon oath. *Cock v. Evans*, *ubi supra*; *Cunningham v. Pell*, 6 Paige, 655. In case the bill is upon oath, there is greater caution exercised in reference to amendments. *Ibid.*; *Verplanck v. Merct. Ins. Co.*, 1 Edw. Ch. 46; *Swift v. Eckford*, 6 Paige, 22; *Lloyd v. Brewster*, 4 Paige, 538; *Parker v. Grant*, 1 John. Ch. 434; *Rogers v. Rogers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Paige, 67. So where the object of the amendment is to let in new facts or defences, there is greater reluctance on the part of the Court to allow the amendment where it depends upon parol proof, than where it depends on written instruments omitted by accident or mistake. *Smith v. Babcock*, 3 Sumner, 410; *Calloway v. Dobson*, 1 Brock. 119. And the Court will not allow amendments by inserting facts known to the plaintiff at

an amended bill, the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it; for both the original and amended bill constitute but one record:¹ so much so, that where an original bill is fully answered, and amendments are afterwards made, to which the defendant does not answer, the whole record may be taken, *pro confesso*, generally,² and an order to take the bill *pro confesso* as to the amendments only will be irregular.³ An amended bill must therefore, in all cases, be addressed to the same Lord Chancellor, Lord Keeper, or Lords Commissioners, to whom the original bill was addressed, although a change has taken place in the custody of the Great Seal between the times of filing the original bill and the amendment.⁴ But so far as the pendency of a suit can affect either the parties to it, or strangers, matter brought into a bill by amendment will not * have relation to the time of filing the original bill, *403 but the suit will be so far considered as pendent only from the time of the amendment.¹

Where there is a bill and cross-bill, and the plaintiff in the original suit amends his bill before answer, he will lose his priority of suit, and his right to have an answer before he is called upon to answer the cross-bill.²

the time of filing his bill, unless some excuse is given for the omission. *Whitmarsh v. Campbell*, 2 Paige, 67; *Prescott v. Hubbell*, 1 Hill Ch. 217. Nor where the matter of the proposed amendment might with reasonable diligence have been inserted in the original bill. *North Amer. Coal Co. v. Dyett*, 2 Edw. Ch. 115.

When a plaintiff wishes to amend a sworn bill, he must state the proposed amendments distinctly, so that the Court can see that they are merely in addition to the original bill, and not inconsistent therewith. He must also swear to the truth of the proposed amendments, and render a valid excuse for not incorporating them in the original bill; and the application to amend must be made as soon as the necessity for such amendment is discovered. *Rogers v. Rogers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Paige, 67; *Verplanck v. Merct. Ins. Co.*, 1 Edw. Ch. 46; *Altree v. Horden*, 3 Lond. Jurist, 81. As to the stage of the cause at which applications for leave to amend should be made and acted upon, see *Hewett v. Adams*, 50 Maine, 271; *Clark v. Society in Keene*, 46 N. H. 272, and cases cited; *Codington v. Mott*, 1 McCarter (N. J.), 430. [*Infra*, 424.]

¹ *Vere v. Glynn*, 2 Dick. 441; *Hoyt v. Smith*, 28 Conn. 466; *Hurd v. Everett*, 1 Paige, 124; *Walsh v. Smyth*, 3 Bland, 9, 20; *O'Grady v. Barry*, 1 Irish Eq. 56; *Story Eq. Pl.* §§ 332, 885; *Carey v. Smith*, 11 Geo. 539. [Equitable Life Assurance Society v. Laird, 9 C. E. Green, 319; *Wilson v. Beadle*, 2 Head, 512; *Bradley v. Dibrell*, 3 Heisk. 522; *Seay v. Ferguson*, 1 Tenn. Ch. 291; *Hix v. Gosling*, 1 Lea, 560.]

² *Jopling v. Stuart*, 4 Ves. 619. Where the plaintiff amends his bill after answer, if a further answer of the amended bill becomes necessary, and is not waived, the defendant must put in a further answer to the amendment; or the plaintiff will be entitled to an order taking the whole bill as amended, as confessed. *Trust & Fire Ins. Co. v. Jenkins*, 8 Paige, 589; see *Thomas v. Visitors Fred. Co. School*, 7 Gill & J. 369; *Cowman v. Lovett*, 10 Paige, 559; *Tedder v. Stiles*, 16 Geo. 1.

³ *Bacon v. Griffith*, [4 Ves. 619, note; S. C. 2 Dick. 473; *Lea v. Vanbibber*, 6 Humph. 18. But the plaintiff may limit his *pro confesso*. *Abergavenny v. Abergavenny*, 2 Eq. Ca. Abr. 178; *Weaver v. Livingstone*, Hopk. Ch. 493; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 605;] and see *Landon v. Ready*, 1 S. & S. 44.

⁴ If the description of the plaintiff, or his next friend, is not the same as when the bill was filed, the new description should appear in the amended bill. *Kerr v. Gillespie*, 7 Beav. 269, 271; 8 Jur. 50; but the name of his solicitor cannot be altered, unless an order to change the solicitor has been obtained. *Braithwaite's Pr.* 299.

¹ *Id.* Red. 330; *Long v. Burton*, 2 Atk. 218; [*Lillard v. Porter*, 2 Head, 177; *Miller v. Taylor*, 6 Heisk. 465.]

² *Steward v. Roe*, 2 P. Wms. 434; *Johnson v. Freer*, 2 Cox, 371; *Noel v. King*, 2 Mad. 392; and see *post*, Chap. XXXIV. § 1, *Cross Bills*. But if the plaintiff amends his bill before he knows of the filing of the cross-bill, he does not lose his priority. *Gray v. Haig*, 13 Beav. 65. The rule stated in the text applies, it is conceived, to a concise

Amendments to a bill are of two sorts : those which relate to parties, and those which affect the substance of the case.³ Under a common order to amend, as the plaintiff may be advised, the plaintiff may, before a defendant has appeared to the bill, strike out the name of such defendant, or the name of a co-plaintiff, or add plaintiffs or defendants ;⁴ after appearance, the plaintiff, under such an order, may, it seems, before answer, add the names of plaintiffs or defendants ; but he cannot strike out the names of plaintiffs or defendants : and under a common order to amend by adding parties, the plaintiff cannot, after answer, alter his bill, by putting in the names of other persons as co-plaintiffs with himself,⁵ or after appearance by striking out the names as plaintiffs of any persons filling that character upon the original record :⁶ nor can he introduce any allegation, against the original defendants, which is not necessary to explain the amendment.⁷

In some cases, special orders may, however, be obtained for the purpose of altering the co-plaintiffs ; but as a diminution of the number of plaintiffs has the effect of lessening the defendant's security for costs, an order will not be made to strike out the names of plaintiffs without the Court also providing, at the same time, that security for the costs of the suit shall be given,⁸ unless such security be waived by the defendants. In the case of *Brown v. Sawyer*,⁹ one of two
 *404 co-plaintiffs, who had authorized the institution * of the suit, refused to proceed in it ; a motion was thereupon made, on behalf of the other co-plaintiff, that she might be at liberty to amend the bill by striking out the name of the co-plaintiff who had refused to proceed, and by making him a defendant, and that he might be ordered to pay the costs occasioned by such amendment, and also the costs of giving any security for costs which the defendants or any of them might be declared entitled to in consequence of such amendment, and incidental thereto, and also the costs of and incident to that application, to be taxed as between solicitor and client. Lord Langdale M. R., in

statement, which, under 15 & 16 Vic. c. 86, § 19, may be substituted for a cross-bill. See *Mertens v. Haigh*, 1 J. & H. 231 ; 6 Jur. N. S. 1288.

³ By statute in Massachusetts, amendments may be allowed by changing suits at Law into proceedings in Equity, or proceedings in Equity into suits at Law, if the same be necessary to enable the plaintiff to sustain his action for the cause for which it was intended to be brought. St. 1865, c. 179, § 1 ; see *Williston v. Mich. South. & North. Ind. R. R. Co.*, 13 Allen, 400, 406. [And the statute was held to apply to a suit pending at its passage. *George v. Reed*, 101 Mass. 378.]

⁴ See *Braithwaite's Pr.* 300.

⁵ *Lock v. Bagley*, 1 W. N. 65, M. R. ; but see *Hichens v. Congreve*, 1 Sim. 500 ; see also *Milligan v. Mitchell*, 1 M. & C. 433, 442 ; see 1 C. P. Coop. t. Cott. 35 ; *Story Eq. Pl.* § 541, note ; *Miller v. McCan*, 7 Paige, 451.

⁶ *Fellowes v. Deere*, 3 Beav. 353 ; *Slog-*

gett v. Collins, 13 Sim. 456 ; 7 Jur. 639 ; see *Mason v. York & Cumb. R. R. Co.*, 52 Maine, 107.

⁷ *Gibson v. Ingo*, 5 Hare, 156 ; 11 Jur. 555 ; *Barlow v. M'Murray*, L. R. 2 Eq. 420 ; 12 Jur. N. S. 519, V. C. S.

⁸ For form of order, see *Seton*, 1253, No. 7 ; *Sweeney v. Hull*, *Sausse & S.* 662.

⁹ 3 Beav. 598 ; 5 Jur. 500 ; see *Hart v. Tulk*, 6 Hare, 611, 613 ; *Bather v. Kearsley*, 7 Beav. 545 ; *M'Leod v. Lyttleton*, 1 Drew. 36 ; *Drake v. Symes*, 7 Jur. N. S. 399, L. JJ. ; 3 De G., F. & J. 491. As to the course where, after a decree, the solicitor of the plaintiffs ceases to practice, and one of them refuses to concur with the rest in appointing a successor, see *Butlin v. Arnold*, 1 H. & M. 715. And for the practice where a co-plaintiff refuses to proceed after cause is at issue, see *Miller v. Smith*, 3 Beav. 598 n. (a). For form of notice of motion in such case, see Vol. III.

giving judgment upon the motion, said: "The suit cannot be prosecuted unless the alteration is made, and, therefore, justice will not be done unless the alteration is made; I think, therefore, that this order must be made, but on such terms as will be just towards the defendants, and by securing the costs of suit already incurred; and the co-plaintiff having, by revoking the authority, made this application necessary, ought therefore to pay the costs."¹

It must not be considered as a matter of course to obtain an order to strike out the name of a person who has once been made a plaintiff in a cause, even upon the terms of giving security for costs. In the case of the *Attorney-General v. Cooper*² an application was made, by a number of relators named in an information, to strike out the names of several of themselves. Lord Cottenham, in refusing the motion, observed: "It cannot be justly said, that all the relators have to establish in support of such an application is, that the defendants will not be prejudiced by such an alteration; they must show that justice will not be done, or that the suit cannot be so conveniently prosecuted, unless the alteration is made. I cannot give them such an advantage as they ask, and permit them to alter the record, merely because they may have a different wish at one time, from that which they may have at another time: which may be the result of mere caprice."

In the case of *Hall v. Lack*,³ where it appeared that the association * of a *cestui que trust* and trustee, as co-plaintiffs on the *405 record, might materially injure the interests of the former, Sir J. L. Knight Bruce V. C. gave leave to amend the record, by striking out the name of the trustee as plaintiff, and making him a defendant.

Leave may also be obtained to amend a bill, by the addition of persons as co-plaintiffs.¹ After answer, however, the addition of a co-plaintiff is not a matter of course, but is discretionary in the Court; and it would appear, that where a plaintiff applies, after answer, for leave to amend his bill, by adding a co-plaintiff, he must, in support of his application, show that the person proposed to be added is willing to become a co-plaintiff.² An order for leave to amend by adding a plain-

¹ *Hewett v. Adams*, 50 Maine, 271. It is within the discretion of the Court to permit a bill to be amended, by substituting the name of a new for the original plaintiff, even after answer filed; but it must be upon the payment of all the costs, up to the time of the amendment, as well as of the amendment itself. *Jennings v. Springs*, 1 Bailey Eq. 181; *Winthrop v. Farrar*, 11 Allen, 398.

So an amendment may be allowed even after a hearing on bill, answer, and proofs. *Clark v. Society in Keene*, 46 N. H. 272; *Codington v. Mott*, 1 McCarter (N. J.), 430.

The Court may impose other conditions of amendments besides the payment of costs. *Bellows v. Stone*, 14 N. H. 175; *Bowen v. Idley*, 6 Paige, 53; *Clark v. Society in Keene*, 46 N. H. 275.

² 3 M. & C. 258, 261; 1 Jur. 790.

³ 2 Y. & C. C. C. 631; see also *Plunket v. Joice*, 2 Sch. & Lef. 159, ante, p. 72; *Jones v. Rose*, 4 Hare, 52; where leave given to strike out "on behalf of themselves and all other shareholders." *Hart v. Tulk*, 6 Hare, 612; *Drake v. Symes*, 7 Jur. N. S. 399, L. J.; 3 De G., F. & J. 491.

¹ *Mangham v. Blake*, L. R. 3 Ch. Ap. 32; *Winthrop v. Farrar*, 11 Allen, 398.

² *The Governors of Lucton Free School v. Smith*, M'Lel. 17, 19; *Loch v. Bagley*, 1 W. N. 65, M. R. [And the addition of a co-plaintiff, in such case, will not be allowed when the effect would be to introduce a new plaintiff with a new case. *Peek v. Earl Spencer*, 18 W. R. 558. But see *De Groot v. Wilson*, 3 Stew. Eq. 435, where, after hearing, the cause was directed to stand over, for further proof, with leave to the complainant to amend by making a partner co-complainant.]

tiff after replication has been refused, where the plaintiff has been guilty of *laches*.³

A bill of discovery cannot be amended by adding parties as plaintiffs. This was held to be the law of the Court by Lord Eldon, in *Lord Cholmondeley v. Lord Clinton*,⁴ where a bill had been filed by *cestui que trusts*, in aid of an ejectment at Law, and the defendant pleaded facts to show that the legal estate was in the trustees. The difficulty in the case was, however, got over by the plaintiffs consenting to the allowance of the plea, and moving to amend by inserting a statement to show that the legal estate was in trustees, and that a count had been introduced in the declaration in ejectment on the demise of the trustees.

An order made at the hearing for leave to amend, by adding parties, will not authorize the introduction of co-plaintiffs;⁵ but the Court will sometimes allow a bill, which has originally been filed by one individual of a numerous class, in his own right, to stand over at the hearing, for the purpose of being amended by the introduction of the words: on behalf of himself, and all others of the class. Thus, in *Lloyd v. Loaring*,⁶ where a demurrer was allowed, because the parties affected to sue in a corporate capacity, leave was given to amend, by making them sue in their individual rights as members of a copartnership, on behalf of themselves and others.

It has been said, that the Court will, at any time before the hearing, suffer parties to be added by amendment, upon a proper case *406 being shown;⁷ and that even after a decree, and before it * has been enrolled, persons interested may, by petition, be made parties and let into it, if their right be interwoven with the other plaintiffs, and settled (in general) by the decree: they paying the plaintiffs a proportionable part of the charges of the suit.¹

³ *Milward v. Oldfield*, 4 Price, 325.

⁴ 2 Mer. 71, 74.

⁵ *Milligan v. Mitchell*, 1 M. & C. 433, 442; *Miller v. McCan*, 7 Paige, 451; see *Noyes v. Sawyer*, 3 Vt. 160; *Arendel v. Blackwell*, 1 Dev. Ch. 354.

⁶ 6 Ves. 773, 778; see also *Attorney-General v. Newcombe*, 14 Ves. 1, 6; *Good v. Blewitt*, 13 Ves. 397, 401; and *ante*, pp. 238, 242; [*Wormsley v. Merritt*, L. R. 4 Eq. 695; *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347; *Mangan v. Blacke*, L. R. 3 Ch. App. 32.]

⁷ *Goodwin v. Goodwin*, 3 Atk. 370; see *Forbes v. Stevens*, 10 Jur. N. S. 861, V. C. W.; 4 N. R. 386, L. JJ; *Story Eq. Pl. § 887*; *Cooper Eq. Pl. 333*; *Ld. Red. 325*; *Hutchinson v. Reed*, 1 Hoff. Ch. 316; *Gordon v. Holland*, 3 Ired. Ch. 362; *Codington v. Mott*, 1 McCarter (N. J.), 430; *Park v. Ballentine*, 6 Blackf. 223. In respect to amendments as to parties, Courts are more liberal than in respect to other amendments. A Court of Equity will not dismiss a bill absolutely, for want of proper parties, if the plaintiff shows enough to give color to his claim for relief against the parties not before the Court.

Allen v. Smith, 1 Leigh, 331; see *ante*, 294, note; *Thorn v. Germand*, 4 John. Ch. 363; *Pleasants v. Logan*, 4 Hen. & M. 489. Upon a creditor's bill against an insolvent corporation for a receiver, &c., the plaintiff may pray a discovery of the stockholders liable, and having obtained it may amend his bill by making such stockholders parties. *Morgan v. New York & Albany R.R. Co.*, 10 Paige, 290; see *McDougald v. Dougherty*, 14 Geo. 674; *Hewett v. Adams*, 50 Maine, 271; *McLellan v. Osborne*, 51 Maine, 113.

¹ *Wyatt's P. R. 301*. [And see the proper practice upon allowing a person to come in, on petition, and be made a plaintiff in a pending suit. *Aylesworth v. Brown*, 31 Ind. 270. But, except in such cases, there is no practice which will authorize the Court upon the application of persons not parties to a suit, to compel the plaintiffs to make such persons co-plaintiffs. *Drake v. Goodridge*, 6 Blatchf. 151. And see *ante*, 287.] Mere formal amendments, such as the introduction of new parties, or amendments to the prayer of the bill, to meet the exigency of the case, will be made up to, and at, the final hearing. *Codington v. Mott*, 1 McCarter (N. J.), 430; see *Phil-*

If parties are added after the expiration of the time for giving notice of the cross-examination of the witnesses, the evidence of such witnesses cannot be read against the parties so added.²

It is not within the province of this work to point out the cases in which amendments may become requisite, for the purpose of altering the case upon the record as against the defendants already before the Court, or to what extent they may be made. It is to be observed, however, that the rule which formerly existed, that a plaintiff ought not to introduce facts, by amendment, which have occurred since the filing of the original bill,³ has been abolished; * and the facts *407 and circumstances occurring after the institution of a suit may be introduced into the bill by amendment, if the cause is otherwise in a state in which an amendment may be made,¹ and if not, they may be added by supplemental statement.²

hower v. Tod, 3 Stockt. (N. J.) 54, 312; *Buckley v. Cross*, Saxton, 504; *Mavor v. Dry*, 2 S. & S. 113; *Henry v. Brown*, 4 Halst. Ch. 245; *Rodgers v. Rodgers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Paige, 67; *Verplanck v. Merct. Ins. Co.*, 1 Edw. Ch. 46; *Pratt v. Bacon*, 10 Pick. 123.

² *Pratt v. Barker*, 1 Sim. 1, 5; *James v. James*, 4 Beav. 578; *Quantoek v. Bullen*, 5 Mad. 81. After the witnesses in a cause have been examined, and the proofs closed, no amendment of the bill is allowed, except in matters of mere form, unless under very special circumstances. *Bowen v. Idley*, 6 Paige, 467; *Clark v. Society in Keene*, 46 N. H. 272; *Tilton v. Tilton*, 9 N. H. 394; *Bel-lows v. Stone*, 14 N. H. 175; *Doe v. Doe*, 37 N. H. 268; see *Wilbur v. Collier*, 1 Clark, 315; *Shepherd v. Merrill*, 3 John. Ch. 423; *Smith v. Burnham*, 4 Harr. & J. 331; *Stewart v. Duvall*, 7 Gilf. & J. 180; *Ross v. Carpenter*, 6 McLean, 382.

³ See *Longworth v. Taylor*, 1 McLean, 514. Amendments to a bill are always considered as forming a part of the original bill. They refer to the time of filing the bill; and the defendant cannot be required to answer anything which has arisen since that time. *Hurd v. Everett*, 1 Paige, 124; *Walsh v. Smyth*, 3 Bland, 9, 20; *O'Grady v. Barry*, 1 Irish Eq. 56. Unless, indeed, the defendant has not put in his answer, in which case the bill may be amended by adding supplemental matter. *Candler v. Pettit*, 1 Paige, 168; *Ogden v. Gibbons*, Halst. (N. J.) Dig. 172. Consequently an original bill cannot be amended by incorporating therein any thing which arose subsequently to the commencing of the suit. This should be stated in a supplemental bill. *Stafford v. Howlett*, 1 Paige, 200; *Saunders v. Frost*, 5 Pick. 276; see *Sanborn v. Sanborn*, 7 Gray, 142. Generally, a mistake in the bill in the statement of a fact should be corrected by an amendment, and not by a right statement of the fact in a supplemental bill. *Strickland v. Strickland*, 12 Sim. 253; *Stafford v. Howlett*, 1 Paige, 200.

When the cause has proceeded so far, that an amendment cannot be made, or if material

facts have occurred subsequently to the commencing of the suit, the Court will give the plaintiff leave to file a supplemental bill. And where such leave is given, the Court will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original bill by way of amendment. *Stafford v. Howlett*, 1 Paige, 200; see *Verplanck v. Merct. Ins. Co.*, 1 Edw. 46; *Pinch v. Anthony*, 10 Allen, 470.

Cases, however, do sometimes occur where the introduction, by amendment, of matters which have occurred since the date of the original bill will be permitted by the Court; thus, where the plaintiff has an inchoate right at the time of preparing his original bill, which merely requires some formal act to render his title perfect, and such formal act is not completed until afterwards, the introduction of that fact by amendment will be permitted. The case of an executor filing a bill before probate, and afterwards obtaining probate, is an instance of this kind. *Humphreys v. Humphreys*, 3 P. Wms. 348; *Bradford v. Felder*, 2 M'Cord Ch. 170; *Gill-out v. Morse*, 2 Hayw. 175; *Butler v. Butler*, 4 Litt. 201; *Blackwell v. Blackwell*, 33 Ala. 57. A bill was amended so as to charge that an infant defendant had attained her full age, thereby to compel her to answer as an adult. *Kipp v. Hanna*, 2 Bland, 26.

¹ 15 & 16 Vic. c. 86, § 53; see *Tudway v. Jones*, 1 K. & J. 691; *Forbes v. Stevens*, *ubi sup.*; and see *Attorney-General v. Portreeve of Avon*, 11 W. R. 1050, 1051, L. J.J.; *Godfrey v. Tucker*, 33 Beav. 280; 9 Jur. N. S. 818; *Beardmore v. Gregory*, 2 H. & M. 491; 11 Jur. N. S. 363; and cases cited, 33 Beav. 283, n.; *Foulkes v. Davies*, L. R. 7 Eq. 42, 46; *Attorney-General v. Cambridge Consumers' Gas Co.*, L. R. 4 Ch. Ap. 71.

² 15 & 16 Vic. c. 86, § 53; see *Rogers v. Solomons*, 17 Geo. 598; Ord. XXXII. 2; and see *post*, Chap. XXXIII., *Revivor and Supplement*. An amendment cannot be thus remedied. *Commerell v. Hall*, 2 Drew. 194; S. C. *nom.* *Commerell v. Bell*, 18 Jur. 141; *Williams v. Jackson*, 5 Jur. N. S. 264; 7 W. R. 104, V. C. W.; *Webb v. Wardle*, 11 Jur. N. S. 278, V. C. K.

Where an answer of a defendant states facts which are material to the plaintiff's case, but which have not been stated in the bill, it is not necessary that the plaintiff, in order to avail himself of them at the hearing, should introduce such facts into his bill by amendment, although perhaps the most convenient course would be to do so.³ Where, therefore, it is important to the plaintiff that a fact disclosed in the answer should be further inquired into, or avoided by some further statement, the practice is often resorted to of introducing such fact from the answer of the defendant into the bill; and where a plaintiff, not being satisfied with the answer, amended his bill, stating, by way of pretence, a quotation from the answer, and negating it, and insisted that the facts would appear differently if the defendant would look into his accounts, Sir Thomas Plumer V. C. held, that the matter so introduced was not impertinent.⁴

Great latitude is allowed to a plaintiff in making amendments,
 *408 * and the Court has even gone to the extent of permitting a bill to be converted into an information;¹ it has also been held, where a plaintiff filed a bill, stating an agreement, and the defendant by his answer admitted that there was an agreement, but different from that stated by the plaintiff, that the plaintiff might amend his bill, abandoning his first agreement, and praying for a decree according to that admitted by the defendant.² In that case, however, the amendment was permitted, because the bill in its original form might have been prepared under a mistake or misconception of counsel,³ and the plaintiff, having afterwards discovered the error, was allowed by the Court to abandon his original case, and insist upon the one alleged by the defendant; but the Court will not carry its liberality further, and permit a plaintiff to amend his bill, so that he may continue to insist upon the agreement originally stated, and if he fails in that, to get the benefit of the one admitted by the defendant. Upon this principle, where the original bill prayed the specific performance of an agreement, and the defendant denied the agreement as stated in the bill, but admitted a different one, whereupon the plaintiff amended his bill, continuing to insist on the original agreement, and praying in the alternative, if

³ *Attwood v. —*, 1 Russ. 353, 361; *Maury v. Lewis*, 10 Yerger, 115; *Rose v. Mynatt*, 7 Yerger, 30; but see *Thomas v. Warner*, 15 Vt. 110; *Dupouti v. Mussy*, 4 Wash. C. C. 128. But where it is important to the plaintiff, that facts disclosed in the answer should be further inquired into, or avoided by some further statement, such facts may be introduced into the bill from the answer of the defendant, by way of amendment. *Seelye v. Boehm*, 2 Mad. 176; *Spencer v. Van Duzen*, 1 Paige, 555. But no admission in an answer can, under any circumstances, lay a foundation for relief under any specific head of Equity, unless it be substantially set forth in the bill. *Jackson v. Ashton*, 11 Peters, 229. The bill should

be amended so as to state the contract set up in the answer, if that is to be relied upon for a decree. *Byrne v. Romaine*, 2 Edw. Ch. 445. But it is not necessary or proper to amend the bill for the purpose of traversing defensive averments brought forward by the answer. *Janier v. Hill*, 30 Ala. 111.

⁴ *Seelye v. Boehm*, 2 Mad. 176, 180.

¹ *President of St. Mary Magdalen v. Sibthorp*, 1 Russ. 154.

² *Per Ld. Redesdale*, *Lindsay v. Lynch*, 2 Sch. & Lef. 9; *Harris v. Knickerbocker*, 5 Wend. 638; *S. C.* 1 Paige, 209. This has been allowed, even after a hearing on the bill, answer, and evidence. *Bellows v. Stone*, 14 N. H. 175.

³ See *McElwain v. Willis*, 3 Paige, 505.

not entitled to that, to have the execution of the admitted agreement: Lord Redesdale dismissed the bill with costs, but without prejudice to any bill the plaintiff might be advised to file, to obtain a performance of the admitted agreement.⁴

It seems that, as a general rule, the Court will not permit a bill, filed for the mere purpose of discovery, to be converted into one for relief, by the addition of a prayer for relief,⁵ though it has been allowed in some cases;⁶ and it seems, that a bill for relief cannot be converted into a bill for discovery by striking out the prayer;⁷ thus, in *Lord Cholmondeley v. Lord Clinton*,⁸ where the defendants, having answered the bill, obtained an order for the plaintiff to elect whether he would proceed at Law or in Equity, whereupon * the plaintiff elected to *409 proceed at Law, and moved to dismiss his bill as far as it sought relief, and to amend the record by striking out the prayer for relief, the motion was refused: Lord Eldon being of opinion, that the better course for the plaintiff would be to dismiss his bill, and file another for discovery only; which was accordingly done.¹

Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer, making an entirely new defence, and contradicting his former answer.² Thus, in *Bolton v. Bolton*,³ Sir Lancelot Shadwell V. C. on this ground refused, with costs, a motion to take an answer to an amended bill off the file: although it was filed nearly three years after the bill had been amended, and eight years after the original answer, and contradicted the original answer, introducing no less than four new issues or defences. An amendment of the bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which the original bill was open,⁴

⁴ *Lindsay v. Lynch*, 2 Sch. & Lef. 1; see also *Woolam v. Hearn*, 7 Ves. 211, 222; and *Deniston v. Little*, 2 Sch. & Lef. 11, n. (a). [An amended bill will not be allowed where the relief sought is inconsistent with that of the original bill. *Lloyd v. Brewster*, 4 Paige, 537; *Coleman v. Pinkard*, 2 Humph. 185; *Bosley v. Phillips*, 3 Tenn. Ch. 649. Repugnancy or inconsistency between original and amended bills, although in the alternative, is good ground for not allowing an amended bill. *Ray v. Womble*, 56 Ala. 32.]

⁵ *Butterworth v. Bailey*, 15 Ves. 358, 361; *Jackson v. Strong*, M'Lel. 245; *Parker v. Ford*, 1 Coll. 506.

⁶ *Hildyard v. Cressy*, 3 Atk. 303; *Crow v. Tyrell*, 2 Mad. 397, 409; *Lousada v. Templer*, 2 Russ. 561, 565; *Severn v. Fletcher*, 5 Sim. 457.

⁷ An application to the Court in Massachusetts, for relief in Equity, which does not contain a prayer for process to be served on the defendant, or conclude with the general interrogatory as required by the Rules for Practice in Chancery in that State, may be regarded as a bill; and if properly amended, relief may be granted on it. *Belknap v.*

Stone, 1 Allen, 572; see *Wright v. Wright*, 4 Halst. Ch. (N. J.) 143.

⁸ 2 V. & B. 113.

¹ 2 Mer. 71. In the above case, *Gurish v. Donovan*, 2 Atk. 166, was cited in argument in support of the motion; but, upon reference to the Registrar's book, it appeared that the order for striking out the prayer was made by consent, and that an answer was put in by the defendant after the order was made. 2 V. & B. 114, n. (a); see *ante*, 402, note.

² *Miller v. Whittaker*, 33 Ill. 386; *Trust & Fire Ins. Co. v. Jenkins*, 8 Paige, 589; *Bowen v. Idley*, 6 Paige, 46; see *Bosanquet v. Marsham*, 4 Sim. 573; *Richardson v. Richardson*, 5 Paige, 58; [*Dillon v. Davis*, 3 Tenn. Ch. 394;] *Thomas v. Visitors of Fred. Co. School*, 7 Gill & J. 369. In this last case an additional answer to an amended bill was ordered to be taken off the file, because not filed with leave.

³ 29th June, 1831, MSS., *ex relatione Beames*.

⁴ *Attorney-General v. Cooper*, 8 Hare, 166; see also *Wyllie v. Ellice*, 6 Hare, 505. For case prior to 37 Ord. Aug., 1841, now Ord. XIV. 9, see *Ellice v. Goodson*, 3 M. &

unless the nature of the case made by the bill has been changed by the amendments.⁵

No alteration can be made in any pleading, or other matter, after it has been filed, and by that means become a record of the Court, without the sanction of an Order.⁶ Orders for leave to amend bills, may, subject to the rules and regulations hereafter pointed out, be obtained at any period of the cause, previously to the hearing.⁷

An order for leave to amend a bill may be obtained at any time before answer, upon motion or petition without notice;⁸ and for *410 *the purpose of adding parties only, an order for leave to

C. 653, 661; 2 Jur. 249. [Not to put in a plea in the nature of a plea *puis darrein continuance*, to the effect that since he put in his answer to the original bill he had removed the obstacle which prevented proceedings at law, and authorized the filing of the bill. *Morley v. White*, L. R. 8 Ch. Ap. 731. The rule is now otherwise under the Judicature Act. *Powell v. Jewesbury*, 9 Ch. Div. 34. See *infra*, 780.]

⁵ *Cresy v. Bevan*, 13 Sim. 354.

⁶ See *Thomas v. Visitors of Fred. Co. School*, 7 Gill & J. 369.

⁷ See *Luce v. Graham*, 4 John. Ch. 170; *Hunt v. Holland*, 3 Paige, 78. [A plaintiff who is in contempt may obtain an order to amend his bill. *Chatterton v. Thomas*, 36 L. J. Ch. 592.]

⁸ Ord. IX. 8. As many orders as may be required may be thus obtained, and if interrogatories have been filed, and it is necessary to amend them, the Order may give leave to do so. *Braithwaite's Pr.* 319; see form of Order, *Seton*, 1252, No. 2. The following rules on the subject of amendments were adopted by the Supreme Court of the United States, January Term, 1842. "The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling up blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course), after a copy has been so taken, before any answer, or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended, and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby." Equity Rule, 28. "After an answer, or plea, or demurrer, is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the Court, to amend his bill on or before the next succeeding rule day, upon payment of costs, or without pay-

ment of costs, as the Court or judge thereof may in his discretion direct. But, after replication filed, the plaintiff shall not be at liberty to withdraw it and to amend his bill, except upon a special order of a judge of the Court, upon motion or petition, after due notice to the other party, and upon proof by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause." Equity Rule, 29. "If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments, or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made." Equity Rule, 30; *Story Eq. Pl.* § 886, note.

By the Rules of Practice in Chancery in Massachusetts, the plaintiff may amend his bill at any time before answer, plea, or demurrer, filed, of course, and without payment of costs; but if the defendant's appearance shall have been entered, the plaintiff shall, at his own expense, furnish the defendant with a certified copy of the amended bill. No amendment, however, shall be allowed, as of course, to a bill which has been sworn to by the party. If the defendant demurs to the bill for want of parties, or other defect, which does not go to the equity of the whole bill, the plaintiff may amend at any time before the demurrer is set down for argument, or within fourteen days after the demurrer is filed, and notice thereof given to him, upon the payment of a term fee. Rules 20, 21. And upon the coming in of the answer, if the plaintiff shall find it necessary to amend his bill, in order to meet the case made by the answer, he may do so, by furnishing to the defendant a certified copy of the amendment. Rule 22. See *Gerrish v. Black*, 99 Mass. 315. For the Rule in Maine, see 3rd Rule of Chancery Practice, 37 Maine, 581.

In New Hampshire, amendments may be made to the bill, answer, or pleadings, in proper cases, upon the order of the judge in vacation, and upon such terms as he may impose; the amendments being subject, how-

amend may be obtained in like manner at any time before the cause is set down for hearing;¹ but, as we have seen, if the order is obtained after the time for giving notice of the cross-examination of the witnesses, the evidence cannot be read against the parties so added.²

An order for leave to amend a bill, only for the purpose of rectifying some clerical error in names, dates, or sums may be obtained at any time upon motion or petition without notice.³ The order should specify the errors which are to be corrected.

* If a demurrer to the whole bill is not set down for argument *411 within twelve days, or a demurrer to part of the bill within three weeks, after filing the same, the plaintiff must, within such respective times, serve an order, which may be obtained on motion or petition of course, for leave to amend the bill: otherwise, the demurrer will be held sufficient.¹

If a plea to the whole or a part of a bill is not set down for argument within three weeks after the filing thereof, the plaintiff must within that time serve an order, which may be obtained on motion or petition of course, for leave to amend the bill, or undertake in writing to reply to the plea: otherwise, the plea will be held good.²

Where a demurrer has been overruled, it is irregular to obtain an order of course to amend pending an appeal: and in such a case, the order was discharged with costs, and the amendments expunged.³

In like manner, it is irregular to obtain an order of course to amend, pending an inquiry which of two suits is most for an infant's benefit.⁴

If, at the time the order for amendment is made, none of the defendants have appeared, the plaintiff may amend without payment of any

ever, to the order of the Court. Rule 18, of Chancery Practice, 38 N. H. 608.

[In Tennessee, the bill may be amended before copy issued, and afterwards in small matters not affecting the merits, without costs, and before defence made in material points upon paying the costs of a copy of the amendment. In all other cases, amendments can only be made by leave of the Chancellor in open Court. Code, §§ 4332 to 4335. It is of course to allow the plaintiff to amend his bill upon defence made either by plea or answer; amendments after replication, or the setting of a plea or demurrer for hearing will be on terms. *Mount Olivet Cemetery v. Budeke*, 2 Tenn. Ch. 480.]

¹ *Ante*, pp. 293, 294; *Goodwin v. Goodwin*, 3 Atk. 370; *Brattle v. Waterman*, 4 Sim. 125; *Bryan v. Wastell*, Kay Ap. 47; *Gill v. Ravner*, 1 K. & J. 395; see, however, *Hitchcock v. Jacques*, 9 Beav. 192.

² *Ante*, pp. 293, 294, 405; *Quantock v. Bullen*, 5 Mad. 81; *Pratt v. Barker*, 1 Sim. 1, 5; *James v. James*, 4 Beav. 578.

³ Ord. IX. 9. The signature of counsel is not required to an amendment of this description; but such an amendment will render inoperative an order to take a bill *pro confesso*; *Weightman v. Powell*, 2 De G. &

S. 570; see, however, *Cheeseborough v. Wright*, 23 Beav. 173. As to the necessity of reserving the bill after such an amendment, see *Barnes v. Ridgway*, 1 Sm. & G. Ap. 18. The defendant may, where he apprehends danger from a clerical mistake, in stating a deed or other instrument, in a bill, have the bill amended so as to identify the instrument on which the suit is brought, and prevent a second suit on the same. *Ontario Bank v. Schermerhorn*, 10 Paige, 109. A mere clerical error may be amended in a bill, even after final decree. *Donnelly v. Ewart*, 3 Rich. Eq. 18. For forms of motion paper and petition, see Vol. III.

¹ Ord. XIV. 14, 15. As to the effect of holding a demurrer sufficient, see *post*, Chap. XIV. § 5. For forms of motion paper and petition, see Vol. III.

² Ord. XIV. 17. As to the effect of holding a plea sufficient, see *post*, Chap. XV. § 5. And see *Campbell v. Joyce*, L. R. 2 Eq. 377, V. C. W.; [*Kittellwell v. Barstow*, L. R. 10 Eq. 210.] For forms of motion paper and petition, see Vol. III.

³ *Ainslie v. Sims*, 17 Beav. 174.

⁴ *Fletcher v. Moore*, 11 Beav. 617; 13 Jur. 1063.

costs.⁵ If any of the defendants have appeared, but have not answered, or, having answered, the plaintiff requires no further answer from them, the plaintiff may amend without payment of any costs to them; but the plaintiff must pay 20s. to each defendant, or set of defendants, who have answered, and from whom the plaintiff requires a further answer.⁶

Where no further answer is required, the order should contain a recital to that effect: otherwise it is irregular.⁷

It is now proposed to consider the circumstances under which a bill may be amended after answer.⁸ Where there is a sole defendant, or where there being several defendants, they all join in the same answer, the plaintiff may, after answer and before *replication or undertaking to reply, obtain one order of course for leave to amend the bill, at any time within four weeks after the answer is to be deemed or is held to be sufficient;¹ and where there are several defendants who do not join in the same answer, the plaintiff (if not precluded from amending, or limited as to the time of amending by some former order), may, after answer, and before replication or undertaking to reply, at any time within four weeks after the last of the answers required to be put in is to be deemed or is held to be sufficient, obtain one order of course, for leave to amend his bill.² An order of course cannot, however, be obtained, in either of these cases, after any defendant, being entitled to move, has served a notice of motion to dismiss the bill for want of prosecution.³

A voluntary answer is deemed sufficient as soon as it is put in; and therefore, in that case, the period of four weeks commences to run as soon as it is filed.⁴

In computing the period for obtaining orders for leave to amend bills, the times of vacation are not to be reckoned.⁵

It will be convenient here to state the different times of vacation. The vacations observed in the several offices of the Court, except in the office of the Accountant-General, are four in every year: *viz.*, the Easter Vacation, the Whitsun Vacation, the Long Vacation, and the

⁵ *Saunders v. Frost*, 5 Pick. 259; *Droullard v. Baxter*, 1 Scam. 191; Rule 20, Mass. Chancery, *ante*, 410, note.

⁶ *Ante*, 410, note.

⁷ *Buddington v. Woodley*, 9 Sim. 380; 2 Jur. 917; *Breeze v. English*, 2 Hare, 638.

⁸ See *Droullard v. Baxter*, 1 Scam. 191; Rules 29th and 30th of the Equity Rules of the Supreme Court of the United States; Rules 20th and 22nd of the Rules for Chancery Practice in Massachusetts, *ante*, 410, note.

¹ Ord. IX. 10. [The four weeks expire at twelve o'clock at night on the last day. *Preston v. Collett*, 20 L. J. Ch. 228.] Before replication, the order to amend is of course. *Buckley v. Corse*, Saxton, 504; *Vernon v. Cue*, 1 Dick. 358; *Jennings v. Pearce*, 1 Ves. Jr. 447; *Renwick v. Wilson*, 6 John. Ch. 85;

Mount Olivet Cemetery Co. v. Budeke, 2 Tenn. Ch. 480. And without prejudice to an injunction or other order. *Lanning v. Heath*, 10 C. E. Green, 425; *Harvey v. Hall*, L. R. 11 Eq. 31. And it is also a motion of course to re-amend upon the coming in of the answer to an amended bill. *Dunn v. Ferrior*, L. R. 8 Eq. 248.]

² Ord. IX. 11. To avoid a notice to dismiss, the order of course under rr. 10, 11, must also be served; see Ord. XXXIII. 10 (1.) Ord. IX. 11, applies to bills of discovery. *Peile v. Stoddart*, 11 Beav. 591.

³ Ord. IX. 12; see *post*, 416, n.

⁴ *Rogers v. Fryer*, 2 W. R. 67; 2 Eq. Rep. 253, V. C. K.

⁵ Ord. XXXVII. 13 (1); and see *post*, p. 420.

Christmas Vacation. (1) The Easter Vacation commences and terminates on such days as the Lord Chancellor every year specially directs. (2) The Whitsun Vacation commences on the third day after Easter Term, and terminates on the second day before Trinity Term in every year. (3) The Long Vacation commences on the 10th day of August, and terminates on the 28th day of October in every year. (4) The Christmas Vacation commences on the 24th day of December in every year, and terminates on the 6th day of the following month of January.⁶

The vacations in the office of the Accountant-General are the same as in the other offices: except as to the Long Vacation, which commences and terminates on such days as the Lord Chancellor every year directs.⁷

The days of the commencement and termination of each vacation * are included in and reckoned part of such vacation.¹ And *413 the Lord Chancellor may from time to time, by special order, direct any of the vacations to commence and terminate on days different from the fixed days before mentioned.²

When the bill has been once amended after answer, under an order of course, the plaintiff is not, except for the purpose of rectifying clerical errors in names, dates, or sums,³ or of adding parties,⁴ entitled to another order of course, giving him leave to amend his bill;⁵ and this applies, notwithstanding that some of the defendants may answer subsequently to the date of the amendment,⁶ and that those defendants who have already answered consent to the application for the order.⁷

For the purpose of determining whether an order of course to amend can be obtained, an answer held to be insufficient, or the insufficiency of which is admitted by the defendant, must be considered as no answer; and, consequently, an order to amend after such insufficient answer, or after a demurrer or plea overruled,⁸ is of course, and does not preclude the plaintiff from obtaining a further order of course for the amendment of his bill, after a sufficient answer has been put in.⁹ It must, however, be recollected that an answer is deemed sufficient until it has been held insufficient;¹⁰ and, further, that an amendment of the bill, made previously to the answer being held insufficient, operates as an admission of the sufficiency of the answer; consequently, however insufficient an answer may be in fact, an amendment of the bill

⁶ Ord. V. 4 (1-4). The duties of the Vacation Judge commence as each Court rises, although the vacation may not have actually commenced. *Francis v. Browne*, 8 Jur. N. S. 785; 10 W. R. 811, L. C.; see Ord. VI. 11, as to power of one judge to act for another during vacation.

⁷ Ord. V. 5.

¹ Ord. V. 4 (5).

² Ord. V. 6.

³ Ord. IX. 9; *ante*, p. 410.

⁴ *Ante*, pp. 294, 405, 406, 409.

⁵ Ord. IX. 13.

⁶ *Attorney-General v. Nethercoat*, 2 M. &

C. 604; 1 Jur. 635; *Duncombe v. Lewis*, 10 Beav. 273; *Winthrop v. Murray*, 7 Hare, 150. See *Wharton v. Swann*, 2 M. & K. 362.

⁷ *Bainbrigge v. Baddeley*, 12 Beav. 152; 13 Jur. 997.

⁸ But pending an appeal, an order of course, after a demurrer overruled, is irregular. *Ainslie v. Sims*, 17 Beav. 174.

⁹ *Mendizabel v. Hullett*, 1 R. & M. 324; *Bird v. Hustler*, *ib.* 325; *Chase v. Dunham*, 1 Paige, 572.

¹⁰ See *Sibbald v. Lawrie*, 2 K. & J. 277; *n.*; *Lafone v. Falkland Islands Co.*, 2 K. & J. 276.

before it is held insufficient, will have the effect of preventing any further order to amend from being obtained, as of course.

After exceptions for insufficiency have been submitted to, or allowed, the plaintiff may obtain an order, as of course, on motion or petition,¹¹ that he may be at liberty to amend his bill, and that the defendant may answer the amendments and exceptions together.¹² If the bill

*414 has been already amended under such * an order, and exceptions are taken to the answer to the amended bill, and are submitted to or allowed, the plaintiff may have a further order, as of course to amend, and that the defendant may answer the amendments and exceptions together.¹ If, however, the defendant can put in his further answer, before he is served with the order to answer the amendments and exceptions together, the plaintiff will lose the benefit of such order, and the defendant may move, on notice, to discharge it for irregularity.² Where the plaintiff did not amend his bill within the period allowed for that purpose, it was held, that a second order of course for leave to amend was irregular.³

All the applications to amend hitherto considered are of course, and require no notice. They are usually obtained on a petition of course at the Rolls; but they may also be made on motion of course, in the Court of the Judge to whose Court the cause is attached.⁴

In all cases, other than those above pointed out in which an order may be obtained as of course, the plaintiff must, if he desires to amend his bill after answer, make a special application to the Judge for leave to do so. This application is made by summons at Chambers.⁵ The summons must be served on the solicitors for all the defendants who have appeared to the bill. The Judge, at the time of making the order, usually disposes of the costs of the application.⁶

¹¹ For forms of motion paper and petition, see Vol. III.

¹² *Mayne v. Hochin*, 1 Dick. 255; *Adney v. Flood*, 1 Mad. 449; *Dipper v. Durant*, 3 Mer. 465; see *Renwick v. Wilson*, 6 John. Ch. 81; *M'Meehan v. Story*, 1 Bland, 184; *Barnes v. Dickinson*, Dev. Eq. 326; *Read v. Consequa*, 4 Wash. C. C. 174. In Massachusetts, upon the coming in of the answer, if the plaintiff shall find it necessary to amend his bill, in order to meet the case made by the answer, he may do so by furnishing to the defendant a certified copy of the amendment; and the plaintiff may also, at the same time, except to the defendant's answer to the bill, as originally filed. And in such case, if the defendant shall submit to answer further, or shall be ordered to answer further, he shall answer the amendments of the bill, and shall furnish a sufficient answer to the bill as originally filed at the same time. Rule 22 of the Massachusetts Rules for Chancery Practice; see *Gerrish v. Black*, 99 Mass. 315; *ante*, 410, note. Under the general rule allowing the plaintiff to amend, upon an insufficient answer, he cannot amend by leaving out the name of the defendant, and thus discontinue

the suit against him, without costs. *Chase v. Dunham*, 1 Paige, 572; see *Wilkinson v. Belsher*, 2 Bro. C. C. 272.

¹ *Mendizabel v. Hullett*, 1 R. & M. 324; *Bird v. Hustler*, *ib.* 325.

² *Mayne v. Hochin*, 1 Dick. 255; *Bethune v. Bateinan*, *ib.* 296; *Knox v. Symmonds*, 1 Ves. J. 87, 88; *Paty v. Simpson*, 2 Cox, 392; *Partridge v. Haycraft*, 11 Ves. 570, 578; *Pariente v. Bensusan*, 13 Sim. 522; 7 Jur. 618; *Hemming v. Dingwall*, 8 Beav. 102. For form of notice of motion, see Vol. III.

³ *Dolly v. Challin*, 11 Beav. 61; and see *Watson v. Life*, 1 M'N. & G. 104; 13 Jur. 479.

⁴ Ord. VI. 5. And see *post*, Chap. XXXV. § 1, *Interlocutory Applications and Orders*. For forms of motion paper and petitions, see Vol. III.

⁵ 15 & 16 Vic. c. 80, §§ 26, 27; Order XXXV. 2. For form of summons, see Vol. III.

⁶ See 23 Ord. Dec. 1833; Sand. Ord. 781; Beav. Ord. 51; Ord. XXXV. 61. And see as to costs of amendments generally, Ord. XL. 7, 8.

If this special application is made within the period of four weeks from the time when the answer, or last of the answers, required to be put in is to be deemed or is held to be sufficient, it will not be granted without an affidavit to the effect: 1. That the draft of the proposed amendments has been settled, approved, and signed by counsel; and, 2. That such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff.⁷ * Such affidavit must be made either by the *415 plaintiff and his solicitor, or by the solicitor alone, in case the plaintiff, from being abroad or otherwise, is unable to join therein.¹ The affidavit of the solicitor's clerk is not sufficient, although the facts be within his knowledge; and where the facts are within his knowledge only, the Court requires an affidavit from him, as well as the solicitor.²

In the case of an information, the affidavit may be made by the solicitor of the informant,³ or by the solicitor of the relators only.⁴ So, also, if a corporation is plaintiff, an affidavit by the solicitor of the corporation is sufficient.⁵ Where there are several co-plaintiffs, only one need join in the affidavit; and where the sole plaintiff is an infant, the affidavit should be made by the next friend and the solicitor.

After the plaintiff has filed or undertaken to file replication, or after the expiration of four weeks from the time when the answer, or the last of the answers required to be put in, is to be deemed, or is held to be sufficient, a special order for leave to amend will not be granted without a further affidavit showing that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.⁶ The affidavit must also show the nature of the proposed amendments, in order that the Judge may decide as to their materiality;⁷ and must state the facts, so as to enable the Judge to determine whether reasonable diligence has been used.⁸

⁷ Ord. IX. 14. [This order applies in the case of an application to re-amend, after answer, a bill which has been amended after answer under an order of course. *Masterman v. Midland Railway*, 20 L. J. Ch. 23; *McIntosh v. Great Western Railway Co.*, 20 L. J. Ch. 550;] for form of affidavit, see Vol. III.

¹ Ord. IX. 16; *Attorney-General v. Corporation of London*, 13 Beav. 313. As to cross-examination upon the affidavit, see *Catholic Publishing Company v. Wyman*, 11 W. R. 399, V. C. W.

² *Christ's Hospital v. Grainger*, 1 Phil. 634, 639; 10 Jur. 37.

³ *Attorney-General v. Corporation of London*, *ubi sup.*

⁴ *Attorney-General v. Wakeman*, 15 Sim. 358; 10 Jur. 559.

⁵ *Christ's Hospital v. Grainger*, *ubi sup.*

⁶ Ord. IX. 15; *Thorn v. Germand*, 4 John. Ch. 363. If the plaintiff files a replication to the answer after he is apprised of the necessity of an amendment to his bill, he precludes himself from making such amendment. *Ver-*

mylea v. Odell, 4 Paige, 121. The application to amend should be made as soon as the necessity for an amendment is discovered. *Rogers v. Rogers*, 1 Paige, 424; *Platt v. Squire*, 5 Cush. 557; *Codington v. Mott*, 1 McCarter (N. J.), 430; *Howell v. Lebring*, 1 McCarter (N. J.), 84, 90; for form of affidavit, see Vol. III.

⁷ *Phillips v. Goding*, 1 Hare, 40; 5 Jur. 1105; *Attorney-General v. Fishmongers' Company*, 4 M. & C. 1, 8; C. P. Coop. 385; *Stuart v. Lloyd*, 3 M.N. & G. 181; 15 Jur. 411; *Collett v. Preston*, 3 M.N. & G. 432, 438; 15 Jur. 975; *Brown v. Ricketts*, 2 John. Ch. 425. And see as to sufficiency of affidavit, *Attorney-General v. Corporation of London*, 13 Beav. 313. In *Payne v. Little*, 14 Jur. 358, the M. R. held that it was sufficient if some of the proposed amendments were mentioned in the affidavit. *Price v. Salisbury*, 32 Beav. 446. [*Hemming v. Muddick*, L. R. 9 Eq. 175.]

⁸ *Stuart v. Lloyd*, and *Collett v. Preston*, *ubi sup.* Although reasonable diligence

If the plaintiff amends his bill after answer by adding parties, the period of four weeks will still be reckoned from the time when the answer, or the last of the answers required to be put in to the original bill, is to be deemed, or is held to be sufficient.⁹

*416 *The rules laid down in the General Orders, as to obtaining orders of course to amend, do not appear to have been framed with a view to meet those cases where no answer is required, and none is put in; consequently, it has been held, that it was not irregular to obtain an order of course to amend after the plaintiff had served a notice of motion for a decree, and the defendant had filed his affidavits in opposition to such motion.¹ It would seem, that if the motion had been set down for hearing, an order of course would have been irregular.² It is conceived that, after replication has been filed, or the plaintiff has undertaken to file it, an order of course to amend cannot be obtained, even where no answer has been required or put in;³ and where a defendant, being entitled to move, has served a notice of motion to dismiss for want of prosecution, the plaintiff can in no case obtain an order of course to amend;⁴ but the limits above pointed out appear to be the only restraints on the right of the plaintiff to obtain an order of course to amend, where no answer is put in.

After the evidence is closed, the bill cannot be amended in any other respect than by adding parties; and no new allegation can be introduced, or material fact put in issue, which was not so before.⁵ And where a plaintiff by a false suggestion that the cause was at issue only, had obtained an order for liberty to amend his bill, by the addition of a prayer which had been accidentally omitted, the order was discharged, upon the application of the defendant at the opening of the cause, when it came on for hearing.⁶

It is said⁷ that, after publication has passed (that is, after the evidence is closed), there is no instance of a plaintiff obtaining an order to amend, without withdrawing his replication. The observation, however, appears to be a mere *dictum*, and it certainly cannot apply to cases where the amendment is merely by adding parties. In *Haberg-ham v. Vincent*,⁸ Lord Thurlow intimated an opinion, that after a decree had been made, passed, and entered, without bringing before the Court a personal representative who had become so after the bill was

not be thus shown, the application must be made to the judge by summons. As to the power of the Court, and Judge at Chambers, to enlarge the time for doing any act, or taking any proceeding, see Ord. XXXVII. 17, 18; *Potts v. Whitmore*, 10 Beav. 179.

² *Bertolacci v. Johnstone*, 2 Hare, 632; 8 Jur. 751.

¹ *Gill v. Rayner*, 1 K. & J. 395; and see ante, pp. 411, 412.

² *Ibid.* *Goodwin v. Goodwin*, 3 Atk. 370. A motion for a decree would for this purpose, it is apprehended, be considered a hearing of the cause.

³ Ord. IX. 15.

⁴ Ord. IX. 12; but if the notice be withdrawn, matters will be remitted to their former condition. *Briggs v. Beale*, 12 W. R. 934, V. C. W.

⁵ *Goodwin v. Goodwin*, 3 Atk. 370; *Milligan v. Mitchell*, 1 M. & C. 433, 442; *Thompson v. Judge*, 2 Drew. 414; *Horton v. Brocklehurst*, 29 Beav. 503; *Forbes v. Stevens*, 10 Jur. N. S. 861, V. C. W.; but see *S. C.* 4 N. R. 386, L. J.J.

⁶ *Harding v. Cox*, 3 Atk. 583.

⁷ 1 Atk. 51.

⁸ 1 Ves. J. 68; see, however, 1 C. P. Coop. t. Cott. 40, n.

filed, he might be added by amendment, and that a motion for the purpose would be regular, provided it was only for the purpose of making him a witness to * what was done in the Master's office; * 417 but that, if there was any thing in the decree affecting him in the way of an order to pay, such an order would be out of the power of the Court.

Where it is intended to amend a bill, after replication filed, by the addition of new facts or charges, the proper course is to apply for leave to withdraw the replication and amend; and it seems that an order of this description may be obtained, upon an application in Chambers, supported by the affidavits required by the General Orders above referred to,¹ at any time before the closing of the evidence.² The order may be made without prejudice to the evidence already gone into being used.³

Sometimes the Court, at the hearing, will order a cause to stand over, with liberty to the plaintiff to perfect his case by amendment, upon his paying the costs of the day.⁴ Thus, as we have seen, if, at the hearing, the record appears to be defective for want of proper parties, the Court will allow the cause to stand over, for the plaintiff to amend his bill by adding parties;⁵ or, where the parties are too numerous to be brought before the Court, to alter the form of the bill, by making it a bill by the plaintiffs, on behalf of themselves and all others of the same class.⁶ This practice is not confined to amendment, by adding parties: it will be extended to permit the plaintiff to show why he cannot bring the necessary parties before the Court.⁷ And if the record is defective by reason of a misjoinder of plaintiffs, the Court may direct such amendments as may be necessary, in order to grant such relief as any of the plaintiffs may be entitled to, and at the hearing, before such amendments are made, treat any of the plaintiffs as if he were a defendant.⁸ And so, as we have seen,⁹ the Court will sometimes, at the hearing, permit the prayer of the bill to be amended,¹⁰ so as to make it more consistent with the case made by the plaintiff than

¹ For form of summons, see Vol. III.

² *Horton v. Brocklehurst*, 29 Beav. 503; *Champneys v. Buchan*, 3 Drew. 5; see *Thorr v. Germand*, 4 John. Ch. 363; *Story Eq. Pl.* § 887; *Blaisdell v. Stevens*, 16 Vt. 179; *Brown v. Ricketts*, 2 John. Ch. 425.

³ *Ricardo v. Cooper*, cited *Seton*, 1253.

⁴ This may be done, when the cause is heard on motion for decree. *Thomas v. Bernard*, 7 W. R. 271, V. C. K.; [*Budding v. Murdoch*, 1 Ch. Div. 42; *King v. Corke*, 1 Ch. Div. 57. And see where the pleadings are evasive, which are sought to be amended. *Tildesley v. Harper*, 10 Ch. Div. 393, overruling *S. C.* 7 Ch. Div. 403.]

⁵ *Ante*, pp. 290, 291; and see *Leyland v. Leyland*, 10 W. R. 149, V. C. K.; *Story Eq. Pl.* § 891.

⁶ *Ante*, p. 244; and see *Gwatkin v. Campbell*, 1 Jur. N. S. 131, V. C. W.

⁷ *Milligan v. Mitchell*, 1 M. & C. 511, 515; *Gibson v. Ingo*, 5 Hare, 156.

⁸ 15 & 16 Vic. c. 86, § 49; *ante*, p. 303; and see *Lee v. Blackstone, Seton*, 1113, No. 2.

⁹ *Ante*, p. 383.

¹⁰ *Clifton v. Haig*, 4 Desaus. 330, cited *post*, 419, in note; *Lyon v. Tallmadge*, 1 John. Ch. 184. If a formal charge of fraud were necessary, but had been omitted, the Court would grant leave to amend even at the hearing. *Wamburzee v. Kennedy*, 4 Desaus. 480. But after a defendant has put in his answer on oath, the plaintiff cannot amend his bill and include in such amendment a waiver of the answer of the defendant on oath, so as to deprive him of the benefit of his answer to the amendments, so far as it may be responsive to the bill. *Burras v. Loker*, 4 Paige, 227; *Bingham v. Yeomans*, 10 Cush. 58; *Chace v. Holmes*, 2 Gray, 314; Rule 8, of the Mass. Rules for Chancery Practice.

the one he has already introduced. And where a plaintiff had amended his bill, and by accident had omitted to insert in the

*418 * amended bill the prayer for relief, although it was in the original bill, the Court put off the cause, in order that the plaintiff might have an opportunity to re-amend his bill by inserting it.¹

Usually, amendments are allowed at the hearing only for the purpose of making the record complete as to parties, or adapting the prayer to the case made by the bill.² Upon the question of allowing amendments for other purposes at the hearing, Sir George Turner L. J., in the case of *Lord Darnley v. The London, Chatham, and Dover Railway Company*,³ observed: "It is impossible to lay down any general rule; all depends upon the circumstances; but, speaking generally, I should say that leave should be given when the matters proposed to be introduced are connected with the matters in issue, but should be refused when it is not so."⁴ Thus, where a matter has not been put in issue, with sufficient precision, the Court has, upon hearing the cause, given the plaintiff liberty to amend the bill, for the purpose of making the necessary alteration.⁵

Wherever improper submissions have been made in a bill on behalf of infants, the Court will, at the hearing, order that the bill shall be amended, by striking out the submission.⁶ Upon the same principle, where an infant heir-at-law had been made a co-plaintiff, Lord Redesdale ordered the cause to stand over, with liberty to the plaintiff to amend his bill, by making the heir-at-law a defendant;⁷ and where a matter has not been put, by the bill, properly in issue, to the prejudice of an infant, the Court has generally ordered the bill to be amended.⁸

The Court has even gone to the extent of allowing the plaintiffs, at

¹ *Harding v. Cox*, 3 Atk. 583.

² *Watts v. Hyde*, 2 Phil. 406, 411: 11 Jur. 979; and see *Bellamy v. Sabine*, 2 Phil. 425, 447.

³ 9 Jur. N. S. 452, 453; 11 W. R. 388, 391; 1 De G., J. & S. 204, 219, 220; and see *Gossop v. Wright*, 9 Jur. N. S. 592; 11 W. R. 632, V. C. K.

⁴ In *Walker v. Armstrong*, 8 De G., M. & G. 531; 2 Jur. N. S. 959, however, the L. J.J. allowed a bill to be amended at the hearing, by raising an entirely new case, viz., the rectification of a deed. [See, for instances of amendment at the hearing, *Neale v. Neales*, 9 Wall. 1; *Armstrong v. Ross*, 5 C. E. Green, 109; *Elmer v. Loper*, 10 C. E. Green, 475; *Ogden v. Thornton*, 3 Stew. Eq. 569; *Hewitt v. Dement*, 57 Ill. 500; *Drow v. Beard*, 107 Mass. 64; *Rhea v. Puryear*, 26 Ark. 344; *Perkins v. Hays*, Cooke, 189; *Coffman v. Langston*, 21 Gratt. 263. After hearing, *Hampton v. Nicholson*, 8 C. E. Green, 423. And, in a peculiar case, after decree. *The Tremole Patent*, 23 Wall. 518. Amendment will be allowed after the trial of an issue. *Powell v. Mayo*, 11 C. E. Green, 120. See,

however, *Clews v. Brunswick R. Co.*, 50 Ga. 522; *Curtis v. Goodenow*, 24 Mich. 18; *Munch v. Shabell*, 37 Mich. 166.]

⁵ Ld. Red. 326; *Filkin v. Hill*, 4 Bro. P. C. ed. Toml. 640; *nom. Hill v. Eyre*, 1 De G., J. & S. 217, 218, 220; and see observations of L. J. Turner on this case, in *Lord Darnley v. London, Chatham, and Dover Railway Company*, 9 Jur. N. S. 452; 11 W. R. 391; see also *Watts v. Lord Eglington*, 1 C. P. Coop. t. Cott. 423; *Knox v. Gve*, 9 Jur. N. S. 1277, V. C. W.; 12 W. R. 1125, L. J.J.; *Forbes v. Stevens*, 10 Jur. N. S. 861, V. C. W.; 4 N. R. 386, L. J.J.; *Firth v. Kidley*, *ib.* 415, L. J.J.; *Hume v. Pocock*, L. R. 1 Eq. 662; 12 Jur. N. S. 223, V. C. S.; [*Trappes v. Meredith*, L. R. 9 Eq. 229;] see *Conalley v. Peck*, 3 Cal. 75; *McDougal v. Williford*, 14 Geo. 665; [*Midmer v. Midmer*, 11 C. E. Green, 299.] For form of orders to amend at the hearing, see *Seton*, 1113, Nos. 1, 2; and see *ib.* 1114-1116.

⁶ *Serle v. St. Eloy*, 2 P. Wms. 386, *ante*, p. 77.

⁷ *Plunket v. Joice*, 2 Sch. & Lef. 159.

⁸ Ld. Red. 327.

the hearing of an appeal, to amend their bill, by converting it from a bill into an information and bill, or information only.⁹

* But, although the Court will sometimes, at the hearing, allow the cause to stand over, with liberty for the plaintiff to amend his bill, the plaintiff ought to be careful, before the cause comes on, to have the record in a proper state, so as to enable the Court to make a complete decree: for the plaintiff himself cannot, when the cause comes on for hearing (unless under particular circumstances, or with the consent of the defendant), obtain leave to amend his bill, even upon the usual terms of paying the costs of the day;¹ and if a decree were to be obtained upon pleadings which are defective in a material point, it would afterwards be liable to be set aside for error.²

It frequently happens that, upon the argument of a demurrer, the Court, where the ground for demurring can be removed by amendment, has, in order to avoid putting the plaintiff to the expense of filing a new bill, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill, on payment of the costs incurred by the defendant;³ because, after a demurrer allowed to the whole bill, the bill is so completely out of Court that no amendment can take place:⁴ and where the demurrer is for want of parties, the Court, in general, annexes to the order allowing the demurrer a direction that the plaintiff shall be at liberty to amend his bill by adding parties thereto.⁵ Where, previously to the filing of a general demurrer, a notice of motion for an injunction had been served, leave was given, on allowing the de-

⁹ President of St. Mary Magdalen College v. Sibthorp, 1 Russ. 154; *ante*, p. 12. Leave will be granted to amend in the Court of Appeals, if it there be found necessary, in order to let in the whole merits of the case. Lenoir v. Winn, 4 Desaus. 65; Rodgers v. Jones, 1 M'Cord, Ch. 226; M'Kim v. Odom, 3 Bland, 407; Drummond v. Magruder, 9 Cranch, 122; Lewis v. Darling, 16 How. U. S. 1. [If the record shows substance by which to amend. Darlington's Appeal, 86 Pa. St. 512; Edmund's Appeal, 68 Pa. St. 24; Kuhl v. Martin, 2 Stew. Eq. 586; Thurmand v. Clark, 47 Ga. 500. But not upon facts outside of the record, brought forward by affidavit or petition. Fogg v. Union Bank, 4 Baxt. 418, a decision of the Supreme Court of Tennessee recognized and repeated in McKinley v. Sherry, at Jackson in April, 1879. See also Black v. Delaware, &c. Canal Co., 9 C. E. Green, 455, 482.] A petition in Chancery in Connecticut can be amended after the facts in the case have been found by a committee. Camp v. Waring, 25 Conn. 520.

¹ Leave may be granted to amend the prayer of the bill after hearing. Clifton v. Haig, 4 Desaus. 330. If a formal charge of fraud were necessary, but had been omitted, the Court would give leave to amend even at the hearing. Wamburzee v. Kennedy, 4 Desaus. 480.

² Wyatt's P. R. 299. As to obtaining leave to amend at the hearing of an inter-

locutory application, see Barnett v. Noble, 1 J. & W. 227; Pare v. Clegg, 7 Jur. N. S. 1136; 9 W. R. 216, M. R.

³ See Marshall v. Lovelass, Cam. & Nor. 239, 264; Benzein v. Lovelass, Cam. & Nor. 520; Holliday v. Biordon, 12 Geo. 417. After a special demurrer to a bill, the plaintiff may have leave to amend, on payment of costs. Rose v. King, 4 Hen. & Munf. 475. So where a mere formal objection to a bill was made by demurrer *ore tenus*, the plaintiff was permitted to amend. Garlick v. Strong, 3 Paige, 440. So also upon the allowance of a demurrer for want of equity, upon the ground of a formal defect in the bill. M'Elwain v. Willis, 3 Paige, 505; Hunt v. Rousmaniere, 2 Mason. 342; Beauchamp v. Gibbs, 1 Bibb, 483. See also rule 21 of Mass. Ch. Pr.

⁴ Lord Coningsby v. Jekyll, 2 P. Wms. 300; 2 Eq. Ca. Ab. 59, pl. 3; Smith v. Barnes, 1 Dick. 67; see also Mason v. Lake, 2 Bro. P. C. ed. Toml. 495, 497; Bressenden v. Decreets, 2 Cha. Ca. 197; Lloyd v. Loaring, 6 Ves. 773, 779. A different rule prevails in Massachusetts. Merchants' Bank of Newburyport v. Stevenson, 7 Allen, 491; see *post*, note to section "of the effect of allowing demurrers."

⁵ [And this is the proper decree. Gray v. Hays, 7 Humph. 588.] As to the time allowed to amend, where a demurrer or plea to the whole or part of a bill is not set down, see Ord. XIV. 14, 15, 17; *ante*, p. 373.

murrer, to amend within ten days, without prejudice to the notice of motion.⁶

The Court, in allowing a plea, frequently gives leave to
 *420 amend;⁷ * it must not, however, be understood that this is by any means a matter of course, even where the plea covers only part of the bill.¹ Leave to amend has also been given where a plea was overruled, with leave to plead *de novo*.² After the allowance of a plea, an order for leave to amend the bill is special; and, on the application for it, the plaintiff must specify the amendment he intends to make.³

It may be observed in this place, that where a plea for want of parties was put in to a bill of discovery, which had been filed in aid of an ejectment at Law, on the ground that the trustees in whom the legal estate was vested were not co-plaintiffs with the *cestui que trusts*, and upon argument a case was directed for the opinion of a Court of Law, but the parties not being able to agree upon the case, the plaintiffs moved for leave to amend the bill by adding the trustees as co-plaintiffs, Lord Eldon refused the motion, as being irregular while the judgment on the plea was pending.⁴ Afterwards, however, upon the plaintiffs moving that the Vice-Chancellor's order, directing the case to be stated, might be discharged, and that the plaintiffs might be at liberty to amend their bill, by the introduction of facts to show that the legal estate was in the trustees, and that there was a count in the declaration in ejectment on the demise of such trustees, the Lord Chancellor made such an order, but upon condition of the plaintiffs consenting to the plea being allowed.⁵

It seems that, where a plea has been replied to, the plaintiff may, in some cases, have leave to withdraw his replication and amend, but that such leave is not a matter of course, and can only be obtained on a special application;⁶ and, therefore, where an order to withdraw replication to a plea, and to amend, was obtained on a motion of course, it was discharged for irregularity, and the amended bill was ordered to be taken off the file.⁷

After the plaintiff has obtained an order to amend, he has, in all cases in which no other time is limited by such order, fourteen days after the date of the order, within which he may amend his

⁶ *Rawlings v. Lambert*, 1 J. & H. 458; *Harding v. Tingey*, 10 Jur. N. S. 872; 12 W. R. 703, V. C. K.

⁷ *Ld. Red.* 281; *Doyle v. Muntz*, 5 Hare, 509, 518; 10 Jur. 914; *Tudway v. Jones*, 1 K. & J. 691; and see *Barnett v. Grafton*, 8 Sim. 72. Leave to amend given after allowance, without costs, of plea of defendant's bankruptcy. *Jones v. Binns*, 33 Beav. 362; 10 Jur. N. S. 119.

¹ *Taylor v. Shaw*, 2 S. & S. 12; *Neck v. Gains*, 1 De G. & S. 223; 11 Jur. 763; see also *Ord. XIV.* 16; and *post*, Chap. XV. § 5, *Pleas*.

² *Chadwick v. Broadwood*, 3 Beav. 316; 5 Jur. 359.

³ *Taylor v. Shaw*, 2 S. & S. 12; *Neck v. Gains*, 1 De G. & S. 223; 11 Jur. 763.

⁴ *Lord Cholmondeley v. Lord Clinton*, 2 Mer. 71.

⁵ *Ib.* 74.

⁶ *Carleton v. L'Estrange*, T. & R. 23; *Barnett v. Grafton*, 8 Sim. 72; and see *Ord. XIV.* 18.

⁷ *Carleton v. L'Estrange*, *ubi sup.* [*Metro-politan Bank v. Offord*, L. R. 10 Eq. 398.] It has been held that, as Rule 29 of the Circuit Court of the United States makes no provision for amending a bill after issue joined and depositions taken, it is to be construed as prohibiting it, at least except under very special circumstances. *Ross v. Carpenter*, 6 McLean, 382. [But see *ante*, 418, n. 4.]

* bill.¹ If he does not amend within the time limited, or within *421 the fourteen days, the order becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.² The fact of the plaintiff not making his amendment within this period will not, however, preclude him from obtaining another similar order of course to amend, upon the same terms, if the original order was obtained before any answer was put in.³

If the plaintiff is unable to amend the bill within the time limited by the order to amend, or, if no time is thereby limited, within the fourteen days, he should apply by summons, before the time has expired, for an enlargement of the time.⁴ The summons must be served on all the defendants who have appeared to the bill; and the order is drawn up at Chambers.⁵

In a proper case, an order may also be obtained, on a summons served in like manner,⁶ to enlarge the time allowed by the General Orders of the Court, to obtain an order to amend.⁷ The order is drawn up at Chambers.⁸ The usual course, however, is to obtain the common order within due time, and then to apply, before the fourteen days have expired, for an extension of time to amend under it.

In computing the time for amending the bill, the times of vacation are not to be reckoned:⁹ if therefore, the time would expire in vacation, and it is intended to deprive the plaintiff of this advantage, the order should be so framed as to direct the amendment to be made on or before some specified day.

When an order to amend has been irregularly made, the defendant may move on notice to discharge it;¹⁰ it will, however, be considered as valid until it has been discharged:¹¹ and the irregularity will be waived if the defendant accept costs under it.¹²

* An order to amend, whether of course or special, should be *422 served, without delay, on such of the defendants as have appeared to the bill, either in person or by their solicitors: as the order only operates from the time of service.¹

¹ Ord. IX. 17. This order applies to all orders to amend, whether of course or special; see *Cridland v. Lord de Mauley*, 2 De G. & S. 560; 12 Jur. 1015; *Armistead v. Durham*, 11 Beav. 428; 13 Jur. 330; *Bainbrigge v. Baddeley*, 12 Beav. 152; 13 Jur. 997. These cases were decided on the former orders; in the existing orders, the words have been somewhat altered, apparently to meet this question. For a case on the present orders, see *Tampier v. Ingle*, 1 N. R. 159, V. C. K.

² Ord. IX. 24.

³ *Nicholson v. Peile*, 2 Beav. 497; see, however, where the plaintiff had excepted, *Dolly v. Challin*, 11 Beav. 61. The service of an order to amend does not prevent the defendant from filing his answer. *Mackerell v. Fisher*, 14 Sim. 604; 9 Jur. 574.

⁴ Ord. IX. 17, 24; Ord. XXXIII. 11; *Dolly v. Challin*, *ubi sup.*; *Bainbrigge v. Baddeley*, 12 Beav. 152, 154; 13 Jur. 997. For form of summons, see Vol. III.

⁵ For form of order, see Vol. III.

⁶ *Ibid.*

⁷ Ord. XXXVII. 17, 18; see *Potts v. Whitmore*, 10 Beav. 177, 179.

⁸ For a form, see Vol. III.

⁹ Ord. XXXVII. 13 (1). For times of vacation, see *ante*, p. 412.

¹⁰ *Potts v. Whitmore*, 10 Beav. 177; *Horsley v. Fawcett*, *ib.* 191; *Peile v. Stoddart*, 11 *ib.* 591; *Bainbrigge v. Baddeley*, 12 *id.* 152; *Bennett v. Honeywood*, 1 W. R. 490, V. C. K. For form of notice of motion, see Vol. III.

¹¹ *Blake v. Blake*, 7 Beav. 514; *Chuck v. Cremer*, 2 Phil. 113; C. P. Coop. t. Cott. 338.

¹² *Tarleton v. Dyer*, 1 R. & M. 1, 6; *King of Spain v. Hullett*, *ib.* 7, n.; see also *Kendall v. Beckett*, 1 Russ. 152; *Bramston v. Carter*, 2 Sim. 458.

¹ *Price v. Webb*, 2 Hare, 515; [*Vanderbeck v. Perry*, 3 Stew. Eq. 81.]

If the amendments extend, in any one place, to 180 words, or two folios,² or if the bill has been so often amended that the amendment to be inserted cannot be interlined on the record, or is so considerable as to blot or deface it, a reprint of the bill will be necessary.³

The draft of the amended bill is settled and signed by counsel;⁴ and in addition to the signature of counsel, the draft of an amended information, or the reprint, if there be one, must be signed by the Attorney-General:⁵ otherwise, the defendant may move that it be taken off the file.⁶ Before signing the amended information, the Attorney-General requires a certificate from the counsel who settled it that the amendments are proper for his sanction.⁷ The same rules, as regards reprinting, apply to informations as to bills.

If a reprint of the bill is not required, the Record and Writ Clerk will insert the amendments in the record, on the draft amended bill, signed by counsel, being left with him, together with the order directing the amendments, and a *præcipe*:⁸ and the draft and order will be afterwards returned on application. Where a reprint is necessary, *423 the amended bill must be printed and filed * in the manner before explained in treating of original bills:¹ and a like fee is payable on filing the amended bill.² The order to amend must be produced at the time the reprint is filed.

The record of the bill, when amended, is marked with the date of the order, and the day on which the amendment is made;³ and an

² A folio for this purpose is ninety words. Braithwaite's Pr. 305, n.

³ Ord. IX. 18; *Stone v. Davies*, 3 De G., M. & G. 240; 17 Jur. 585. A bill cannot be amended by partly printed and partly written alterations. *Naylor v. Wright*, 7 De G., M. & G. 403; 3 Jur. N. S. 95. As to bills filed before 2d November, 1852, the old practice as to amending them continues. Ord. IX. 23. Reprint required where the amendments, although under two folios in any one place, would have rendered the bill very difficult to read; the Clerks of Records and Writs have a discretion. *John v. Lloyd*, L. R. 1 Ch. Ap. 64; 11 Jur. N. S. 898. In *Pierce v. West*, 3 Wash. C. C. 354, it is held, that the amendment should be by a separate bill, and not by interlining the original bill. So in *Walsh v. Smyth*, 3 Bland, 9, 21. This, however, is not the practice in all cases. See *Luce v. Graham*, 4 John. Ch. 170; *Willis v. Evans*, 2 B. & B. 225; *State Bank v. Reeder*, Halst. N. J. Dig. 172. By these cases it appears that if there be not much new matter to be introduced, it is to be done by interpolation; but if much, it is to be done on another engrossment, to be annexed to the bill, in order to preserve the record from being defaced. The plaintiff may, however, set forth in the amended bill all the charges of the original bill. *Fitzpatrick v. Power*, 1 Hogan, 24; but see *Walsh v. Smyth*, 3 Bland, 9, 21; *Luce v. Graham*, 4 John. Ch. 170; *Willis v. Evans*, 2 B. & B. 225. In *Walsh v. Smyth*, *ubi supra*, it was held, that the original bill should be recited in the amended bill no further than is

necessary to introduce the amendments, so as to avoid impertinency. See also *Luce v. Graham*, *ubi supra*; *Bennington Iron Co. v. Campbell*, 2 Paige, 159; *Pierce v. West*, 3 Wash. C. C. 354. When amendments are made to a bill, if the plaintiff file or serve an entire new bill, incorporating therein as well the original matter as the amendments, he must distinctly designate the amendments in the new bill. *Bennington Iron Co. v. Campbell*, 2 Paige, 159; see also *Hunt v. Holland*, 3 Paige, 82; *Luce v. Graham*, 4 John. Ch. 170. Where, after a hearing, a bill was amended, in order to bring in a new party, but no new fact was stated, it was held unnecessary to serve process anew upon the defendant. *Longworth v. Taylor*, 1 McLean, 514.

⁴ *Ante*, p. 312. Ord. VIII. 1, 2; see *Kirkley v. Burton*, 5 Mad. 378. The amendments should be carefully distinguished. Braithwaite's Pr. 304.

⁵ Braithwaite's Pr. 25, 309.

⁶ *Attorney-General v. Fellows*, 1 J. & W. 254; for forms of notice of motion, see Vol. III.

⁷ For form of certificate, see Vol. III.

⁸ For a form, see Vol. III. The fee is 10s. Braithwaite's Pr. 305.

¹ *Ante*, p. 396 *et seq.*; 15 & 16 Vic. c. 86, § 8.

² Regul. to Ord. Sched. IV.; Braithwaite's Pr. 305.

³ Thus: Amended—day of —, 186—, by order dated —day of —, 186—.

entry of the amendment, and of the date of making it, and of the order, is made in the Record and Writ Clerk's Book; and the amended bill is deemed to be filed at and from the date of making the amendment.⁴

The like course is pursued, where the bill requires to be re-amended.⁵

Where the order to amend is made upon payment of costs, or where, by the course of the Court, fixed costs are payable on amendment,⁶ such costs should be paid or tendered before any further proceedings are had:⁷ otherwise, the defendant may apply to the Court to stay such proceedings until the plaintiff has fulfilled the condition, by making the required payment.⁸ The sum of 20s. being frequently very inadequate to remunerate the defendant for the expense incurred by the plaintiff amending his bill, it has been provided by the General Orders of the Court, that where a plaintiff is directed to pay to the defendant the costs of the suit, the costs occasioned to a defendant by any amendment of the bill, shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which may have been made by special leave of the Court, or which shall appear to have been rendered necessary by the default of such defendant); but there shall be deducted from such costs any sum which may have been paid by the plaintiff, according to the course of the Court, at the time of any amendment;⁹ and that where, upon taxation, a plaintiff, who has obtained a decree with costs, is not allowed the costs of any amendment of the bill upon the ground of its having been unnecessarily made, the defendant's costs, occasioned by such amendment, shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.¹⁰

If the plaintiff amends his bill after he has obtained an injunction, it is usual, although not indispensable, for the order giving *him liberty to amend, to be expressed to be "without pre- *424 judice to the injunction;" and the order of course to amend may be obtained in this form.¹ Where, however, an injunction had been

⁴ Ord. IX. 19.

⁵ A plaintiff who has amended his bill by special leave may obtain an order of course to re-amend upon the answer to the amended bill coming in. *Dunn v. Ferrior*, L. R. 3 Eq. 248. [*Ante*, 412, n. 1.]

⁶ *Ante*, p. 411.

⁷ But see *Thomas v. Taylor*, 14 W. R. 493, L. J.

⁸ *Breeze v. English*, 2 Hare, 638. The costs of a demurrer prepared, but not filed, at the time of amending the bill, will be costs in the cause. *Bainbridge v. Moss*, 3 K. & J. 62; 3 Jur. N. S. 107. The costs are usually paid at the time the order to amend is served.

⁹ Ord. XL. 7.

¹⁰ Ord. XL. 8.

¹ *Mason v. Murray*, 2 Dick. 536; *Warburton v. London and Blackwall Railway Company*, 2 Beav. 253; *Woodroffe v. Daniel*, 9

Sim. 410; see *Kennedy v. Lewis*, 14 Jur. 166; *Seton*, 873, V. C. K. B.; see also *Ferrand v. Hamer*, 4 M. & C. 143, 145; 3 Jur. 236; *Pratt v. Archer*, 1 S. & S. 433; *Pickering v. Hansom*, 2 Sim. 488; *Renwick v. Wilson*, 6 John. Ch. 81; *Ayers v. Valentine*, 2 Edw. Ch. 451; [*Lanning v. Heath*, 10 C. E. Green, 425.] An injunction bill will not be amended unless the proposed amendments are distinctly stated to the Court, and verified by the oath of the plaintiff; nor unless a sufficient excuse is rendered for not incorporating them in the original bill. *Rogers v. Rogers*, 1 Paige, 424; *Carey v. Smith*, 11 Geo. 539; see *West v. Coke*, 1 Murphy, 191. In Massachusetts, "no amendments shall be allowed, as of course, to a bill which has been sworn to by the party." Rule 20, of the Rules for Chancery Practice. And so, generally, where the bill is upon oath, there is greater caution exercised in reference to

obtained until answer or further order, in a suit by a sole plaintiff, it was held that the injunction was dissolved by adding a co-plaintiff, under an order to amend in which those words were not inserted.²

A writ of *ne exeat regno* is not lost by a subsequent amendment of the bill: it is, therefore, unnecessary that the order should be expressed to be without prejudice to the writ.³

Where a motion for an injunction had been, by arrangement, turned into a motion for decree, times being fixed for the filing of affidavits on both sides, and the defendant undertaking not to do certain specified acts until the hearing, it was held, that the plaintiff, by amending his bill after the time fixed for filing his affidavits, broke the terms of the arrangement, and the defendant was accordingly discharged from his undertaking.⁴

If the plaintiff amends his bill after he has given a notice of a motion for an injunction,⁵ or for a receiver,⁶ he thereby waives the notice; and must pay the defendant's costs of the motion.⁷ *Where after notice of motion for an injunction had been served, a general demurrer to the bill was allowed, leave was given to amend, without prejudice to the notice of motion.¹

Where a defendant is in contempt for want of answer, the plaintiff will, if he amend his bill, be considered to have, by his own act, purged the defendant's contempt;² but where a defendant has been brought to the bar of the Court for his contempt in not answering, and refuses or neglects to answer (not being idiot, lunatic, or of unsound mind), the Court may, upon motion or petition, of which due notice has been given personally to the defendant, authorize the plaintiff to amend his bill, without such amendment operating as a discharge of the contempt,

amendments. *Cock v. Evans*, 9 Yerger, 287; *Verplanck v. Meret. Ins. Co.*, 1 Edw. Ch. 46; *Swift v. Eckford*, 6 Paige, 22; *Lloyd v. Brewster*, 4 Paige, 538; *Parker v. Grant*, 1 John. Ch. 434; *Rogers v. Rogers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Paige, 67. And the Court may require the amendments to any sworn bill to be themselves sworn to. *Semmes v. Boykin*, 27 Geo. 27; see *Latham v. Wiswall*, 2 Ired. Ch. 294; *McDougald v. Dougherty*, 11 Geo. 570. The amendments made to a sworn bill must be consistent with the original bill; and they must be made without striking out any part of the original bill, but by introducing a supplemental statement. *Verplanck v. Meret. Ins. Co.*, 1 Edw. Ch. 46; *Carey v. Smith*, 11 Geo. 539; *Rogers v. Rogers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Paige, 67. An application to strike an allegation from a sworn bill, or to make alterations in it, should be accompanied with affidavits to show how the mistake occurred. *North River Bank v. Rogers*, 8 Paige, 648; *Whitmarsh v. Campbell*, 1 Paige, 67; *Everett v. Winn*, 1 Sm. & M. 67. And the truth of the matter proposed as an amendment should be sworn to in addition to the *jurat* upon the pe-

tition for leave to amend. *Rogers v. De Forest*, 3 Edw. Ch. 171. But no alteration should be made in the original bill on file, but the amended bill must be engrossed anew, and annexed to the original. *Layton v. Evans*, 1 Green Ch. 387. [*Ante*, 401, 402, note.]

² *Attorney-General v. Marsh*, 16 Sim. 572; 13 Jur. 317; and see *Sharp v. Ashton*, 3 V. & B. 144; *King v. Turner*, 6 Mad. 255; and *post* Chap. XXXVI. § 2, *Injunctions*.

³ *Grant v. Grant*, 5 Russ. 189; see *post*, Chap. XXXVIII. § 4, *Ne exeat regno*.

⁴ *Clark v. Clarke*, 13 W. R. 133, V. C. W. ⁵ *Martin v. Fust*, 8 Sim. 199; *Gouthwaite v. Rippon*, 1 Beav. 54; *Monypenny v. —*, 1 W. R. 99, V. C. K.

⁶ *Smith v. Dixon*, 12 W. R. 934, V. C. S.

⁷ *Monypenny v. —*, *ubi sup.*; *London and Blackwall Railway Company v. The Limehouse Board of Works*, 3 K. & J. 123; *Smith v. Dixon*, *ubi sup.*

¹ *Rawlings v. Lambert*, 1 J. & H. 458; and see *Harding v. Tingey*, 10 Jur. N. S. 872; 12 W. R. 703, V. C. K.

² *Ball v. Etches*, 1 R. & M. 324; *Gray v. Campbell*, *ib.* 323.

or rendering it necessary to proceed with the process of contempt *de novo*.³

The amendment of the bill, even for the purpose of rectifying a clerical error, renders a previous order to take the bill *pro confesso* inoperative:⁴ unless the amendment was made in pursuance of an order, obtained under the Act last referred to.

If the plaintiff takes advantage of an order to amend, so as entirely to change his case, and to make the bill a perfectly new one,⁵ or if the amendments introduced into the bill are not, in other respects, warranted by the order to amend, the defendant may move, on notice to the plaintiff, that the amended bill may be taken off the file, or that the amendments may be struck out, and the record restored to its original state; and that the plaintiff may be ordered to pay the defendant's costs occasioned by the amendment, and of and consequent on the application, or to place * the defendant in the same position with regard *426 to costs that he would have been in if the plaintiff, instead of amending, had dismissed his original bill with costs, and filed a new one.¹ Thus, where a plaintiff originally filed his bill against the defendant as his bailiff or agent, in respect of certain farms, praying an account against him upon that footing, and afterwards upon an issue being directed to try whether the plaintiff was or was not a mortgagee of such farms, and the jury finding that he was, the plaintiff amended his bill

³ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 10; and see *post*, Chap. X., *Process to compel, and in default of Answer*.

⁴ *Weightman v. Powell*, 2 De G. & S. 570; 12 Jur. 958. [The effect of filing an amended and supplemental bill is to vacate a *pro confesso*, and to admit the defendant to answer also the original bill. *Gibson v. Rees*, 50 Ill. 383. And a bill substituted for an original bill must contain all the material allegations necessary to justify the relief sought without reference to the original. *Klein v. Horine*, 47 Ill. 430.]

⁵ A party under the privilege of amending, shall not introduce matter which would constitute a new bill. *Verplanck v. Merct. Ins. Co.*, 1 Edw. Ch. 46; *Crabb v. Thomas*, 25 Ala. 212; *Lambert v. Jones*, 2 P. & H. 144; *Shields v. Barrow*, 17 How. U. S. 130; *Fenno v. Coulter*, 14 Ark. (1 Barb.) 39; *Carey v. Smith*, 11 Geo. 539; *Snead v. McCoull*, 12 How. U. S. 407; *Hewett v. Adams*, 50 Maine, 271, 278. After a decision upon a plea to the jurisdiction, that a bill in Equity between members of a manufacturing corporation cannot be sustained, the Court will not grant the plaintiff leave to amend, by averring that the corporation had been dissolved: this being in effect to make a new and distinct case. *Pratt v. Bacon*, 10 Pick. 123. Nor will the Court, where a vendee of land has brought a bill for a rescission of the contract, permit him to change the prayer of his bill and claim a specific execution thereof. *Shields v. Barrow*, 17 How. U. S. 130; *Williams v. Starke*, 2 B. Mon. 196, 197. A second mortgagee of land

brought a bill against the first mortgagee, to redeem the first mortgage, and the Court postponed the plaintiff's mortgage, on account of misrepresentations made by him, so as to let in and give priority to a subsequent mortgage of a part of the same land to the defendant; the Court refused to grant leave to the plaintiff to amend his bill for the purpose of enabling him to proceed under it for the redemption of such subsequent mortgage. *Platt v. Squire*, 5 Cush. 551. See *Sanborn v. Sanborn*, 7 Gray, 142; *Lambert v. Jones*, 2 P. & H. 144. But in some cases it has been held, that a plaintiff who has filed a bill for specific performance of a contract may, under circumstances, amend his bill and pray for a rescission of the contract, and for such other relief as he may be entitled to. *Parrill v. McKinley*, 9 Grattan (Va.), 1; *Codington v. Mott*, 1 McCarter (N. J.), 430; *Hewett v. Adams*, 50 Maine, 271. [And see *ante*, 418.]

¹ *Bullock v. Perkins*, 1 Dick. 110, 112; *Dent v. Wardel*, *ib.* 339; *Smith v. Smith*, G. Coop. 141; *Mavor v. Dry*, 2 S. & S. 113, 116; *Attorney-General v. Cooper*, 3 M. & C. 258, 262; 1 Jur. 790; *Allen v. Spring*, 22 Beav. 615; *Thomas v. Bernard*, 7 W. R. 271, V. C. K.; *Eagle v. Le Breton*, cited *Seton*, 1254; and see *Ainslie v. Sims*, 17 Beav. 174; *Parker v. Nickson*, 4 Giff. 311; 9 Jur. N. S. 864; *Barlow v. M'Murray*, L. R. 2 Eq. 420, 424; 12 Jur. N. S. 519. V. C. S.; *Lloyd v. Brewster*, 4 Paige, 638. For form of order see *Seton*, 1253, No. 10; and for forms of notice of motion, see Vol. III.

by stating the mortgage, and converting his former prayer for relief into a prayer for a foreclosure: upon the defendant's moving that the amended bill might be taken off the file, Lord Eldon held, that the defendant was entitled to all the costs sustained by him, beyond what he would have been put to if the bill had been originally a bill for a foreclosure, and made an order accordingly: although, as the amended bill had been set down for hearing, he did not go the length of ordering it to be taken off the file.²

Upon the same principle, where a plaintiff takes advantage of an order to amend, to strike out a portion of his bill: though he does not alter the nature of it, yet, if expenses have been occasioned to the defendant by the part which has been struck out, which, in consequence of its having been so struck out, could not be awarded to him at the hearing, the Court will, upon motion, with notice, order such costs to be taxed and paid to the defendant.³ Thus, where a plaintiff filed a bill which was of great length, and prayed relief in a variety of matters, to which the defendants put in answers, which were also of great length, after which the plaintiff, by virtue of a common order to amend, amended his bill and filed a new engrossment, which was very short, and confined to one only of the objects of relief prayed by the original bill: upon the defendants moving that the order to amend might be discharged, and the bill dismissed with costs, or that the plaintiff might pay to them the costs of putting in their answer to so much of the original bill as

did not relate to the relief prayed by the amended bill, Lord *427 Northington directed that the order for *amending the bill should stand, but that the plaintiff should pay to the defendants the further sum of five pounds, beyond the sum of twenty shillings mentioned in the order.¹ And where a cause, at the hearing, was ordered to stand over, with liberty to the plaintiff to amend by adding parties, and the plaintiff took advantage of that order to strike out several charges which had necessarily led the defendant into the examination of witnesses, and to add others, the Court, upon motion, ordered that part of the amendment to be discharged, and the plaintiff's bill to be restored to what it was before: in order that, at the hearing, the costs of those parts of the bill which had been abandoned by the plaintiff might be awarded to the defendant.² Where, however, a bill was filed for a foreclosure of a mortgage and for a transfer of a sum of stock, and, on the answer being filed, disclosures were made which rendered it advis-

² *Smith v. Smith*, *ubi sup.*; and see *Mavor v. Dry*, and *Parker v. Nickson*, *ubi sup.*; see, however, *Allen v. Spring*, *ubi sup.*, where such a motion was refused; and it seems it will only be granted, where the case made is entirely new. *Thomas v. Bernard*, *ubi sup.* The defendant should not enter into evidence, as to any charges struck out by amendment. *Stewart v. Stewart*, 22 Beav. 393.

[See *Whelan v. Sullivan*, 102 Mass. 204, where the plaintiff was not allowed to amend

without the payment of such costs as would make the result equivalent to dismissing the bill, and commencing *de novo*, and, therefore, the bill was dismissed without prejudice.]

³ For form of notice of motion, see Vol. III.

¹ *Dent v. Wardel*, 1 Dick. 339.

² *Ballock v. Perkins*, 1 Dick. 110; and see *Strickland v. Strickland*, 3 Beav. 242; *Leather Cloth Company v. Bressey*, 3 Giff. 474, 494; 8 Jur. N. S. 425, 429.

able to amend the bill by striking out all that related to the mortgage, whereby nearly one-half of the bill and answer was rendered useless, Sir Lancelot Shadwell V. C. refused to order, on motion, the plaintiff to pay the defendant's costs occasioned by the amendment, as it appeared that the amendment was made under the advice of counsel, and not for the purpose of vexation or oppression.³

The fact of an irregular amendment having been made, under a common order to amend, will not be a sufficient reason for ordering the bill to be taken off the file, if the record can be restored to the state in which it was before such irregular amendment was made.⁴

³ *Monck v. Earl of Tankerville*, 10 Sim. 258, 262; 1 Jur. 790; and see *Ainslie v. Sims*, 284; 3 Jur. 1167.

⁴ *Attorney-General v. Cooper*, 3 M. & C.

17 Beav. 174.

[The proceedings under this chapter are statutory, and not applicable to the practice in the United States.]

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* CHAPTER VII.

PROCESS BY SERVICE OF A COPY OF THE BILL ON FORMAL DEFENDANTS, AND PROCEEDINGS BY SERVICE OF NOTICE OF THE DECREE.

SECTION I. — *Process by Service of a Copy of the Bill on formal Defendants.*

As soon as the bill has been filed, the plaintiff may proceed to bring before the Court the proposed defendants to the suit. We have seen, however, that the plaintiff is enabled, as against certain formal parties, to dispense with the ordinary process of the Court, upon serving them with a copy of the bill under the General Order,¹ and thereupon, in the event of their not voluntarily appearing after such service, to proceed, without further attention to their rights or interests; and that in certain other cases, the plaintiff may file his bill, and obtain a decree against some or one of the persons who were formerly necessary parties, upon serving the others with notice of the decree that has been made.² It will be convenient, therefore, to consider, in the first place, the mode of proceeding where parties are served with copies of the bill under the General Order, or with notice of the decree, and then the ordinary process against other defendants.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it is not necessary for the plaintiff to require such party, not being an infant, to appear to the bill; but the plaintiff may serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill,³ without any indorsement requiring such party to appear thereto; and such bill, as against such party, must pray that such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause.⁴ But the plaintiff may, nevertheless, require a party against whom no account, payment, conveyance, or other direct

*429 relief is sought, to appear to the bill, * and may prosecute the suit against such party in the ordinary way, if he shall think fit.¹

¹ Ord. X. 11; *ante*, Chap. V., *Parties*.

² 15 & 16 Vic. c. 86, § 42; *ante*, Chap. V., *Parties*.

³ This includes a bill of revivor and supplement; *Walcot v. Walcot*, 10 Beav. 20.

⁴ For form of prayer, see Vol. III.

¹ Ord. IX. 11. The 54th Equity Rule of the United States Courts is similar. As to the effect of this Order between co-defendants, see *Boyd v. Moyle*, 2 Coll. 316, 321, 323.

This Order does not authorize service of the copy of the bill on a defendant out of the jurisdiction;² and if a party served dies before the hearing, his personal representative cannot be brought before the Court by order of revivor, but an original bill must be filed against him.³

If the bill is amended after service, a copy of the amended bill must also be served;⁴ and if a bill of revivor and supplement, or a supplemental bill is filed, it must be served also;⁵ and so, it is conceived, must a supplemental statement.

A plaintiff, availing himself of the course of proceeding introduced by this Order, must serve a plain, unstamped, and unsealed copy of the bill,⁶ without any indorsement thereon requiring the party to appear thereto, upon each of the defendants to be served: either personally, or by leaving the same with his servant or some member of his family at his dwelling-house, or usual place of abode.⁷

In the case of a husband and wife, where the suit does not relate to the separate estate of the wife,⁸ service upon the husband alone is sufficient;⁹ but where it relates to her separate estate, or they are living apart, a copy must be served upon or for each.¹⁰

The service must be within twelve weeks from the filing of the bill,¹¹ unless the Court shall give leave to make such service after that time.¹² Such leave must be applied for by motion, without notice,¹³ and the application must be supported by affidavits explaining the cause of the delay.¹⁴ It seems that substituted service will not be ordered.¹⁵

Where a plaintiff serves a defendant with a copy of the bill under this Order, he must cause a memorandum of such service,¹⁶ *and of the time when it was effected, to be entered in the *430 Record and Writ Clerks' Office. An order authorizing such entry to be made is necessary, and may be obtained on motion,¹ without notice, upon the Court being satisfied of a copy of the bill having been served, and of the time when the service was made.²

² *Lorton v. Kingston*, 2 M.N. & G. 139. This case was before the 15 & 16 Vic. c. 86, but it would appear still to apply; power to serve the bill out of the jurisdiction being confined to the copy served under that Act; see *Penfold v. Kelly*, 12 W. R. 286, V. C. K.

³ *Hardy v. Hull*, 14 Sim. 21; 8 Jur. 609. The reason is, that he has not appeared; see also *Crowfoot v. Mander*, 9 Sim. 396; *Edlington v. Banham*, 2 Coll. 619; *Bland v. Davison*, 21 Beav. 312.

⁴ Ord. X. 11; *Anon.*, 1 De G. & S. 321; *Vincent v. Watts*, 3 M.N. & G. 248; *Braithwaite's Pr.* 515.

⁵ Ord. X. 11; *Walcot v. Walcot*, 10 Beav. 20.

⁶ Where a printed bill has been filed, a printed copy will of course be served.

⁷ *Braithwaite's Pr.* 31; Ord. X. 1; the member of the family should be an inmate of the defendant's house. *Edgson v. Edgson*, 3 De G. & S. 629.

⁸ *Salmon v. Green*, 8 Beav. 457.

⁹ *Kent v. Jacobs*, 5 Beav. 48.

¹⁰ *Braithwaite's Pr.* 516.

¹¹ Ord. X. 17.

¹² Ord. X. 17, 18; *Horry v. Calder*, 7 Beav. 585; *Bell v. Hastings*, *ib.* 592. The defendant need not be served with the Order enlarging the time. *Fenton v. Clayton*, 15 Sim. 82. Where a formal defendant came within the jurisdiction after decree, and after the twelve weeks, leave was refused. *Penfold v. Kelly*, 12 W. R. 286, V. C. K.

¹³ Ord. X. 18. For forms of motion paper, see Vol. III.

¹⁴ See *Horry v. Calder*, 7 Beav. 585; *Bell v. Hastings*, *ib.* 592.

¹⁵ *Thomas v. Selby*, 9 Beav. 194.

¹⁶ For form of memorandum, see Vol. III.

¹ For form of motion paper, see Vol. III.

² Ord. X. 12. Memorandum of service ordered to be entered on defendant's acknowledgment of having received the bill by post. *Burton v. Shaw*, 10 L. T. N. S. 292, V. C. W.

There have been several cases concerning the extent of information demanded by the Court, upon motions of this description; but the result seems to be, that no further proof is absolutely necessary than what is pointed out by the Order itself, namely, proof by affidavit, first, that due service has been effected upon each of the defendants of a copy of the bill, sworn to be a true copy of the bill itself; secondly, of the time and place when and where such service was made, so that the Court may know that it has been effected within the jurisdiction.³ Where a party served with a copy of the bill had subsequently appeared, it was considered an admission of due service, and no further evidence was required;⁴ and in such a case, a memorandum of service need not be entered.⁵ Proof has, in some cases, been required that the person upon whom such service was made was not an infant, and that the bill did not pray an account, payment, conveyance, or other direct relief against such person;⁶ but the terms of the Order do not seem to render it necessary that these facts should be established upon the motion, and the later cases are against the necessity for giving proof of them.⁷

The plaintiff would seem to take the Order at his own risk; and if the case be one in which he is not entitled to proceed in this manner, the whole process would be nugatory, and the defendant would not be bound by any of the proceedings in the cause.⁸

Where the defendant, who had been served, was misnamed in the bill, leave was given to enter the memorandum, on production of an affidavit showing that the person served was the same person as the person referred to in the memorandum of service;⁹ and where the copy of the bill had been served after the expiration of the twelve *431 weeks, without an order enlarging the time being obtained, * leave was given to enter a memorandum of service, on the defendant served appearing and consenting.¹

The Order² merely confers upon the plaintiff the privilege of adopting this course; but it is not obligatory upon him, and he may, if he thinks fit, compel such parties to appear, and in other respects, prosecute his suit against them in the ordinary manner. The costs occasioned by such a course must, however, be paid by the plaintiff, unless the Court shall otherwise direct.³

³ *Warren v. Postlethwaite*, 1 Coll. 171; 8 Jur. 282; and see *Haigh v. Dixon*, 1 Y. & C. C. C. 180. For form of affidavit, see Vol. III.

⁴ *Maude v. Copeland*, 1 Coll. 505.

⁵ *Attorney-General v. Donnington Hospital*, 12 Beav. 551.

⁶ *Goodwin v. Bell*, 1 Y. & C. C. C. 181; *Haigh v. Dixon*, *ib.* 180; *Davis v. Prout*, 5 Beav. 102.

⁷ *Sherwood v. Rivers*, 2 Y. & C. C. C. 166; 7 Jur. 78; *Mawhood v. Labouchere*, 12 Sim. 362; *Anon.*, 1 Hare, 317, n.; *Welch v. Welch*, *ib.* 593; 6 Jur. 593; *Hudson v. Dungworth*, 3 Hare, 508; 8 Jur. 1024; *Jones v.*

Skipwith, 8 Beav. 127. There can be no doubt, that the Court would now act, as to the question of the prayer, on an inspection of a print of the bill; as it appears it would have done on an inspection of an office copy in *Davis v. Prout*, 5 Beav. 102, if one had been in Court.

⁸ *Marke v. Locke*, 2 Y. & C. C. C. 500, 506; *Boreham v. Bignall*, 4 Hare, 633; 7 Jur. 528.

⁹ *Witham v. Salvin*, 16 Jur. 420, M. R.

¹ *Tugwell v. Hooper*, 10 Beav. 19.

² Ord. X. 11.

³ Ord. XL. 16; *Abram v. Ward*, 6 Hare, 165, 170.

The question to what parties the Order applies has frequently arisen; but it is not possible to deduce from the cases any clear rule upon the subject: though it appears that it is not, in general, considered as applicable, where the interest of the defendant is adverse to that of the plaintiff, even though no further relief is sought against the defendant than the binding of his rights by a decree. The alterations in the practice of the Court,⁴ have rendered proceedings under the Order we are now considering of comparatively rare occurrence; and it is not, therefore, desirable to refer in detail to the cases which have occurred; but they are collected in the note.⁵ It may be mentioned, however, that it has been held, that the Order does not apply to the Attorney-General;⁶ and it seems that it does not apply to a person of unsound mind.⁷

If the motion for leave to enter a memorandum of service be granted, the Order made upon the motion must be drawn up, passed, and entered; and should then be left with the Record and Writ Clerk in whose division the cause is.⁸ The memorandum is then entered by him in his cause book, and the Order is returned to the solicitor, with an indorsement upon it to show that the memorandum has been entered.⁹ The Order should be kept for the purpose of production at the hearing of the cause,¹⁰ and on bespeaking the decree or order;¹¹ and at any other period of the cause, when the regularity of the service and the entry of the memorandum are required to be established. The memorandum must be entered before a certificate to set down the cause can be granted;¹² and a certificate that no appearance has been entered by the defendant, * must be left with the Registrar, on *432 bespeaking the decree or order made at the hearing,¹ when the defendant has not appeared.

A party so served with a copy of the bill, may, if he desires the suit to be prosecuted against himself in the ordinary way, enter an appearance for himself in the common form;² and in such case, the plaintiff must proceed against such defendant in the ordinary way; but the costs occasioned thereby must be paid by the party so appearing, unless the Court shall otherwise direct.³ A party so served may also, if he is desirous of being served with a notice of the proceedings in the cause, but not of otherwise having the suit prosecuted against himself, enter a

⁴ *Ante*, Chap. V., *Parties*.

⁵ *Marke v. Locke*, 2 Y. & C. C. C. 500; *Duncombe v. Levy*, 5 Hare, 232, 236; 11 Jur. 282; *Davis v. Davis*, 4 Hare, 389, 391; *Powell v. Cockerell*, *ib.* 557; *Abram v. Ward*, *ubi sup.*; *Lloyd v. Lloyd*, 1 Y. & C. C. C. 181; 6 Jur. 162; *Clarke v. Tipping*, 9 Beav. 284, 292; *Johnson v. Tucker*, 15 Sim. 485; 11 Jur. 382; *Barklay v. Lord Reay*, 2 Hare, 306, 309; *Knight v. Cawthron*, 1 De G. & S. 714; 12 Jur. 33; *Adams v. Paynter*, 1 Coll. 530, 532; 8 Jur. 1063; *Gaunt v. Johnson*, 7 Hare, 154; 12 Jur. 1067; *Lewellin v. Cobbold*, 17 Jur. 1111, V. C. S.

⁶ *Christopher v. Cleghorn*, 8 Beav. 314.

⁷ *Pemberton v. Langmore*, *ib.* 166.

⁸ For form of order, see *Seton*, 1244, No. 3.

⁹ *Braithwaite's Pr.* 516; no fee is payable, *ib.* 517. For form of indorsement, see Vol. III.

¹⁰ *Carter v. Bentall*, 12 L. J. Ch. 369, M. R.

¹¹ *Reg. Regul.* 15 March, 1860, r. 24.

¹² *Braithwaite's Pr.* 516.

¹ *Reg. Regul.* 15 March, 1860, r. 24.

² See *post*, Chap. XIII., *Appearance*.

³ *Ord. X.* 14.

special appearance in the following form: "A. B. appears to the bill for the purpose of being served with notice of all proceedings therein." In this case, he must be served with notice of all proceedings in the cause, and he is entitled to appear upon them, but he will have to pay the costs occasioned thereby, unless the Court shall otherwise direct.⁴ The notice to be given under this rule, must give the defendant the same length of notice as if he were proceeded against in the ordinary way.⁵

Such common or special appearances may be entered within twelve days after service of a copy of the bill; but they cannot be entered afterwards without leave of the Court, to be obtained on notice to the plaintiff; and terms may be imposed by the Court on such an application.⁶

If the defendant does not enter an appearance within twelve days, the plaintiff may proceed in the cause as if the person served were not a party; and the defendant will be bound by all the proceedings, in the same manner as if he had appeared and answered;⁷ and if he appears, after the expiration of the twelve days, he will be bound by all proceedings prior to such appearance.⁸ An application for leave to enter an appearance, without being bound by prior proceedings, has been refused.⁹

SECTION II.—*Proceedings by Service of Notice of the Decree.*

The practice of serving, with notice of the decree, persons who are not named as parties on the record, was introduced by the 42d section of the Chancery Amendment Act of 1852.¹⁰ Under the *433 *provisions of that section: (1.) Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.¹ (2.) Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.² (3.) Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.³ (4.) Any one of several *cestui que trusts* under any deed or instrument may, without serving any other of such *cestui que trusts*, have a decree for the execution of the trusts of the

⁴ Ord. X. 15.

⁵ *Wilton v. Rumball*, 14 Sim. 56; 8 Jur. 236.

⁶ Ord. X. 16; *Rigby v. Strangways*, 10 Jur. 998, V. C. E. For form of order in such case, see *Seton*, 1249, No. 5; and for form of notice of motion, see Vol. III.

⁷ Ord. X. 13; *Powell v. Cockerell*, 4 Hare, 557, 565.

⁸ Ord. X. 16.

⁹ *Boreham v. Bignall*, 4 Hare, 633.

¹⁰ 15 & 16 Vic. c. 86.

¹ 15 & 16 Vic. c. 86, § 42, r. 1; *ante*, pp. 217, 234, 237, 238. Where a residuary legatee, who had been served with notice of the decree, settled her interest, the notice was directed to be re-served on the trustee. *White v. Steward*, 1 W. N. 83, M. R.

² Rule 2; *ante*, pp. 218, 225.

³ Rule 3; *ante*, p. 218.

deed or instrument.⁴ (5.) In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.⁵ (6.) Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate, or the execution of the trusts.⁶ In all the above cases, the persons who, according to the former practice of the Court, were necessary parties, may be served with notice of the decree; and after such notice shall be bound by the proceedings, in the same manner as if they had been originally made parties to the suit.⁷

The notice of the decree must be served personally, unless otherwise directed; and where a husband and wife have to be served, the notice must be served on each, personally, notwithstanding that the suit does not relate to the wife's separate estate, and that they are residing together; but the Court or Judge will, on a proper case being made, dispense with personal service.⁸

Unlike the course of proceeding by service of a copy of the bill under the General Order, referred to in the preceding section, the process by service of notice of the decree applies to infants, *persons of unsound mind not so found by inquisition, and per- *434 sons out of the jurisdiction;¹ but in the case of infants, or persons of unsound mind not so found by inquisition, the notice is to be served upon such person, and in such manner, as the Judge shall direct;² and an order is necessary for leave to serve a person out of the jurisdiction.³

The application for the direction of the Judge, as to the manner of serving notice of the decree on infants, and persons of unsound mind not so found by inquisition, should be made by summons *ex parte*;⁴ and must be supported by affidavit showing, as far as the applicant is able: (1.) With respect to infants: The ages of the infants; whether they have any parents or testamentary guardians, or guardians appointed by the Court of Chancery; where, and under whose care, the infants are residing; at whose expense they are maintained, and, in case they have no father or guardian, who are their nearest relations; and that the parents, guardians, relations, or persons on whom it is proposed to serve the notice, have no interest in the matters in ques-

⁴ Rule 4; *ante*, p. 226.

⁵ Rule 5; *ante*, p. 244.

⁶ Rule 6; *ante*, p. 226. In all the above cases, the Court, if it shall see fit, may require any other person to be made a party to the suit, and may give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question. Rule 7. By Rule 9, trustees represent beneficiaries in certain cases; see *ante*, pp. 212, 222, 228, 256, 257.

⁷ Rule 8; *ante*, pp. 190, 191, 217, 218, 225. It is improper to serve, under these provisions, notice of the decree on any other persons than those specified in 15 & 16 Vic. c. 86, § 42; *Colyer v. Colyer*, 9 Jur. N. S. 294, V. C. K.; and see *Knight v. Pocock*, 24 Beav. 436; 4 Jur. N. S. 197.

⁸ Braithwaite's Pr. 520. 521.

¹ *Chalmers v. Laurie*, 10 Hare Ap. 27; 1 W. R. 265; *Clarke v. Clarke*, 9 Hare Ap. 13, marginal note; 1 W. R. 48; *Strong v. Moore*, 22 L. J. Ch. 917, M. R.

² Ord. VII. 5.

³ See *Strong v. Moore*, *ubi sup.*

⁴ For forms of summons, see Vol. III.

tion, or, if they have, the nature of such interest, and that it is not adverse to the interest of the infants. (2.) With respect to persons of unsound mind not found so by inquisition: Where, and under whose care, such persons are residing, and at whose expense they are maintained; who are their nearest relations; and that such relations, or persons, upon whom it is proposed to serve the notice, have no interest in the matters in question, or, if they have, the nature of such interest, and that it is not adverse to the interest of the persons of unsound mind.⁵

The order on the summons is drawn up by the Registrar; and the service must be effected in strict accordance with the directions contained in the order; and copy of such order must also be served, at the time of serving the notice of the decree.⁶

An order to serve notice of a decree on a person out of the jurisdiction may be obtained on an *ex parte* summons, supported by affidavit showing the nature of his interest in the suit, and the place or country where he is supposed to be residing.⁷

The Judge in Chambers will not, in general, in the first instance, direct upon whom the notice of the decree is to be served;⁸ but he will entertain an application to dispense with the service upon any person as to whom it appears that, from absence, or other sufficient cause,
*435 it ought to be dispensed with, or cannot * be made;¹ or to substitute service, or give notice by advertisement or otherwise, in lieu of such service.² The party having the prosecution of the decree should, therefore, in the first place, consider what persons not named on the record ought, under the provisions of the Chancery Amendment Act of 1852,³ to be served with notice of the decree. On this subject, he is referred to the former part of this treatise.⁴ He should then consider whether the circumstances of the case, and the nature of their interest in the suit, are such as will justify an application to the Judge to dispense with service on any of them; or to sanction some special mode of service: as, on one or more for all the members of a class, or by public advertisement, or through the post, or on a substitute. An application of this description to the Judge is usually required to be made by an *ex parte* summons,⁵ supported by evidence of the facts on which it is founded; and where a special mode of service is directed, an order is ordinarily drawn up by the Registrar, which will contain a direction that a copy of it shall be served with the notice. Where service is dispensed with, an order to that effect is not usually drawn up:⁶

⁵ Regul. 8 Aug., 1857, r. 7; for forms of affidavit, see Vol. III.

⁶ Braithwaite's Pr. 523; see Seton, 1212.

⁷ For forms of summons, and affidavit in support, see Vol. III.

⁸ See, however, *De Balinhard v. Bullock*, 9 Hare Ap. 13.

¹ *Ibid.*; Ord. XXXV. 18.

² Ord. XXXV. 18; for form of summons in such case, see Vol. III.

³ 15 & 16 Vic. c. 86, § 42, rr. 1-8.

⁴ See *ante*, pp. 216-218, 225, 226, 244.

⁵ For a form, see Vol. III.

⁶ But is sometimes; see *Gavin v. Osborne*, cited Seton, 1213.

but the fact is stated in the Chief Clerk's certificate of the result of the proceedings.

If service through the post is sanctioned, and no special directions are given as to the mode of authenticating such service, it seems advisable to enclose the notice in a letter addressed to the person to be served,⁷ and to request him to acknowledge, through the post, the receipt of the notice; and it would be well to enclose a form of acknowledgment for signature.⁸ The service, in this case, will be deemed to have been effected at the date of the letter of acknowledgment.⁹

The Judge will, usually, proceed to give his directions as to the manner in which the decree is to be prosecuted, notwithstanding evidence is not adduced to satisfy him that all proper parties have been served with notice.¹⁰ Indeed, it not unfrequently happens, that the persons to be served cannot be known till some of the inquiries under the decree have been prosecuted at Chambers: as where the members constituting a class of residuary legatees, or next of kin, have to be ascertained; and by directions being obtained for insertion of advertisements for creditors and other claimants to come in, and for the accounts to be brought in, and the inquiries answered, before these class inquiries are entered * upon, much time in prosecuting the decree may *436 be saved, without prejudicing persons who may be subsequently served with notice of the decree, and obtain orders to attend the proceedings.

The notice of the decree must be entitled in the cause; and a memorandum must be indorsed thereon, giving the person served notice that from the time of service he will be bound by the proceedings in the cause, in the same manner as if he had been originally made a party; and that he may, by an order of course, have liberty to attend the proceedings, and may, within one month after service, apply to the Court to add to the decree.¹

Service of a copy of the decree is regarded as service of notice of the decree; but the copy must be indorsed in like manner as a notice.²

When any party has been served with notice of a decree, a memorandum of service must, upon proof by affidavit that the service has been duly effected, be entered in the office of the Clerks of Records and Writs.³

When it appears by the affidavit that the service has not been effected in accordance with the ordinary practice in these cases, and

⁷ For form of letter, see Vol. III.

⁸ For forms of acknowledgment and affidavit of service, see Vol. III.

⁹ Braithwaite's Pr. 522.

¹⁰ See Ord. XXXV. 16.

¹ Ord. XXIII. 20; for forms of notice and indorsement, see Vol. III.

² Braithwaite's Pr. 519.

³ Ord. XXIII. 19. An office copy of the affidavit, together with the *præcipe* to enter the memorandum, and any exhibits or orders connected with the affidavit of service, are required to be left at the office for examination, but will be returned to the solicitor. For forms of *præcipe* and affidavits, see Vol. III.

the Record and Writ Clerk refuses, in consequence, to enter a memorandum of service thereon, the plaintiff may instruct counsel to apply to the Court, *ex parte*, for its sanction to the memorandum being entered; or where directions for the service have been given at Chambers, or the service is required for the purpose of proceedings pending there, the application should be made at Chambers, *ex parte*, by the solicitor, without summons. The sanction, if given, is evidenced by an indorsement on the affidavit to the following effect: "Let the memorandum of service be entered on this affidavit:" and such indorsement is signed by the Registrar in Court, or by the Chief Clerk at Chambers, as the case may be, and will be acted on by the Record and Writ Clerk, without a formal order being drawn up.⁴

The Record and Writ Clerk will give a certificate of the entry of the memorandum of service;⁵ and a copy of such certificate, certified by the solicitor, is to be left at the Chambers of the Judge to whose Court the cause is attached.⁶

The party served may apply, within one month after service, for leave to add to the decree.⁷ Such application is usually made *437 *by summons:¹ which must be served on the solicitors of all parties to the cause, and of all persons who have obtained orders to attend. The party served may also obtain an order of course,² upon petition at the Rolls, or on motion,³ for liberty to attend all proceedings under the decree.⁴

Infants, and persons of unsound mind not so found, attend the proceedings by their guardians *ad litem*, who are appointed in the same manner as guardians *ad litem* to answer and defend suits;⁵ and the Judge may, at any time during proceedings in Chambers, under any decree or order, require a guardian *ad litem* to be appointed for any infant, or person of unsound mind not so found by inquisition, who has been served with notice of such decree or order.⁶

Where a person served with notice of the decree obtains an order for leave to attend the proceedings, no other evidence of service of the notice on him will be required; the Judge must, however, be satisfied of his identity with the person on whom the notice ought to have been served.

A copy of every order for leave to attend proceedings should be

⁴ See Braithwaite's Pr. 521; and *Re Newbold*, there cited.

⁵ The fee is 4s. Regul. to Order, Sched. 4. For form of certificate, see Vol. III.

⁶ 8th Regulation, 8 Aug., 1857. For form of certificate, see Vol. III.

⁷ 15 & 16 Vic. c. 86, § 42, r. 8; Ord. XXXIII. 18; the month is lunar, Ord. XXXVII. 10. Where the party to be served is out of the jurisdiction, an enlarged time may be given: see *Strong v. Moore*, 22 L. J. Ch. 917, M. R. *Semble*, the Attorney-General may apply to add to the decree after the month. *Johnstone v. Hamilton*, 11 Jur. N. S. 777, V. C. S.

¹ For form of summons, see Vol. III.

² 15 & 16 Vic. c. 85, § 42, r. 8; Seton, 188, 1213.

³ For forms of petition and motion paper, see Vol. III.

⁴ The order can only be obtained by those persons who, under the former practice, were necessary parties to the suit. *Colyer v. Colyer*, 9 Jur. N. S. 294, V. C. K.

⁵ Ord. VII. 6: see *ante*, pp. 160, 176; and for forms of motion paper and petition, see Vol. III.

⁶ Ord. VII. 7.

served on the solicitors of all parties in the cause, and of all persons who have leave to attend the proceedings; and a copy, certified by the solicitor to be a true copy,⁷ should be left at the Judge's Chambers.*

No appearance is to be entered at the Record and Writ Clerks' Office by a person served with notice of the decree; nor is it necessary that any order he may obtain to attend the proceedings should be produced or entered there.⁹ The practitioner will, therefore, be unable to ascertain from the books of that office what parties have, by obtaining orders to attend the proceedings, entitled themselves to be treated as *quasi* parties to the suit. He must seek this information by search in the books kept at the entering seat in the Registrar's office, at the Report office, and in the Secretary's office at the Rolls, for the entry of orders, and at the Chambers of the Judge; or by inquiring of the parties in the cause, what orders for leave to attend have been served on them.

If the party served attends, without obtaining an order giving him leave, he will not be allowed his costs of such attendance, * without a special order for that purpose;¹ and it is to be ob- *438 served, that the order giving a party served with notice of the decree liberty to attend, does not specify at whose costs he is to attend, but his costs are dealt with at the hearing of the cause on further consideration; and it is conceived that, where the Court is of opinion that the interest of the party in question is sufficiently protected by the parties named on the record, or who have already obtained leave to attend the proceedings, it will refuse to allow him any costs.²

A person who has been served with notice of the decree, and who has obtained leave to attend the proceedings, may, if aggrieved by any order in the suit, present a petition of rehearing in the usual manner,³ but if he is unable to raise the question on the pleadings, the proper course for him to pursue is to move, on notice, for leave to file a bill which would be in the nature of a bill of review.⁴

[The effect of service of notice of the decree appears to be to put the persons served on the same footing as if they were defendants; they cannot be treated as co-plaintiffs, and no inquiries can be directed for their benefit, which could not have been directed as between co-defendants.⁵]

⁷ For form of certificate, see Vol. III.

⁸ Regul. 8 Aug. 1857, r. 8.

⁹ Braithwaite's Pr. 525.

¹ Ord. XL. 28.

² See Ord. XXXV. 20; Seton, 187; Stevenson v. Abington, 11 W. R. 936, M. R.; Re Taylor, Daubney v. Leake, L. R. 1 Eq. 495, M. R.; Hubbard v. Latham, 1 W. N. 105; 14 W. R. 553, V. C. K.; Wragg v. Morley, 14 W. R. 949, V. C. W., as to classes of parties appearing by different solicitors; and see Bennett v. Wood, 7 Sim. 522; Hutchinson v. Freeman, 4 M. & C. 490; 3 Jur. 694;

Shuttleworth v. Howarth, 4 M. & C. 492; 5 Jur. 2; C. & P. 228, where persons intervening, who were not made parties because they belonged to a very numerous class, were allowed the same costs as if they had been made parties to the suit.

³ Ellison v. Thomas, 1 De G., J. & S. 13; see post, Chap. XXXII. § 2. *Rehearings and Appeals in the Court of Chancery*.

⁴ Kidd v. Cheyne, 18 Jur. 348, V. C. W.; see post, Chap. XXXIV. § 5, *Bills of Review*.

⁵ [Whitney v. Smith, L. R. 4 Ch. App. 513.]

PROCESS TO COMPEL, AND PROCEEDINGS IN DEFAULT OF,
APPEARANCE.

SECTION I. — *Service of the Copy of the Bill.*

FORMERLY, when the bill was filed, the ordinary course of proceeding against the defendants was to sue out and serve a writ of *subpæna*.¹ This has, however, as we have seen, been abolished ;² * and,

¹ The former English practice of compelling the appearance of the defendant by issuing and serving a writ of *subpæna* is still adhered to in the Circuit Courts of the United States, and in Massachusetts and some other State Courts. Under this practice the first step usually is, to sue out and serve a *subpæna*, which is a writ issuing out of the Court, and directed to the party himself, commanding him to appear (according to the old form of the writ), under a certain penalty therein expressed (*subpæna centum librarum*), and answer to the matters alleged against him.

It is to be observed, that the writ of *subpæna* differs from the other writs of process, in being directed to the party himself, whereas the subsequent writs or orders are directed, not to the party himself, but certain ministerial officers, commanding them to take certain proceedings against the defendant, calculated to enforce his obedience.

It would seem, according to the American practice, that the bill ought in all cases to be filed before or at the time of issuing the *subpæna*. 1 Hoff. Ch. Pr. 101, note; *ante*, 399, notes; Rule 2 of Chancery Practice in Massachusetts; Rule 11 of the Equity Rules of the United States Courts. Howe v. Willard, 40 Vt. 654. [See *ante*, 280, n. 7.]

By the 7th Equity Rule for the U. States Courts, it is provided that the process of *subpæna* shall constitute the proper mesne process in all suits in Equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and by Rule 12, whenever a bill is filed, the clerk shall issue the process of *subpæna* thereon, as of course, upon the application of the plaintiff, which shall be returnable into the Clerk's office the next rule day or the next rule day but one, at the election of the plaintiff, occur-

ring after twenty days from the time of the issuing thereof. Where there is more than one defendant, a writ of *subpæna* may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint *subpæna* against all the defendants.

By Chancery Rule 51, in New Jersey, the names of all the defendants in the same cause shall be inserted in one *subpæna*, unless the defendants reside in different counties, in which case the names of all those who reside in the same county shall be inserted in the same *subpæna*; by Rule 52, copies of tickets served with the *subpæna* upon the defendants shall be annexed to and returned with the *subpæna*. [Dick. Ch. Pr. 13.]

In Massachusetts, the *subpæna* on bills in Equity shall be issued from the Clerk's office either in term time or in vacation upon a bill there filed, shall bear *teste* of the first Justice of the Court, who is not a party to the suit, and shall be under the seal of the Court, and signed by the Clerk. Genl. Sts. c. 132, § 18. The process shall be made returnable at the next succeeding term, or at any intermediate rule day, at the election of the party who takes it out. Rule 4, of the Rules of Chancery Practice.

In Maine, "a *subpæna* in the form prescribed shall issue on the filing of the bill with the Clerk; and it may be made returnable on a day certain in or out of term time." Rule 2, of the Rules of Chancery Practice.

In Connecticut, to a bill in Chancery against defendants residing in that State, a citation, signed by a magistrate, must be annexed, which must be served upon the defendants at least twelve days before the sit-

² Except as to bills filed on or before 1 Nov., 1852; Ord. XXVIII. 10.

instead, the defendants are to be served with a printed copy of the bill,¹ properly stamped by one of the Clerks of Records * and *441

ting of the Court to which the bill is preferred. *Central Manuf. Co. v. Hartshorn*, 3 Conn. 199.

[In Tennessee, the defendants are brought before the Court by summons and copy bill served by the sheriff by reading them to the defendants, the latter being each entitled to call for a copy of the bill to be taxed in the costs. Code, § 4340 *et seq.*, as modified by 1877, ch. 45.]

In New Hampshire, "bills in Equity may be filed in term, or in the Clerk's office in vacation. If filed in term, a *subpoena* or order of notice may issue, returnable at the same term, if the Court shall so order, and such further proceedings may be had at the same term as the Court may direct. If filed in vacation, a *subpoena* or order of notice may be issued by the Clerk as of course, returnable at the next law term." Rule 11, 38 N. H. 607. Every such *subpoena* or order of notice must contain an order on the defendants to deliver to the plaintiff's solicitor, within two months after the service thereof, his plea, answer, or demurrer, otherwise the bill to be taken as confessed. Rule 15. Rule 12 provides that "*subpoenas* shall be served by the same officers and in the same manner as original writs of summons are by law to be served, and the plaintiff shall also cause an attested copy of the bill to be delivered to the defendant, or left at his usual place of abode, at the time of the service of the *subpoena*, or within fifteen days afterwards." As to the service of an order of notice, Rule 13 provides that "due service of an attested copy of the bill and order of notice, shown by affidavit of the person giving or leaving the same, or by return of an officer, shall be deemed sufficient notice of the suit." In this State, the *subpoena* is directed to the defendant, and is in form similar to that for Massachusetts, with the addition of a command to the defendant to deliver to the plaintiff's solicitor, his answer in writing to the bill, within two calendar months after the service thereof; otherwise the bill to be taken as confessed. See Form, 38 N. H. 624. The order of notice above provided for is an order, signed by the Clerk, directing the plaintiff to give notice to the defendant to appear at the next law term of the Court, and answer the bill, by serving on him an attested copy of the bill and of the order, at least fourteen days before the term. This order further directs the defendant to deliver to the plaintiff's solicitor his answer in writing, as in the case of the *subpoena* above referred to. See Form, 38 N. H. 614.

In Maine, the *subpoena* is directed to the sheriffs of the counties or their deputies, with a command to summon the defendant to appear according to the directions of the *subpoena*, to answer to the plaintiff in a bill in Equity, and to enter an appearance thereto by himself or his attorney. The sheriffs are also ordered to make due return of their proceedings. See Form, 37 Maine, 594, 595.

When the bill is not inserted in a writ of attachment, a *subpoena* in the form prescribed shall issue on the filing of the bill with the Clerk, and be served by copy, accompanied by a copy of the bill. Rule 2, 37 Maine, 581.

In Massachusetts, a bill or petition in an Equity suit, may be inserted in an original writ of summons, or of summons and attachment, and shall be returnable at the terms of the Court as established in the several counties, or on the rule days established by the Court. Genl. Sts. c. 113, § 3, *ante*, 305, note. [See form, Ch. Rule 1.]

In Maine, the bill may be inserted in a writ of attachment, and when so inserted, in addition to the service required by law, a copy shall be left with each defendant, or at his last and usual place of abode, or he will not be required to file his answer within sixty days. Rule 2, 37 Maine, 581; see *Stephenson v. Davis*, 56 Maine, 73, 76.

When a party is charged in a bill in the capacity in which he is liable, as executor, &c., it is not ground of demurrer, that the *subpoena* was issued to him generally, not stating the capacity in which he is sued. *Walton v. Herbert*, 3 Green Ch. 73.

On the filing of a bill in Equity in the Supreme Court of the United States by the State of Florida against the State of Georgia, the Court directed that process of *subpoena* issue against "The State of Georgia." *State of Florida v. Georgia*, 11 How. U. S. 293..

The statute prohibiting the service of civil process in the city of New York on the days of charter elections, does not apply to a *subpoena* and injunction issued out of the Court of Chancery. *Wheeler v. Bartlett*, 1 Edw. Ch. 323.

The issuing of a *subpoena*, in New Jersey, except in cases to stay waste, before the filing of the bill, is irregular, and if promptly brought to the notice of the Court, the *subpoena*, on motion for that purpose, will be set aside as illegally issued; but the irregularity is purely technical, and is waived by an appearance. *Crowell v. Botsford*, 1 C. E. Green (N. J.), 458. [And a mistake in antedating a *subpoena*, when in fact it was not issued before the filing of the bill, may be corrected. *Dismore v. Westcott*, 10 C. E. Green, 302.]

In Vermont it has been held that a failure to have service made of the original *subpoena* with the bill and injunction, seasonably for the term to which the *subpoena* was made returnable, does not operate a discontinuance of the proceedings, so that the order of the

¹ 15 & 16 Vic. c. 86, §§ 2-5. In *Yeatman v. Mousley*, 2 De G., M. & G. 220; 16 Jur. 1004, a bill was ordered to be filed, although a mistaken transposition of the names of one of the parties had been corrected in ink; and see *Barnes v. Ridgway*, 1 Sm. & G. Ap. 18; but now, no bill will be filed, as a printed bill, unless all alterations are made in type. *Braithwaite's Pr.* 25; *ante*, p. 396, n. (e).

Writs indicating the date of the filing of the bill,¹ and with an indorsement thereon,² directing the defendant to cause an appearance to be entered for him within eight days;³ to which is added the following note: "If you fail to comply with the above directions, the plaintiff may enter an appearance for you, and you will be liable to be arrested and imprisoned, and to have a decree made against you in your absence."⁴

The indorsement need not be printed;⁵ and may be partly printed and partly written:⁶ and such variations may be made therein as circumstances may require.⁷ Consequently, when the defendant to be served is out of the jurisdiction, the time specially fixed by the Court for him to appear should be inserted in the indorsement, instead of "eight days."⁸ In such a case, the time fixed for him to plead, answer, or demur, not demurring alone, should also be inserted in the indorsement, if the plaintiff intends to serve him with interrogatories."⁹

When the defendant is a corporation aggregate, the words "you will be liable to have your lands and tenements, goods and chattels, distrained upon, and other proceedings taken against you," are substituted for the words, "you will be liable to be arrested and imprisoned."¹⁰

Where the Attorney-General is served with a bill, there should be no indorsement upon it.¹¹

*442 * All peers of the three kingdoms, with or without a seat in the Upper House,¹ provided they are not members of the House of Commons,² and the widows and dowagers of the temporal lords,³ are entitled, before they are served with an indorsed copy of the bill, to be informed by a communication from the Lord Chancellor, termed a letter missive, of the fact of the bill having been filed. To obtain this letter missive, a petition for that purpose to the Lord Chancellor must be left with his Lordship's secretary: who will thereupon prepare the letter missive,⁴ obtain his Lordship's signature thereto, and deliver it out to the plaintiff's solicitor:

Chancellor, and the injunction issued in pursuance of it, become vacated and void. Suing time having expired before service could be made, the plaintiff had the right to another *subpena* returnable to the next term. *Howe v. Willard*, 40 Vt. 654.

[See to the same effect, *Ford v. Bartlett*, 59 Tenn. (3 Baxt.) 20. And where the process issued several years after the bill was filed. *Stern v. Ledden*, 4 Bibb, 178.]

¹ 15 & 16 Vic. c. 86, § 3. For a case where the defendant was served with an unstamped copy, see *Hutton v. Smith*, 24 L. J. Ch. 147, V. C. W. As to service of unstamped copies on formal parties, see *ante*, p. 429.

² 15 & 16 Vic. c. 86, § 3, and Sched., as varied by Ord. IX. 2; and see forms in Vol. III.

³ A defendant may, however, appear gratis, before service on him of a copy of the bill; see *post*, Chap. XIII., *Appearance*.

⁴ 15 & 16 Vic. c. 86, Sched., as varied by Ord. IX. 2.

⁵ *Sharpe v. Blondeau*, cited 9 Hare Ap. 27.

⁶ *Braithwaite's Pr.* 30.

⁷ 15 & 16 Vic. c. 86, § 3; *Chatfield v. Berchtoldt*, 9 Hare Ap. 28.

⁸ *Ibid.*; *Sharpe v. Blondeau*, *ib.* 27; *Baines v. Ridge*, *ibid.*; 1 W. R. 99.

⁹ For forms, see Vol. III.

¹⁰ *Braithwaite's Pr.* 29, n. As to the form of the indorsement, where the defendant is a peer, see *post*, p. 445.

¹¹ *Braithwaite's Pr.* 31.

¹ *Robinson v. Lord Rokeby*, 8 Ves. 601.

² *Ibid.*

³ *Harr. by Newl.* 101.

⁴ A fee of 20s. higher scale, and 5s. lower scale, is payable in Chancery fee fund stamps, on each letter missive; Regul. to Ord. Sched.

⁵ For forms of petition and letter missive, see Vol. III.

Where a written bill is filed, a written copy, stamped and indorsed as before explained, may be served on any defendant; and such service will have the same effect as the service of a printed copy.⁵

The indorsement must be tested as of the day on which the copy of the bill is stamped for service; and at the time it is presented for the purpose of being stamped, a *præcipe* must be filled up, and filed with the proper officer.⁶

If the copy of the bill is to be stamped for service in pursuance of any special order, such order must be produced at the same time. The copy of the bill may be altered and re-stamped at any time before service, on another *præcipe* being left with the proper officer.⁷

When the copies of the bill have been stamped and indorsed, in the manner above pointed out, the next step is to serve each of the defendants with one of such copies. This, unless the Court directs some other mode of service, is effected, by serving such copy on each defendant personally, or by leaving the same with his servant, or some member of his family,⁸ at his dwelling-house or usual place of abode; and has the same effect as the service of a *subpœna* formerly had.⁹

When an affidavit has been filed with the bill, a copy of such affidavit, but not necessarily an office copy, should be sealed at the Record and Writ Clerks' Office, and annexed to, and served with, each copy of the bill sealed there for service.¹⁰

* Service on a Sunday is not good service.¹ Service of a copy *443 of the bill is either ordinary, or extraordinary. Ordinary service requires no leave from the Court; extraordinary service requires a special order of the Court to render it valid, and is not used except under special circumstances, when the ordinary service cannot be effected.

When the copy is left at the dwelling-house, it is necessary that it should be the place where the defendant actually resides;² and the

⁵ 15 & 16 Vic. c. 86, § 6.

⁶ Each copy stamped for service must bear a 5s. Chancery fee fund stamp if on the higher scale, and a 1s stamp if on the lower scale. Regul. to Ord. Sched. 4. One *præcipe* is sufficient for any number of copies. For forms of *præcipe*, see Vol. III.

⁷ Braithwaite's Pr. 32. No fee is payable for restamping the copy, unless, as it would seem, the application is made after the expiration of twelve weeks from the date of the indorsement. Ord. XXVIII. 5, 9; 15 & 16 Vic. c. 86, §§ 4, 5; Braithwaite's Pr. 32; Braithwaite's Manual, 190.

⁸ The member of the family should be an inmate of the house. *Edgson v. Edgson*, 3 De G. & S. 629.

⁹ Ord. X. 1; 15 & 16 Vic. c. 86, §§ 4, 5.

¹⁰ *Ante*, pp. 395, 396.

¹ *Mackreth v. Nicholson*, 19 Ves. 367. A *subpœna* returnable on Sunday is irregular, and will not warrant the issuing of an attachment for disobedience thereof, as no Court can be held on that day for any purpose. *Gould v. Spencer*, 5 Paige, 541.

² Service on the Deputy-Governor of a prison was held to be due service on a defendant, a prisoner there. *Newenham v. Pemberton*, 2 Coll. 54; 9 Jur. 637.

In the United States Courts, the service of all *subpœnas* shall be by a delivery of a copy thereof by the officer serving the same, to the defendant personally, or, in the case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family. 13th Equity Rule. The service is to be made by the marshal of the district, or his deputy, or by some other person specially appointed by the Court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof. 15th Equity Rule. Whenever any *subpœna* shall be returned, not executed as to any defendant, the plaintiff shall be entitled to another *subpœna*, *toties quoties*, against such defendant, if he shall require it, until due service is made. 14th Equity Rule.

mere leaving the copy at a defendant's ordinary place of business, if he does not reside there, will not be good service;³ and *444 *therefore, where, under the old practice, a *subpœna*, returnable immediately,¹ was moved for upon affidavit stating that the defendant lived at Epsom, but that he had chambers in the Temple and resided there, Lord Thurlow said, that as it did not appear that his place of abode was in the Temple, he could not make the order.² Where, however, a member of the House of Commons, having a house at Southampton and no town residence, was served with a *subpœna*, returnable immediately, at a friend's house in London, with whom he was upon a visit, and for default of appearance a sequestration had been awarded, Lord Thurlow refused to set aside the sequestration for

In Massachusetts, "if a party shall not be found, a copy of the *subpœna* may be left at his usual place of abode; and, the truth of the case being returned by the officer, if it shall be made to appear to the Court that the party has actual notice of the suit, no other service shall be required; otherwise, such notice shall be given as the Court shall order." Rule 4, of the Rules of Practice in Chancery.

In some States the *subpœna* may be served by any person; as in Maryland, *Hoye v. Penn*, 1 Bland, 29; *Taylor v. Gordon*, 1 Bland, 132; so in New Jersey, *West v. Smith*, 1 Green Ch. 309; but the service, if made by any person other than a legal officer, must be proved. *Hoye v. Penn*, 1 Bland, 29.

In Vermont, service of a *subpœna* cannot be made by an indifferent person not named in it. *Allyn v. Davis*, 10 Vt. 547; *Burlington Bank v. Cottin*, 11 Vt. 106. As to Kentucky, see *Trabue v. Holt*, 2 Bibb, 393; *Barnett v. Montgomery*, 6 Monr. 327. In New Hampshire, where a private person may make service of process by copy, he may himself certify and swear to the copy. *Stone v. Anderson*, 25 N. H. 221.

The service of a *subpœna* must be within the jurisdiction, otherwise it is irregular. *Dunn v. Dunn*, 4 Paige, 425; *Creed v. Bryne*, 1 Hogan, 79; *Johnson v. Nagle*, 1 Molloy, 243; *Hawkins v. Hale*, 1 Beav. 73; *Erickson v. Smith*, 46 N. H. 375. But the defendant may voluntarily appear or stipulate in writing to accept out of the jurisdiction a service as regular. *Dunn v. Dunn*, *ubi supra*; *Picquet v. Swan*, 5 Mason, 561; see *Henderson v. Hopper*, Halst. Dig. 170. In Tennessee, where service of a *subpœna* has been made upon one material defendant in the proper district or county, a [counterpart] *subpœna* may be served upon any other defendant out of the county or district, [but within the State]. *University v. Cambreling*, 6 Yerger, 79; [Code, § 4306; *Moore v. Gennett*, 2 Tenn. Ch. 375].

In *Pratt v. Bank of Windsor*, Harring. Ch. 254, it was held, that the service of a *subpœna* upon a defendant out of the State is irregular. In *Picquet v. Swan*, 5 Mason, 561, the plaintiff obtained an order, appointing a commissioner to make service on one of two defendants in Paris, and to take his answer to the bill. See the mode of proceeding, *ib.* p. 562.

[But the defendant having refused to appear, the cause was, on motion of the other defendants, ordered to stand dismissed, unless the plaintiff procured the appearance and answer of the defendant within a given time. *Id.* 571. See *infra*, 449, n. 6.]

³ See *Smith v. Parke*, 2 Paige, 298; *Dyett v. N. A. Coal Co.*, 20 Wend. 570; *Johnston v. Macconnel*, 3 Bibb, 1. A copy of the *subpœna* left at the residence of a party domiciled in the State, and temporarily absent therefrom, is sufficient unless it is made to appear that he has been surprised. *Southern Steam Packet Co. v. Roger*, 1 Cheeves, 48. Where the defendant has no family, but boards or makes it his home in the family of another, the *subpœna* to appear and answer may, in his absence from home, be served upon either of the heads of the family, at such place of his abode, although he has no wife or servant. But to make such service regular, the place of service must be his actual place of residence at the time, and his absence therefrom must be merely temporary. *People v. Craft*, 7 Paige, 325; see *Bickford v. Skewes*, 9 Sim. 428; [*Wagner v. Blanchet*, 12 C. E. Green, 387]. The personal service of a *subpœna* on a defendant, who is confined in the State's prison for a term of years, is regular. *Phelps v. Phelps*, 7 Paige, 500. So where the service of the *subpœna* was made on the keeper of the State's prison instead of on the defendant, who was confined therein. *Johnson v. Johnson*, Walker Ch. 309. For service on a defendant under criminal sentence, see further, *Newenham v. Pemberton*, 2 Coll. 54. The return to a *subpœna* against A. and B, was as follows: "Executed on A., — B. not found:" and this was held insufficient to found a decree. *Pegg v. Capp*, 2 Blackf. 275. [And see where the *subpœna* was blank as to the return day. *Arden v. Waldon*, 1 Edw. Ch. 631.] In Illinois, where a summons in Chancery is served by leaving it at the residence of the defendant, the return must show that it was left with some person who was a member of the defendant's family. *Townsend v. Griggs*, 2 Scam. 365.

¹ See *Hinde*, 78.

² — *v. Shaw*, *Hinde*, 92; see *McPherson v. Horsel*, 2 Beasley (N. J.), 35.

irregularity: saying, that he could not suppose that the defendant, a Member of Parliament, during the session of Parliament had no town residence, or that the residence above stated should not be taken as a residence *quoad* the defendant, whose duty it was to attend, and who actually did attend, the House.³ And so, where a letter missive, and subsequently a *subpœna*, had been served at the town residence of a peer during the sitting of Parliament, Lord Thurlow appears to have been of opinion that it was good;⁴ and where a letter missive, and afterwards a *subpœna*, had been served at the town residence of a peer, who at the time was abroad, and afterwards an order *nisi* for a sequestration was issued, a motion to discharge the order *nisi* was refused.⁵

Ordinary service upon an infant defendant, or upon a defendant of weak or unsound mind, not so found by inquisition, is effected in the same manner as upon an adult.⁶

* Where a husband and wife are defendants, ordinary service *445 upon the husband alone is sufficient;¹ and process of contempt may issue against him alone for his wife's default.² But if they are living apart, each should be served. If the husband is abroad, or cannot be served, and the subject-matter of the suit arises in right of the wife, the plaintiff must obtain, on an *ex parte* motion, supported by affidavits, an order that service upon her may be deemed good service.³

³ East India Company v. Rumbold, Hil. Term 1781, cited Hinde, 92.

⁴ Attorney-General v. Earl of Stamford, 2 Dick. 744.

⁵ Thomas v. Earl of Jersey, 2 M. & K. 398; and see Davidson v. Marchioness of Hastings, 2 Keen, 509, 513.

⁶ See Ord. VII. 3. In Morgan v. Jones, 4 W. R. 381, V. C. W., substituted service on the medical officer or keeper of an asylum in which a lunatic was confined, was refused; personal service if practicable being held necessary; and see Anon., 2 Jur. N. S. 324, V. C. W.; [Rodgers v. Ellison, Meigs, 90. But substituted service has been allowed when shown to be dangerous to the patient. Raine v. Wilson, L. R. 16 Eq. 576; Speak v. Metcalf, 2 Tenn. Ch. 214. Ante, 177, n. 6.]

Upon a bill against a lunatic in the custody of a committee, service of process upon the committee is sufficient. Cates v. Woodson, 2 Dana, 455.

Process ought to be served personally on infants. Massie v. Donaldson, 8 Ohio, 377; Jones v. Mason, N. C. Term R. 125. [In the presence of, or with notice to, the natural or legal guardian, or other person having the control of the infant. Cooper v. Green, 2 Add. Ec. 454; 1 Hoff. Ch. Pr. 107.] But service of a *subpœna* on the father of a minor defendant, if within the jurisdiction, was held sufficient, although the minor resided out of the jurisdiction. Kirwan v. Kirwan, 1 Hogan, 264; see 1 Barb. Ch. Pr. 51, 52; Bank of Ontario v. Strong, 2 Paige, 301. So on the surviving parent, whether the minor is more

or less than fourteen years of age. Sanders v. Godley, 23 Ala. 473. But when the parent and child are both parties, a service on the parent alone is not sufficient to bring the infant before the Court. The *subpœna* should be served on the parent for the infant, and this should appear by the officer's return. Hodges v. Wise, 16 Ala. 509.

[In Tennessee, the general guardian of an infant represents the person and estate of his ward, and the infant is well brought before the Court by service of process on such guardian, even where the bill is filed to subject lands descended to the payment of the ancestor's debt. Britain v. Cowen, 5 Humph. 315. And see Cowen v. Anderson, 7 Coldw. 291; Scott v. Porter, April Term 1879, at Jackson.]

Where a bill has been served on an infant, there is no necessity for serving the same again on the guardian *ad litem* after he is appointed. Jones v. Drake, 2 Hayw. 237.

¹ See Leavitt v. Cruger, 1 Paige, 421.

² Gee v. Cottle, 3 M. & C. 180. The affidavit of service should state that the service was made on the husband and wife, by serving the husband. Steel v. Parsons, 8 Jur. 641, V. C. K. B. For an order, giving leave to serve husband and wife separately out of the jurisdiction, the fact of the marriage being in dispute, see Longworth v. Bellamy, cited Seton, 1245.

³ For form of order, see Seton, 1246, No. 9; and for forms of motion paper and affidavit, see Vol. III.

Service on her alone, in the usual manner, will then be sufficient;⁴ but no compulsory process can be issued against her, grounded on such service, without a previous order of the Court.⁵

If a corporation aggregate be a defendant, the copy of the bill may be served upon any one of its members, or, in the case of a public company, upon the public officer appointed to be sued on its behalf, or if there be no such officer, upon the chairman, manager, or secretary, either personally or at the office of the company.⁶ Provision is also made, by various public Acts, respecting the mode in which documents may be served on a company.⁷

If the defendant be entitled to the privilege of peerage, it has previously been stated that he has a right to a letter missive, before an indorsed copy of the bill is served upon him.⁸ This letter mis-
 *446 sive, with a copy of the petition for the same, and with * an undorsed copy of the bill, must be served in the same manner as a copy of the bill in ordinary cases. If the peer does not enter his appearance within eight days, the plaintiff must serve him with a copy of the bill indorsed in the usual form: except that the words, "you will be liable to have your estate sequestered, and other proceedings taken against you," must be substituted for the words, "you will be liable to be arrested and imprisoned."¹

The Attorney-General used not to be served with a *subpœna*, but with a copy of the bill.² Hence, now the practice with respect to the Attorney-General will be the same as with respect to other defendants.

⁴ Bell v. Hyde, Prec. Ch. 328; Dubois v. Hole, 2 Vern. 613; Bunyan v. Mortimer, 6 Mad. 278; and see Pemberton v. M'Gill, 1 Jur. N. S. 1045, V. C. W.; see Dyett N. A. Coal Co., 20 Wend. 570.

⁵ Graham v. Fitch, 2 De G. & S. 246; 12 Jur. 833; and see ante, p. 183.

Where the plaintiff seeks relief out of the separate estate of the wife, the *subpœna* must be served on her personally, and she may put in a separate answer; the husband in such case being considered only a nominal party. Leavitt v. Cruger, 1 Paige, 422; Ferguson v. Smith, 2 John. Ch. 139.

In New Jersey, in cases where husband and wife are made defendants, and he only is served with process of *subpœna*, the wife being out of the State, an order of publication shall be taken against her, unless an appearance be entered for her. Chancery Rule, 23.

⁶ Braithwaite's Pr. 33. The *subpœna*, in case of a corporation, is usually served on the president, cashier, secretary, or other principal officer. 1 Barb. Ch. Pr. 52. Service on private corporators is no service on the corporation. De Wolf v. Mallett, 3 Dana, 214. Where the business of a company had practically ceased, but the company had never been dissolved, service was ordered on the late chairman and secretary. Gaskell v. Chambers, 26 Beav. 252; 5 Jur. N. S. 52.

⁷ See 8 & 9 Vic. c. 16, § 135; *ib.* c. 18, § 134; *ib.* c. 20, § 138; 25 & 26 Vic. c. 89, §§ 62, 63.

⁸ Robinson v. Lord Rokeby, 8 Ves. 601; Vigers v. Lord Audley, 9 Sim. 409; *ante*, p. 441; Braithwaite's Pr. 29, n.

¹ Braithwaite's Pr. 29, n.

² Lord Red. 39. Where the United States or a State is interested, the District Attorney or the Attorney-General must be served with a copy of the bill. If he omits to enter an appearance, an order may be obtained on petition, that he appear within a certain time, or the bill be taken as confessed. 1 Hoff. Ch. Pr. 108. In Grayson v. Virginia, 3 Dall. 320, it was held that when process at Common Law or in Equity shall issue against a State, the same shall be served upon the Governor or chief executive officer, and the Attorney-General of such State. Rules of Supreme Court of the United States, December Term, 1858, No. 5.

In New Jersey v. New York, 3 Peters, 461, it was held that where the bill is brought by one State against another, the *subpœna* must be served upon the Governor and Attorney-General of the defendant State, and a service on the Governor alone, there being no appearance entered for the defendants, will not authorize the Court to proceed. See Huger v. S. Carolina, 3 Dall. 339.

If the plaintiff amends his bill, he must serve a copy of the amended bill on all the defendants,³ or, if they have appeared, on their solicitors;⁴ or, where they have appeared in person, at the place named for service;⁵ and the copy served must be stamped by the Record and Writ Clerk, so as to indicate the filing of the amended bill, and the date of the filing. Where the plaintiff requires an answer to the amended bill, the copy served should be indorsed in the same manner as the copy of an original bill: otherwise, the copy served should be without indorsement.⁶ It is, of course, to be understood, that as to defendants added by amendment, the bill is to be treated as an original bill.

Where the plaintiff is unable to effect ordinary service upon a defendant, in the manner above mentioned, the Court will, in many cases, permit service to be effected upon the defendant himself out of the jurisdiction, or to be substituted upon his agent within the jurisdiction. It is expressly enacted by the late Act, that the Court shall be at liberty to direct substituted service of the bill, as it shall think fit;⁷ but it seems that this enactment *does not extend the *447 jurisdiction previously exercised by the Court in this respect.¹

The principle upon which the Court acts in directing substituted service is clearly enunciated by Lord Cranworth C., in the case of *Hope v. Hope*:² in which case he says, that, where there is an agent in this country managing all the affairs of a defendant who is abroad, and regularly communicating with him upon his affairs, or where he has an agent here specially managing the particular matter involved in the suit, the Court has felt that it might safely allow service upon the agent to be deemed good service upon the person abroad: because the inference was irresistible, that service so made was service on a person either impliedly authorized to accept that particular service, or who certainly would communicate the process so served to the party who was not in this country to receive it himself. The object of all service was of course only to give notice to the party on whom it was made, so that he might be made aware of, and able to resist, that which was sought against him; and when that had been substantially done, so that the Court might feel perfectly confident that service had reached him, every thing had been done that was required.³

³ Ord. IX. 20. The copy may be partly printed and partly written, if the amendment is not made by a reprint. *Ibid.*

⁴ Ord. IX. 21. It is sufficient to serve one copy on each solicitor, notwithstanding he may be concerned for several defendants. Where, however, a solicitor is properly concerned as solicitor for one defendant, and as agent for another, two copies should be served. Braithwaite's Pr. 308; and *ib. n.* [Service on the solicitor is sufficient, although the defendant is out of the jurisdiction. *Zulueta v. Vincent*, 3 McN. & G. 246, overruling *Marquis of Hertford v. Suisse*, 13

Sim. 489, and *Sewell v. Gadden*, 1 De G. & S. 126.]

⁵ Ord. IX. 22.

⁶ *Barry v. Crokey*, 2 J. & H. 130.

⁷ 15 & 16 Vic. c. 86, § 5; and see 4 & 5 Will. IV. c. 82, § 2, *post*, p. 450.

¹ See *Bones v. Angier*, 18 Jur. 1050, V. C. W.; *Hope v. Hope*, 4 De G., M. & G. 328, 341; and see Ord. X. 2.

² 4 De G., M. & G. 328.

³ *Id.* 342. Where a bill was filed against a firm, one member of which was resident abroad, substituted service on the members in England was directed. *Henderson v. Campbell*, 13 W. R. 704, L. J.J.

Where a bill is filed to restrain an action at law, and the defendant (the plaintiff in the action) is out of the jurisdiction, or cannot be found,⁴ the Court will allow substituted service on the attorney employed by him to conduct the proceedings at Law, on an affidavit proving those facts.⁵

Substituted service of the copy of a cross-bill, upon the solicitor who filed the original bill, will not be ordered; but the Court will, in such a case, stay the proceedings in the original cause until the defendants have entered an appearance.⁶

In the case of *Hobhouse v. Courtney*,⁷ the cases and authorities upon the subject of substituted service upon an agent were reviewed. There, the defendant, who was out of the jurisdiction, had given special authority to a person within the jurisdiction to act as his agent,
 *448 with respect to the property which was the subject of the * suit; and the Court ordered service on that person to be good service upon the defendant. An application of a similar kind was made to Sir James Wigram V. C., in the case of *Webb v. Salmon*,¹ and refused by him upon the ground, that the persons upon whom the substituted service was sought to be effected were not agents in the matter of the suit when the correspondence with the plaintiff's solicitor commenced, and that they refused to accept the agency; there was not, therefore, that appointment of them as the solicitors or agents of the defendant, which, in the case of *Hobhouse v. Courtney*, was assumed to be necessary. He also observed, that he was not prepared to go beyond that case. In *Cooper v. Wood*,² Lord Langdale M. R. ordered substituted service on a person who had acted as the solicitor of the absent defendant, in the subject of the mortgage to which the suit related, and who, there was reason to believe, was in communication with the defendant. And in *Weymouth v. Lambert*,³ the same judge ordered substituted service in a creditors' suit, on one who, acting as the attorney of the executor and general devisee and legatee, resident in India, had obtained administration here, and had entered into receipt of the rents of the real es-

⁴ *Sergison v. Beavan*, 9 Hare Ap. 29, marg.; 16 Jur. 1111, V. C. S.; *Hamond v. Walker*, 3 Jur. N. S. 686, V. C. W.; and see *Seton*, 877; *Anderson v. Lewis*, 3 Bro. C. C. 429; 5 Sim. 505; *Baillie v. Blanchet*, 10 L. T. N. S. 365, V. C. W.

⁵ The merits need not now be shown by affidavit. *Sergison v. Beavan*, *ubi sup.*

⁶ *Anderson v. Lewis*, *ubi sup.*; and *Gardiner v. Mason*, 4 Bro. C. C. 478; 5 Sim. 506; and see *Waterton v. Croft*, 5 Sim. 502, 507. [But substituted service is permitted in the United States Courts in cross-causes and injunction bills to stay proceedings at Law in the same Court. *Hitner v. Suckley*, 2 Wash. C. C. 465; *Ward v. Sebring*, 4 Wash. C. C. 472; *Dunn v. Clarke*, 8 Pet. 1; *Schenck v. Peay*, 1 Woolw. 175.]

⁷ 12 Sim. 140, 157; 6 Jur. 28; approved and acted on in *Murray v. Vipart*, 1 Phil. 521; 9 Jur. 173; and see *Bankier v. Poole*, 3

De G. & S. 375; 13 Jur. 800; *Hurst v. Hurst*, 1 De G. & S. 694; 12 Jur. 152; *Hornby v. Holmes*, 4 Hare, 306; 9 Jur. 225, 796; *Dicker v. Clarke*, 9 Jur. N. S. 636; 11 W. R. 635; V. C. K.; *Barker v. Piele*, 11 W. R. 658, V. C. K.; *Jackson v. Shanks*, 13 W. R. 287, V. C. W.; *Gauthier v. Meinertzhagen*, 1 W. N. 48, V. C. W.; *Brown v. Crowe*, *ib.* 80, V. C. W.

¹ 3 Hare, 251, 255.

² 5 Beav. 391; and see *Heald v. Hay*, 9 W. R. 369, V. C. S.; *Hope v. Carnegie*, L. R. 1 Eq. 126, V. C. S.

³ 3 Beav. 333; and see *Howkins v. Bennett*, 1 Giff. 215; 6 Jur. N. S. 948; and the cases cited in the note to *Skegg v. Simpson*, 2 De G. & S. 454, 456; and as to service of bill, or order of revivor, see *Norton v. Hepworth*, 1 M'N. & G. 54; 13 Jur. 244; *Hart v. Tulk*, 6 Hare, 618; *Forster v. Menzies*, 16 Beav. 568; 17 Jur. 657.

tate; and where an infant had been taken out of the jurisdiction for the express purpose of preventing his being served personally, his Lordship ordered, that service upon the solicitor and Six Clerk of the parent should be good as against the infant.⁴ It is to be observed, however, that the principle, as laid down in *Hope v. Hope*,⁵ seems to go beyond the case of *Hobhouse v. Courtney*.

The Court, in the exercise of its discretion, has by special order permitted various other modes of substituted service to be adopted. Thus, service at the last place of abode of the defendant's wife, has been ordered to be good service.⁶ So, service by sending the document under cover to the person to whom the defendant had directed his letters to be sent, has been permitted.⁷ Again, in the case of infants, substituted service upon the mother, in one case,⁸ and upon the father-in-law in another,⁹ was ordered to be good service.

* Whenever an order is made for substituted service, such *449 order must be served at the same time that the bill is served, and it must be stated in the order that it is to be served;¹ care should also be taken that the service is effected in strict accordance with the terms of the order, and it will then have the same effect as ordinary service.² The application for the order is made by an *ex parte* motion;³ and must be supported by an affidavit showing what efforts have been made to serve the defendant, and that all practicable means of doing so have been exhausted,⁴ and how the substituted service is proposed to be effected.⁵

It would seem that the Court had no authority, under its original jurisdiction, to serve process upon any defendant, whether a natural born subject or not, who was residing out of the territorial limits of its jurisdiction, unless, indeed, the defendant was shown to have absconded to avoid such service.⁶ Such power has, however, been conferred on

⁴ *Lane v. Hardwicke*, 5 Beav. 222.

⁵ 4 De G., M. & G. 328. [And see in case of partners, *Carrington v. Cantillon*, Bunb. 107; *Coles v. Gurney*, 1 Mad. 187; *Kinder v. Forbes*, 1 Beav. 503; *Atkinson v. Mackreth*, W. N. (1867) 41. In a suit against a foreign State. *Smith v. Weguelin*, W. N. (1867) 273.]

⁶ *Pulteney v. Shelton*, 5 Ves. 147; and see *Manchester and Stafford Railway Company v. How*, 17 Jur. 617, V. C. W.; 15 & 16 Vic. c. 86, § 5, *ante*, p. 445.

⁷ *Hunt v. Lever*, 5 Ves. 147; but see *Gathercole v. Wilkinson*, 1 De G. & S. 681; 11 Jur. 1096.

⁸ *Baker v. Holmes*, 1 Dick. 18; and see *Garnum v. Marshall*, *ib.* 77; S. C. *nom.* *Smith v. Marshall*, 2 Atk. 70; *Clark v. Waters*, V. C. S., cited, 1 Smith's Pr. 378; *Hope v. Carnegie*, L. R. 1 Eq. 126, V. C. S.

⁹ *Thompson v. Jones*, 8 Ves. 141. [See *ante*, 444, n. 6.]

¹ 1 Jones v. Brandon, 2 Jur. N. S. 437, V. C. W. For form, see Seton, 1244, No. 4.

² *Wilcoxon v. Wilkins*, 9 Jur. N. S. 742;

11 W. R. 868, M. R.; but see *Dicker v. Clarke*, 11 W. R. 765, V. C. K.

³ *Reed v. Barton*, 4 W. R. 793, V. C. W. For form of motion paper, see Vol. III.

⁴ *Firth v. Bush*, 9 Jur. N. S. 431; 11 W. R. 611, V. C. K.; and see *Barker v. Piele*, 11 W. R. 658, V. C. K.

⁵ For form of affidavit, see Vol. III.

⁶ Per Lord Westbury, L. C., *Cookney v. Anderson*, 1 De G., J. & S. 365, 382; 9 Jur. N. S. 736; and see *Foley v. Maillardet*, 1 De G., J. & S. 389; 10 Jur. N. S. 161; *Samuel v. Rogers*, 1 De G., J. & S. 396; *Norris v. Cotterill*, 5 N. R. 215, V. C. W. Where leave was given to serve process out of the jurisdiction, the service was useless unless the defendant entered an appearance, for no subsequent proceeding could be based upon it. *Cookney v. Anderson*, 31 Beav. 452, 468; 8 Jur. N. S. 1220, 1223; and see note to *Shaw v. Lindsay*, 18 Ves. 2d ed. 496; *Fernandez v. Corbin*, 2 Sim. 544; *Davidson v. Marchioness of Hastings*, 2 Keen, 509, 616. *Whitmore v. Ryan*, 4 Hare, 612, 615; 10 Jur. 368.

[See *Flower v. Baker*, 3 Mason, 251; *Wil-*

it by statute, in all cases in which a suit has been instituted concerning lands, tenements, or hereditaments situate in England or Wales, or concerning any charge, lien, judgment, or incumbrance thereon, or concerning any money vested in any Government or other public stock, or public shares in public companies or concerns,⁷ or the dividends or produce thereof.⁸

By the statutes referred to, it is enacted :

First, that in any such suit, upon special motion, the Court may order and direct that service in any part of Great Britain, or Ireland, or in the Isle of Man, shall be deemed good service upon the defendants, on such terms, in such manner, and at such time as to the Court shall seem reasonable.⁹

Secondly, that in any such suit of the same description, in case the defendant or defendants shall appear by affidavit to be resident

*450 * in any specified place out of the United Kingdom of Great

Britain and Ireland, the Court may, upon open motion of any of the complainants in any such suit, founded upon an affidavit or affidavits, and such other documents as may be applicable for the purpose of ascertaining the residence of the party, and the particulars material to identify such party and his residence, and also specifying the means whereby such service may be authenticated, and especially whether there are any British officers, civil or military, appointed by or serving under her Majesty, residing at or near such place, order that service of the bill¹ upon the party, in manner by the order directed, or in case where the Court may deem fit, upon the receiver, steward, or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned, returnable at such time as the said Court shall direct, shall be deemed good service upon such party.²

Thirdly, that if it shall be made to appear by affidavit that any defendant, in any such suit, cannot by reasonable diligence be personally served with the bill,¹ or that, upon inquiry at his usual place of abode, he could not be found, so as to be served with such process, and that there is just ground for believing that such defendant secretes or withdraws himself, so as to avoid being served with the process of the

son v. Graham, 4 Wash. C. C. 53; Dunn v. Dunn, 4 Paige, 425; Moore v. Gennett, 2 Tenn. Ch. 375. *Ante*, 443, n. 2.]

⁷ See Official Manager of the National Association v. Carstairs, 9 Jur. N. S. 955; 11 W. R. 866, M. R. [See Royal Mail Packet Co. v. Braham, 2 App. Cas. 381; Ingate v. Lloyd Austriaco, 4 C. B. N. S. 704.]

⁸ 2 & 3 Will. IV. c. 33, § 1; 4 & 5 Will. IV. c. 82, § 1.

⁹ 2 & 3 Will. IV. c. 33, § 1. This Act extends to Scotland. Cameron v. Cameron, 2 M. & K. 289, 292; Innes v. Mitchell, 4 Drew. 141; 1 De G. & J. 423; Maclean v. Dawson, 4 De G. & J. 150; 5 Jur. N. S. 663; and see, for cases under this Act, Hasluck v. Stewart, 6 Sim. 321; Anderson v. Stather, 10 Jur. 383; L. C.; Turner v. Sowden, 12 W. R. 522, V.

C. K., where service on an infant was allowed. Suits commenced by summons are within the Acts. Cohen v. Alcan, 1 De G., J. & S. 398; 10 Jur. N. S. 531, overruling Lester v. Bond, 1 Dr. & S. 392; 7 Jur. N. S. 538.

¹ The Acts provided for the service of the *subpoena* to appear to and answer the bill; but now, a properly stamped and indorsed copy of the bill must be served. 15 & 16 Vic. c. 86, § 3, *ante*, pp. 439-441.

² 4 & 5 Will. IV. c. 82, § 2; see, for cases under this Act, Godson v. Cook, 7 Sim. 519; Parker v. Lloyd, 5 Sim. 508, 510; Dodd v. Webber, 2 Beav. 502; Green v. Pledyer, 3 Hare, 165, 168; Cox v. Bannister, 8 W. R. 206, M. R.; Official Manager of the National Association v. Carstairs, 9 Jur. N. S. 955; 11 W. R. 866, M. R.

Court, then and in all such cases, the Court may order that the service of the bill¹ shall be substituted in such manner as the Court shall think reasonable, and direct by such order.³

Besides the provisions of the Acts above referred to, there is a General Order of the Court which provides, that where a defendant in any suit is out of the jurisdiction, the Court may, upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is or may probably be found, order that a copy of the bill under the stat. 15 & 16 Vic. c. 86, § 3, and, if an answer is required, a copy of the interrogatories may be served on such defendant in such place or country, or within such limits, as the Court shall think fit to direct; and that such order shall limit a time after such service within which such defendant is to appear to the bill: such time to depend on the place or country within which the copy of the bill is to be served; and where an answer is required, such order shall also limit a time within which such defendant is to plead, answer, or demur, or obtain from * the Court further time to make his de- *451 fence to the bill; and that at the time when such copy of the bill shall be served, the plaintiff shall also cause the defendant to be served with a copy of the order giving the plaintiff leave to serve such copy of the bill.¹

It is to be observed, that the Acts of Parliament before referred to, conferring upon the Court of Chancery the power of serving process out of the jurisdiction, apply to suits of a particular kind, and further, that they fetter the exercise of the privilege by certain restrictions; but the language of the General Order above mentioned applies to suits of all descriptions, and in some respects dispenses with the provisions which the Legislature had required. It was formerly considered, that the General Order enabled the Court to direct service on a defendant who had neither a domicile nor property within the jurisdiction, and in any suit whatever. This interpretation of the General Order was acted upon for a long series of years;² but it has been recently overruled, on the ground that the General Order only applies to the cases within the Acts above referred to; and it has been held, that the statutes³ enabling the Court to make alterations in forms and mode of proceeding, do not empower the Court to sanction the service of the bill out of the jurisdiction, except in cases within the Acts.⁴

Where it is sought to serve the bill out of the jurisdiction, it is usual,

³ 4 & 5 Will. IV. c. 82, § 2; and see 15 & 16 Vic. c. 86, § 5; *ante*, p. 446; 11 Geo. IV. & 1 Will. IV. c. 36, §§ 3, 9; Ord. X. 6; *post*, pp. 456-459.

¹ Ord. X. 7 (1) (2) (3).

² *Whitmore v. Ryan*, 4 Hare, 612, 617; 10 Jur. 368; *Blenkinsopp v. Blenkinsopp*, 2 Phil. 1; 1 C. P. Coop. t. Cott. 20; 8 Beav. 612; *Steele v. Stuart*, 1 H. & M. 793, 796; 10 Jur. N. S. 15; *Curtiss v. Grant*, 9 Jur. N. S. 766, M. R.

³ 3 & 4 Vic. c. 94; 5 Vic. c. 5, § 29; 15 & 16 Vic. c. 86, § 63.

⁴ *Cookney v. Anderson*, 1 De G., J. & S. 365; 9 Jur. N. S. 736; *Foley v. Maillardet*, 1 De G., J. & S. 389; 10 Jur. N. S. 161; *Samuel v. Rogers*, 1 De G., J. & S. 396; *Norris v. Cotterill*, 5 N. R. 215, V. C. W.; but see *contra*, *Drummond v. Drummond*, L. R. 2 Eq. 335; 12 Jur. N. S. 581, V. C. S., affirmed by L. C. & L. J. 1 W. N. 378; *Cory v. Jacobsen*, 1 W. N. 290, V. C. K.

and in most cases desirable, to apply for leave to serve interrogatories to the bill at the same time;⁵ indeed, if it should be necessary to take the bill *pro confesso* against the defendant out of the jurisdiction, it cannot be done unless interrogatories have been served.⁶

The application for leave to effect service out of the jurisdiction, is made by an *ex parte* motion, or by summons at Chambers.⁷ The affidavits in support must show the place of residence at the time the application is made, or as near thereto as is practicable;⁸ and an affidavit showing that the defendant was resident at Calais, seven weeks previously to the application, was held insufficient;⁹ but the affidavit need not, it seems, show more than the country in which the defendant resides.¹⁰

*452 * It is not necessary to show, by affidavit, that the circumstances are such as to warrant the order. The Court may look at the pleadings for that purpose;¹ and, if necessary, may go into the merits of the case: it being always in the discretion of the Court whether to grant or refuse the application;² but it acts on a *prima facie* case being made out.³

Leave may be granted to serve infants,⁴ and persons of unsound mind,⁵ out of the jurisdiction; and upon such service, guardians *ad litem* will be appointed; and a husband out of the jurisdiction may be served for himself and his wife.⁶ Where the fact of the marriage is in dispute, leave will be granted to serve them separately.⁷ Where a father and his infant children were living together out of the jurisdiction, it was held, that a separate copy must be served on each.⁸

The order giving leave to make the service out of the jurisdiction must be served with the copy of the bill;⁹ and this requirement is expressed in the order itself.¹⁰ If no directions to the contrary are given by the order, the service should be effected by serving the copy

⁵ *Leaman v. Brown*, 7 W. R. 322, V. C. K.; see *post*, Chap. IX., *Interrogatories*.

⁶ *Post*, Chap. XI., *Taking Bills pro confesso*.

⁷ For form of order, see Seton, 1244, No. 6; and for forms of motion paper and summons, see Vol. III.

⁸ *Preston v. Dickinson*, 9 Jur. 919; 7 Beav. 582, n.

⁹ *Fieske v. Buller*, 7 Beav. 581.

¹⁰ *Blenkinsopp v. Blenkinsopp*, 8 Beav. 612; 2 Phil. 1; C. P. Coop. t. Cott. 20; *Preston v. Dickinson*, *ubi sup.*; *Biddulph v. Lord Camoys*, 7 Beav. 580; 10 Jur. 485. For form of affidavits, see Vol. III.

¹ *Blenkinsopp v. Blenkinsopp*, *ubi sup.*; *Maclean v. Dawson*, 4 De G. & J. 150; 5 Jur. N. S. 663; *Official Manager of National Association v. Carstairs*, 9 Jur. N. S. 955; 11 W. R. 866, M. R.; *Steele v. Stuart*, 1 H. & M. 793; 10 Jur. N. S. 15; *Foley v. Maillardet*, 1 De G., J. & S. 389; 10 Jur. N. S. 161; *Hawarden v. Dunlop*, 2 Dr. & S. 155; *Norris v. Cotterill*, 5 N. R. 215, V. C. W.

² *Lewis v. Baldwin*, 11 Beav. 153, 158;

Whitmore v. Ryan, 4 Hare. 612, 617; 10 Jur. 368; *Innes v. Mitchell*, 4 Drew. 141; 3 Jur. N. S. 991; 1 De G. & J. 423; *Cook v. Wood*, 7 W. R. 424, V. C. K.; *Maclean v. Dawson*, 27 Beav. 25; 4 De G. & J. 150; 5 Jur. N. S. 663.

³ *Maclean v. Dawson*, *ubi sup.*; *Meiklan v. Campbell*, 24 Beav. 100. The plaintiff takes the order at his own risk. *Brooks v. Morison*, 32 Beav. 652.

⁴ *Anderson v. Stather*, 10 Jur. 383; L. C.; *Turner v. Sowden*, 12 W. R. 522; 13 W. R. 66; 10 Jur. N. S. 1122, V. C. K.; S. C. *nom.* *Turner v. Snowden*, 2 Dr. & Sm. 265.

⁵ *Biddulph v. Lord Camoys*, 7 Beav. 580; 10 Jur. 485.

⁶ *Jones v. Geddes*, 9 Jur. 1002, V. C. E.; *Steele v. Plomer*, 2 Phil. 782, n.; 1 M. N. & G. 83.

⁷ *Longworth v. Bellamy*, M. R., cited Seton, 1245.

⁸ *Jones v. Geddes*, *ubi sup.*

⁹ Ord. X. 7 (3).

¹⁰ For form, see Seton, 1244, No. 6.

of the bill and a copy of the order on the defendant personally, or by leaving the same with his servant, or some member of his family, at his dwelling-house or usual place of abode,¹¹ within the limits defined by the order. The order fixes the time after service of the bill within which the defendant is to appear, and also, if an answer is required, the time after service of the interrogatories within which the defendant is to plead, answer, or demur, not demurring alone, or obtain from the Court further time to make his defence to the bill;¹² but it is not necessary to fix any time for his demurring alone: such time being the same as in cases where the defendant is served within the jurisdiction.¹³

These times are fixed by the Registrar; and, as a general rule, * twice the time it ordinarily takes to reach the place where the *453 defendant is residing is allowed for appearing, and twice that time for answering.¹ The times so fixed should be inserted in the indorsement on the bill, instead of the time inserted there when the bill is to be served within the jurisdiction.²

Where a defendant has been served out of the jurisdiction under this order, he cannot be attached for want of appearance, upon his coming within the jurisdiction.³

A defendant, on being served with the bill, may enter an appearance at the Record and Writ Clerks' Office,⁴ whereupon the suit will be prosecuted against him in the ordinary way; or he may move, on notice to the plaintiff, to set aside such service for irregularity.⁵ Before, however, he can so move, he must enter what is called a conditional appearance, with the Registrar.⁶

Where the plaintiff has introduced into the bill statements, as to the subject-matter of the suit, that bring it within the Acts authorizing service out of the jurisdiction, the defendant may on the motion to discharge the order, read affidavits disproving such statements.⁷

¹¹ Ord. X. 1; Braithwaite's Pr. 33.

¹² *Ibid.*; Ord. X. 7 (2). The interrogatories may be served with the bill. *Leaman v. Brown*, 7 W. R. 322, V. C. K.

¹³ *Brown v. Stanton*, 7 Beav. 582; *Preston v. Dickinson*, *ib. n.*; *Blenkinsopp v. Blenkinsopp*, 8 Beav. 612; *Grüning v. Prioleau*, 10 Jur. N. S. 60; 12 W. R. 141, M. R.; 33 Beav. 221.

¹ *Seton*, 1245; *Chatfield v. Berchtoldt*, 9 Hare Ap. 28.

² *Baynes v. Ridge*, 9 Hare Ap. 27; 1 W. R. 99; *Chatfield v. Berchtoldt*, *ubi sup.*; *Sharpe v. Blondeau*, 1 W. R. 100, V. C. K., cited 9 Hare Ap. 27. For form of indorsement, see Vol. III.

³ *Hackwood v. Lockerby*, 7 De G., M. & G. 238; and see *Penfold v. Kelly*, 12 W. R. 286, V. C. K.

⁴ See *post*, Chap. XIII., *Appearance*.

⁵ *Maclean v. Dawson*, 27 Beav. 25; 4 De G. & J. 150; 5 Jur. N. S. 663; *Official Manager of National Association v. Carstairs*, 9 Jur. N. S. 955; 11 W. R. 866, M. R.; *Foley*

v. Maillardet, 10 Jur. N. S. 34; *ib.* 161; 1 De G., J. & S. 383; *Steele v. Smart*, 1 H. & M. 793; 10 Jur. N. S. 15; see Braithwaite's Pr. 321, and for forms of notice of motion, and affidavit in support, see Vol. III.

⁶ *Mackreth v. Nicholson*, 19 Ves. 367; *Davidson v. Marchioness of Hastings*, 2 Keen, 509; *Johnson v. Barnes*, 1 De G. & S. 129; *Lewis v. Baldwin*, 11 Beav. 153, 154; *Maclean v. Dawson*, *ubi sup.*; *Foley v. Maillardet*, *ubi sup.*; but see *Betts v. Barton*, 3 Jur. N. S. 154, V. C. W. The appearance is entered under an order, which is obtained on an *ex parte* motion, or on petition of course at the Rolls. By the order the defendant must, by his counsel, submit to any process which the Court may direct to issue against him on the appearance. For the mode of entering a conditional appearance, see Index, *Appearance*; for form of order and appearance, see *Seton*, 1249, No. 6; and for form of motion paper, see Vol. III.

⁷ *Foley v. Maillardet*, 1 De G., J. & S. 389; 10 Jur. N. S. 161; and see *Official*

All orders, writs, and other proceedings upon which process of contempt may afterwards be issued, require, in general, what is called personal service.⁸ The same strictness is not, however, necessary for the service of notice of ordinary proceedings in the cause; and it will be convenient here to state the manner in which service of such proceedings is effected.

Every solicitor of a party suing or defending by a solicitor, must cause to be written or printed upon every writ or summons which he sues out, and upon every bill,⁹ demurrer, plea, answer, or other pleading

*454 or proceeding, and all exceptions which he may leave * with the Clerks of Record and Writs to be filed, and upon all instructions which he may give to them for any appearance or other purpose, his name or firm, and place of business, and also (if his place of business shall be more than three miles from the Record and Writ Clerks' Office) another proper place (to be called his address for service), which shall not be more than three miles from that office, where writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor shall only be the agent of any other solicitor, he must add to his own name or firm, and place of business, the name or firm, and place of business, of the principal solicitor.¹

A party suing or defending by a solicitor is not at liberty to change his solicitor, in any cause or matter, without an order of the Court for that purpose: which may be obtained by motion or petition as of course;² and until such order is obtained and served, and notice thereof given to the Clerk of Records and Writs, the former solicitor is considered the solicitor of the party.³

Where a party sues or defends by a solicitor, and no address for service of such solicitor has been written or printed, pursuant to the directions of the General Order,⁴ all writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, are, unless the Court shall otherwise direct, to be deemed

Manager of National Association v. Carstairs, 9 Jur. N. S. 955, 11 W. R. 896, M. R.

⁸ In such cases, personal service is, however, sometimes dispensed with. *Rider v. Kidder*, 12 Ves. 202; *De Manneville v. De Manneville*, *ib.* 203.

⁹ This includes an information. *Prel. Ord. X. (4)*.

¹ *Ord. III. 2*; and see *ante*, p. 397.

² The application is almost invariably made by petition; see *post*, Chap. XLIV., *Solicitors*. The application should not be made as of course, when the plaintiff in a creditor's suit, whose debt is small, sells his debt after decree. *Topping v. Seanson*, 2 H. & M. 205. For forms of motion paper and petition, see Vol. III.

³ *Ord. III. 3*; *Davidson v. Leslie*, 9 Beav.

104; *Wright v. King*, *ib.* 161. This order was held not to apply where the suit was at an end, and a petition was presented by a new solicitor for payment out of a fund carried to a separate account. *Waddilove v. Taylor*, 12 Jur. 598, V. C. W. Where there has been any special contract as to employment of solicitor, the order to change is not of course. *Jenkins v. Bryant*, 3 Drew. 70; *Richards v. Scarborough Market Company*, 17 Beav. 83. And see, as to this order, *Ward v. Swift*, 6 Hare, 309, 311. Service of notice of motion at solicitor's address for service held sufficient, although the office was untenanted; the solicitor having absconded, and the party being out of the jurisdiction. *Reuben v. Thompson*, 16 Jur. 1008, V. C. T.

⁴ *Ord. III. 2*.

sufficiently served upon the party, if served upon his solicitor, at his place of business; but if an address for service of such solicitor shall have been written or printed as aforesaid, then all such writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, are to be deemed sufficiently served upon such party, if left for his solicitor, at such address for service.⁵

Every party suing or defending in person, must cause to be written or printed upon every writ which he sues out, and upon * every *455 bill,¹ demurrer, plea, answer or other pleading or proceeding, and all exceptions, which he may leave with the Clerks of Records and Writs to be filed, and upon all instructions which he may give to them for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall be more than three miles from the Record and Writ Clerks' Office), another proper place (to be called his address for service), which shall not be more than three miles from that office, where writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.²

Where a party sues or defends in person, and no address for service of such party has been written or printed, pursuant to the direction of the General Order,³ or where a party has ceased to have a solicitor, all writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, are, unless the Court shall otherwise direct, to be deemed to be sufficiently served upon such party, if served upon him personally or at his place of residence; but if an address for service of such party shall have been written or printed as aforesaid, then all such writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party, if left for him at such address for service.⁴

Where the solicitor of a party dies, the other side may sue out a *subpœna* against him to name a new solicitor;⁵ and it seems that substituted service of this *subpœna* will be ordered, in a proper case.⁶

Service of all writs, notices, summonses, orders, warrants, documents,

⁵ Ord. III. 4. Service, in a supplemental suit, upon the solicitor in the original suit, has been held good service. *Scott v. Wheeler*, 13 Beav. 239; see also *Hart v. Tulk*, 6 Hare, 618; *Norton v. Hempworth*, 1 M.N. & G. 54; 13 Jur. 244; *Bligh v. Tredgett*, 5 De G. & S. 74; 15 Jur. 1101.

¹ This includes an information. *Prel. Ord.* 10 (4).

² Ord. III. 5; see *Price v. Webb*, 2 Hare, 511, 513; *Johnson v. Barnes*, 1 De G. & S. 129; 11 Jur. 261. Where the solicitor for any party, or any party suing or defending in person, changes his residence or address for service, notice thereof should be given to

the Clerk of Records and Writs, and also to each solicitor concerned in the cause. *Braithwaite's Pr.* 10. For form of notice, see Vol. III.

³ Ord. III. 5.

⁴ Ord. III. 6.

⁵ *Ratcliff v. Roper*, 1 P. Wms. 420; *Gibson v. Ingo*, 2 Phil. 402; 12 Jur. 105; *Ward v. Swift*, 6 Hare, 309, 311; *Wyatt's Pr.* 411; *Ord. III.* (1); *Braithwaite's Pr.* 264, 265; and see *Butlin v. Arnold*, 1 H. & M. 715. For form of *subpœna*, see *Ord. Sched. E.*, No. 5; and Vol. III.

⁶ *Gibson v. Ingo*, *ubi sup.*; *Dean v. Lethbridge*, 26 Beav. 397.

and other proceedings, not requiring personal service⁷ upon the party to be affected thereby, is to be made before seven o'clock in the evening; except on Saturday, when it is to be made before two o'clock in the afternoon; and if made after seven o'clock in the evening on any day except Saturday, the service is to be deemed as made on the following day; and if made after two o'clock in the afternoon on Saturday, the service is to be deemed as made on the following Monday.¹

Where a person who is not a party appears in any proceeding, either before the Court or in Chambers, service upon the solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, is to be deemed good service, except in matters of contempt requiring personal service.²

The plaintiff is, without special leave of the Court, at liberty to serve any notice of motion, or other notice, or any petition or summons, personally, or at the dwelling-house or office of any defendant, who, having been duly served with a copy of the bill, has not caused an appearance to be entered within the time limited for that purpose;³ but such service cannot be made out of the jurisdiction without special leave.⁴

SECTION II.—*Proceedings where no Service of a Copy of the Bill can be effected.*

In the event of the plaintiff not being able, by any of the means previously mentioned, to effect a due service of the copy of the bill upon the defendant, the plaintiff is entitled to have the bill taken *pro confesso*, without either appearance by, or service of the copy of the bill upon, the defendant. In order that the plaintiff may pursue this course, he must be able to satisfy the Court, by affidavit, that the defendant is beyond the seas, or that upon inquiry at his usual place of abode he could not be found, so as to be served with process; and there is just ground to believe that he is gone out of the realm, or otherwise absconded, to avoid being served with the process of the Court.⁵ And if the affidavit shows the defendant to be beyond the seas, the plaintiff must also prove, by affidavit, that the defendant has been in England within two years next before the bill was filed.⁶

⁷ Documents requiring personal service may be served at any hour of the day (on week days), and at any place within the jurisdiction of the Court. Braithwaite's Pr. 12.

¹ Ord. XXXVII. 2. By Order XLII. 2, any one who uses violence or abusive language to a person serving the process or orders of the Court, or uses scandalous or contemptuous words against the Court or the process thereof, is liable to be committed, upon motion, on notice to the person so offending. [See Price v. Hutchison, L. R. 9 Eq. 534.]

² Ord. III. 7; Jennings v. Devey, 4 Jur.

858, V. C. E. With respect to the service of a summons, see *post*, Chap. XXIX., *Proceedings at Chambers*.

³ Ord. III. 8.

⁴ Green v. Pledger, 3 Hare, 165, 168. As to serving notices out of the jurisdiction, see Davidson v. Marchioness of Hastings, 2 Keen, 509, 516; Hawarden v. Dunlop, 2 Dr. & Sm. 155; [Kavenagh v. Wall, 18 L. T. N. S. 18.]

⁵ 11 Geo. IV. & 1 Will. IV. c. 36, § 3.

⁶ *Id.* § 9; and see 15 & 16 Vic. c. 86,

§ 4.

Upon *ex parte* motion supported by such affidavit,⁷ the Court may make an order, directing and appointing such defendant to appear at a certain day therein to be named; and a copy of such order must, within fourteen days after it was made, be inserted in the "London Gazette,"¹ and affixed to the door of the parish church of the parish where such defendant made his usual abode within thirty days next before such his absenting; and a copy of such order must also, within the time aforesaid, be posted up in some public place at the Royal Exchange, in London; and if the defendant do not appear within the time limited by such order, or within such further time as the Court shall appoint, then, on proof made of such publication of such order as aforesaid, the Court being satisfied of the truth thereof, may order the plaintiff's bill to be taken *pro confesso*.²

⁷ For forms of motion paper and affidavit, see Vol. III.

¹ 7 Will. IV. & 1 Vic. c. 45, § 2; Braithwaite's Pr. 292, 293.

² 11 Geo. IV. & 1 Will. IV. c. 36, § 3. For forms of orders under this Act, see Kingsford v. Poile, cited Seton, 1249.

In Massachusetts, "whenever it shall appear that a defendant resides out of the Commonwealth, the clerk, on application of the plaintiff, at any time after the filing of the bill, shall enter an order requiring such defendant to appear and answer the plaintiff's bill, if in any part of the United States east of the Mississippi River, or the States of Louisiana, Missouri, Iowa, or Minnesota, within one month; if within any other of the United States, or New Brunswick, Nova Scotia, or Canada, within two months; if elsewhere in the United States, or in Great Britain, Ireland, or France, within three months; and if in other foreign parts, within six months, from the rule day next succeeding the date of such order. The order shall state the title of the suit, and shall set forth briefly the substance of the plaintiff's bill. A copy of the order shall be served on such defendant personally or published three times, in different weeks, within thirty days after the date of the order, in some newspaper published in the county where the suit is pending; and proof of such service shall be made by affidavit, or in such other manner as the Court shall order." Rule 5, Chancery Practice.

In Vermont, when the defendant is out of the State, so that a *subpoena* cannot be served upon him, the plaintiff may file his bill in the office of the Clerk of the Court, and obtain an order of publication. Genl. Sts. of Vt. c. 29, § 21; Howe v. Willard, 40 Vt. 654, 659.

There are, undoubtedly, provisions made in other States for giving notice to non-resident defendants, and taking bills as confessed against them upon their non-appearance. New York, see 1 Barb. Ch. Pr. 92-96; Jermain v. Langdon, 8 Paige, 41; Evarts v. Becker, *ib.* 506; Corning v. Baxter, 6 Paige, 178; Connecticut Central Manuf. Co. v. Hartshorne, 3 Conn. 193; [Code of Tennessee, §§ 4311, 4352.]

Non-resident infants defendants must have

notice given them of the pendency of a suit against them by publication, as in the case of adults. Walker v. Hallet, 1 Ala. (N. S.) 379; Dunning v. Stanton, 9 Porter, 513; Coster v. Bank of Georgia, 24 Ala. 37; Sturges v. Longworth, 1 Ohio (State), 544.

In New York, where there is an infant absentee, the course under the statute must be pursued; and on the expiration of the time fixed for his appearance, if no one applies in his behalf, the plaintiff may move, as in ordinary cases, for a guardian *ad litem*. Ontario Bank v. Strong, 2 Paige, 301. Proceedings may also be had under the statute by publication, where the infant is concealed. Mortimer v. Copsey, 1 Hoff. Ch. Pr. 194. And the Court has directed the same course to be pursued where the defendant was a resident of another State, and a lunatic. Otis v. Wells, 1 Hoff. Ch. Pr. 194.

The statutes authorizing proceedings against absent defendants and unknown heirs, upon constructive notice of publication, must be strictly pursued. Brown v. Wood, 6 J. J. Marsh. 11, 14; Hunt v. Wickliffe, 2 Peters, 201; Lingan v. Henderson, 1 Bland, 236; Miller v. Hall, 3 Monroe, 242; Tevis v. Richardson, 7 Monroe, 654; see Karr v. Karr, 4 C. E. Green (N. J.), 427; Oram v. Dennison, 2 Beasley (N. J.), 438; [Boswell v. Otis, 9 How. 336; Ferriss v. Lewis, 2 Tenn. Ch. 291.]

Where the statute directs an order of publication to be certified by the printer in whose paper the order has been published, a certificate must be made by the printer or proprietor, and not by a mere editor. Brown v. Wood, 6 J. J. Marsh. 11, 19; Butler v. Cooper, 6 J. J. Marsh. 27, 30; Brodie v. Skelton, 6 Eng. 120; Sprague v. Sprague, 7 J. J. Marsh. 331. A certificate of publication must show when, and in what paper the order was published. Hopkins v. Claybrook, 5 J. J. Marsh. 234; see Swift v. Stebbins, 4 Stew. & Port. 84. Where an order of publication has not been returned, an entry on the record that it was proved to have been duly executed, is insufficient evidence of publication to authorize the rendition of a decree. Green v. McKinney, 6 J. J. Marsh. 193, 197; but see *contra*, Swift v. Stebbins, 4 Stew. & Port.

- *458 *The 6th rule of the 10th Order applies to the same circumstances as the provisions of the Act last stated; the affidavits
 *459 which the *order requires are very nearly the same as those necessary under the Act; but the order only enables the plaintiff to obtain an appearance to be entered for the defendant, and does not,

447. It is not sufficient that an order of publication is had in a Chancery cause; proof of the publication must also be made. *Moore v. Wright*, 4 Stew. & Port. 84. The proceeding by publication on the ground that the defendant does not reside in the State, does not apply to those, such as mariners, who are temporarily absent in their vocation. *M'Kim v. Odom*, 3 Bland, 407; *Wash v. Heard*, 27 Miss. (5 Cush.) 400. Publication of notice, as in the case of a non-resident defendant, is of no effect whatever, if the defendant in fact be not a non-resident. *Snowden v. Snowden*, 1 Bland, 550; see *Jermain v. Langdon*, 8 Paige, 41; *Evarts v. Beeker*, 8 Paige, 506.

In Alabama, notice to absent defendants must be published on the court-house door as well as in the newspaper. *Batre v. Auze*, 5 Ala. 173. So in Virginia, *Myrick v. Adams*, 4 Munf. 366. So in Mississippi, *Zecharie v. Bowers*, 3 Smedes & M. 641.

In Kentucky, by Act of Feb. 2, 1837, a warning order and traverse were substituted for publication of notice against non-resident defendants. *Stump v. Beatty*, 8 Dana, 14. A warning order is constructive notice to a non-resident of the pendency of the suit. *Chiles v. Boon*, 3 B. Mon. 82.

In New Jersey, where any of the defendants reside in the State, and are served with process, it is not necessary, unless under special circumstances, that the order for the appearance of absent defendants should be published in any newspaper out of the State. Foreign publication is required only where all of the defendants reside out of the State. *Wetmore v. Dyer*, 1 Green Ch. 386; *Oram v. Dennison*, 2 Beasley (N. J.), 438. [See where substituted service by publication was held good, although the defendant was a resident of the State. *Equitable Life Assurance Society v. Laird*, 9 C. E. Green, 319.]

A decree against non-resident defendants upon whom process has not been served, or proof of publication made, is erroneous. *Gale v. Clark*, 4 Bibb, 415. But a decree regularly made against absent defendants, will not be set aside of course, on their coming in and answering, nor unless the justice of the case requires it. *Dunlap v. M'Elvoy*, 3 Litt. 269; see *Pike v. McBratney*, 15 Ill. 314.

In New York, where a defendant is proceeded against as an absentee, he is entitled of course without an affidavit of merits, at any time before a sale under the decree, to come in and make his defence, if he has any, upon payment of such cost as the Court may deem reasonable. *Jermain v. Langdon*, 8 Paige, 41; *Evarts v. Beeker*, 8 Paige, 506.

In such a case it is not necessary to vacate the decree in the first instance; the decree

may be permitted to stand until the validity of the defendant's defence is ascertained, and proceedings for this purpose may be had in the same manner as if the decree had been opened or vacated. *Jermain v. Langdon*, *ubi supra*.

Where a defendant, who has a fixed and notorious domicile within the State, is proceeded against as an absentee, it is irregular, and if he applies the first opportunity after he has notice of the proceedings against him and before a sale under the decree, he will be let in to defend of course, and without costs. *Jermain v. Langdon*, 8 Paige, 41; *Evarts v. Beeker*, *ib.* 506.

In order to obtain a decree against a non-resident defendant who does not appear, and who has not been personally served with process, the report of a Master as to the truth of the allegations contained in the bill is necessary. *Corning v. Baxter*, 6 Paige, 178.

In *Erickson v. Nesmith*, 46 N. H. 371, 377, Sargent J. said: "We find in all the elementary books, rules for making extraordinary or substituted service on parties out of the jurisdiction, but upon examination, we find that the statutes authorizing such service have reference to those called absentees, who have a legal residence in the State or country where the cause is pending, but who have left to avoid personal service or for some other cause, but who are still considered as inhabitants of such State or country, and where service on the attorney or agent of the party is held to be good service on the principal, under the peculiar circumstances of the case. See *Jermain v. Langdon*, 8 Paige, 41; *Evarts v. Beeker*, 8 Paige, 506. But where no attachment of property has been made within the jurisdiction, and where the Court can make no actual service of process, and where the party residing in another State refuses to submit to the jurisdiction of the Court, we know of no way to acquire such jurisdiction over the person. A statute could not give it any more than a rule of Court. The legislature have no more jurisdiction to make laws for the inhabitants of other States, while remaining there, than the Court has to execute them upon such inhabitants. *Bissell v. Briggs*, 9 Mass. 468; *Rangle v. Webster*, 11 N. H. 299, and cases cited. This subject has recently been pretty fully considered by the Supreme Court of the United States in *Baldwin v. Hale*, 1 Wallace U. S. 232, and *Baldwin v. Bank of Newbury*, 1 Wallace U. S. 234, and by this Court in *Bank v. Butler*, 45 N. H. 236, 239." See *Stephenson v. Davis*, 56 Maine, 75, 76; *Spurr v. Scoville*, 3 Cush. 578; *ante*, 149, note. [See now *Pennoyer v. Neff*, 95 U. S. 714, where the subject is fully considered in a very able opinion by Mr. Justice Field.]

like the Act, authorize the bill to be taken *pro confesso* at once. The Order, however, dispenses with the necessity of having the notice posted up at the Royal Exchange, or affixed to the door of the parish church. It is as follows: "Where the Court is satisfied, by sufficient evidence, that any defendant has been within the jurisdiction of the Court, at some time, not more than two years¹ before the bill was filed, and that such defendant is beyond the seas, or that upon inquiry at his usual place of abode (if he had any), or at any other place or places where, at the time when the bill was filed, he might probably have been met with, he could not be found, so as to be served with a copy of the bill under the statute 15 & 16 Vic. c. 86, § 3, and that, in either case, there is just ground to believe that such defendant has gone out of the realm,² or otherwise absconded to avoid being served with such copy of the bill or with other process,³ the Court may order that such defendant do appear at a certain day, to be named in the order; and a copy of such order, together with a notice to the effect set forth at the end of this rule, may, within fourteen days after such order made, be inserted in the 'London Gazette,' and be otherwise published as the Court shall direct; and where the defendant does not appear within the time limited by such order, or within such further time as the Court may appoint, there, on proof made of such publication of the said order, the Court may order an appearance to be entered for the defendant, on the application of the plaintiff."

The notice referred to in the rule is in the following terms: *Notice*. "A. B., take notice, that if you do not appear pursuant to the above order, the plaintiff may enter an appearance for you, and the Court may afterwards grant to the plaintiff such relief as he may appear to be entitled to on his own showing."⁴

Application under the General Order is made by an *ex parte* motion,⁵ supported by an affidavit or affidavits, which should follow the language of the General Order as far as possible.⁶ One calendar month from the date of the order is generally limited as the time for appearance; the limitation of time within which the advertisements of the order in any newspapers, other than the "London Gazette," are to be inserted, is optional; and they all may be *directed to be inserted within *460 fourteen days.¹ The subsequent order is also made upon an *ex parte* motion,² supported by the production of the Gazette, and any

¹ Thurlow v. Treeby, 27 Beav. 624.

² It is not necessary to show that he has absconded to avoid service in the particular suit. Barton v. Whitcombe, 16 Beav. 205; 17 Jur. 81; Allen v. Loder, 15 Jur. 420, V. C. Ld. C.

³ Cope v. Russell, 2 Phil. 404; 12 Jur. 105; and see Crosse v. Crosse, 6 Jur. N. S. 360; 8 W. R. 338, V. C. K.

⁴ Ord. X. 6. For form of order, see Seton, 1248, No. 3.

⁵ For form of motion paper, see Vol. III.

⁶ For form of affidavit, see Vol. III.

¹ Seton, 1248, 1249. If the advertisements cannot be inserted within fourteen days, the Court will extend the time. Dicker v. Clarke, 11 W. R. 870, V. C. K. As to the propriety of limiting, by the order, a time to answer, see Braithwaite's Pr. 336, n.

² Hawkins v. Gathercole, 3d Nov., 1851, cited 1 Smith's Pr. 380. For form of motion paper, see Vol. III.

newspapers in which the former order has been inserted, and of the Record and Writ Clerk's certificate that no appearance has been entered.

SECTION III. — *Proceedings by the Plaintiff, where service of the Copy of the Bill has been effected.*

If the defendant (not being an infant, or a person of unsound mind) neglects to appear, within the time mentioned in the indorsement thereon, to a bill which has been duly served on him within the jurisdiction of the Court, an appearance may be entered for him on the application of the plaintiff;³ or the plaintiff may (though this is now an unusual course)⁴ compel him, by attachment or other process, to appear.

Where the bill has been served out of the jurisdiction, and the defendant has not entered an appearance within the time allowed by the special order under which the service was effected, an *ex parte* application, by motion for leave to enter an appearance for him, must be made by the plaintiff.⁵ The application must be supported by an affidavit of due service of the copy of the bill and copy of the order, and by the Record and Writ Clerk's certificate of no appearance having been entered by the defendant;⁶ and the Court may proceed on such service as if duly made within the jurisdiction.⁷

If the bill has been served within the jurisdiction, it is provided by the General Order,⁸ that where any defendant, not appearing to be an infant or a person of weak or unsound mind unable of himself to defend the suit,⁹ is, when within the jurisdiction of the Court, duly served with a copy of the bill under the statute 15 & 16 Vic. c. 86, § 3, and refuses or neglects to appear thereto within eight days after such service, the plaintiff may, after the expiration of such eight days,¹⁰ and within *461 three weeks¹¹ from the time of such *service, apply to the

Record and Writ Clerk to enter an appearance for such defendant; and no appearance having been entered, the Record and Writ Clerk is to enter such appearance accordingly, upon being satisfied, by affidavit, that the copy of the bill was duly served. And after the expiration of such three weeks, or after the time allowed to such defend-

³ Ord. X. 3, 4. [A formal entry of appearance has, throughout the United States, ceased to be important, because service on a defendant of notice to appear is made equivalent to actual appearance. *Sweeny v. Collin*, 1 Dill. 75; *Fowlkes v. Webber*, 8 Humph. 530; *Pugsley v. Freedman's Sav. & Tr. Co.*, 2 Tenn. Ch. 138. See *infra*, 536.]

⁴ *Hackwood v. Lockerby*, 7 De G., M. & G. 238; and see *post*, p. 462.

⁵ For form of motion paper, see Vol. III.

⁶ 4 & 5 Will. IV. c. 82, § 1; Ord. X. 7 (4). For form of order to enter appearance, see Seton, 1248, No. 2; and for form of affidavit, see Vol. III.

⁷ 4 & 5 Will. IV. c. 82, § 1.

⁸ Ord. X. 4.

⁹ An appearance by the plaintiff for a person thus incapacitated is irregular and of no validity. Ord. X. 5; *Leese v. Knight*, 8 Jur. N. S. 1006; 10 W. R. 711, V. C. K.

¹⁰ The day of service is excluded in the computation of the eight days and three weeks. 15 & 16 Vic. c. 86, Sched.; Ord. XXXVII. 9.

¹¹ Where the plaintiff accidentally omitted to enter the appearance, the Court extended the time. *Clarkson v. Eldridge*, 8 W. R. 466, V. C. K.

ant for appearing has expired, in any case in which the Record and Writ Clerk is not thereby required to enter such appearance, the plaintiff may apply to the Court for leave to enter such appearance for such defendant; and the Court, being satisfied that the copy of the bill was duly served, and that no appearance has been entered for such defendant, may, if it so thinks fit, order the same accordingly.

Service of an amended bill, on the solicitor of a defendant, who has appeared to the original bill,¹ is due service within the meaning of the General Order above referred to, whether the defendant, at the time of such service is, or is not, within the jurisdiction;² and the order applies where an order to revive has been served on a new defendant;³ it also applies where substituted service has been effected, under an order obtained for that purpose.⁴

An application for leave to enter an appearance, where the three weeks have expired, or the bill has not in the opinion of the Record and Writ Clerk been duly served, may be made by *ex parte* motion to the Court, or by *ex parte* summons at Chambers, supported, in either case, by an affidavit of service,⁵ and by the Record and Writ Clerk's certificate that no appearance has been entered by the defendant; this certificate should bear even date with the application, but should be bespoken the day before.⁶ The order is drawn up by the Registrar.⁷ If any delay in making the application is not satisfactorily explained, the Court or Judge may require notice of the motion to be given to the defendant, or the bill to be re-served;⁸ and in such a case, an order has been made giving leave to enter an appearance at the expiration of ten days unless the defendant * appeared in the mean time, on *462 the plaintiff undertaking to serve the defendant with the order within six days.¹

Where a bill was filed against an officer of the Crown, who refused to enter an appearance, on the ground that the Court had no jurisdiction to entertain the suit, leave was given to enter an appearance for him.²

An appearance by the plaintiff for the defendant is entered by fill-

¹ Under Ord. IX. 21; see *ante*, p. 447.

² *Zulueta v. Vinent*, 3 M.N. & G. 246; 15 Jur. 277, overruling *Marquis of Hertford v. Suisse*, 13 Sim. 489; 9 Jur. 1001; *Sewell v. Godden*, 1 De G. & S. 126; 11 Jur. 260; and see *Steele v. Gordon*, 3 W. R. 158, V. C. K. As to appearance to an amended bill, see Index, *Appearance*; and Chap. XIII., *Appearance*; and also *Braithwaite's Manual*, 159.

³ *Forster v. Menzies*, 16 Beav. 568; 17 Jur. 657; *Cross v. Thomas*, 16 Beav. 592; 17 Jur. 336. It is not, however, usual, in practice, for the plaintiff to enter an appearance, by default, in such a case.

⁴ *Wilcoxon v. Wilkins*, 9 Jur. N. S. 742; 11 W. R. 868, M. R.; but see *Dicker v. Clarke*, 11 W. R. 765, V. C. K.

⁵ For forms of motion paper, summons, and affidavit, see Vol. III.

⁶ *Braithwaite's Pr.* 334. A fee of 4s., by a Chancery fee fund stamp, is payable; Regul. to Ord. Sched. 4.

⁷ For form, see *Seton*, 1247, No. 1.

⁸ *Radford v. Roberts*, 2 Hare, 96; 6 Jur. 1080; *Morgan v. Morgan*, 1 Col. 228; *Edmonds v. Nichol*, 6 Beav. 334; *Bradstock v. Whatly*, 7 Beav. 346; *Totty v. Ingleby*, *ib.* 591; *Walker v. Hurst*, 13 Sim. 490; 9 Jur. 1002; *Devenish v. Devenish*, 7 Jur. 841, L. C.; *Bointon v. Parkinson*, *ib.* 367, V. C. K. B.; and see *Burton v. Tebbutt*, 1 W. N. 208, V. C. S.

¹ *Husham v. Dixon*, 1 Y. & C. C. C. 203; and see cases, *ib.* n.

² *Felkin v. Lord Herbert*, 1 Dr. & S. 608; 8 Jur. 8 N. S. 90.

ing up a *præcipe*,³ and leaving the same with the Record and Writ Clerk, together with an office copy of the affidavit of service,⁴ or, if special leave has been obtained, the order authorizing the appearance to be entered. Any number of defendants may be included in one *præcipe*.⁵ The plaintiff need not give notice of having entered the appearance.⁶

If, however, the plaintiff does not choose himself to enter an appearance for the defendant, it was formerly competent for him to proceed, as of course, to compel the defendant, by attachment, to appear;⁷ but this cannot now be done without a special order of the Court,⁸ and the practice is virtually abolished.⁹

As, however, the practice of compelling appearance by attachment is not absolutely abolished, it will be convenient here to state the mode of prosecuting a contempt. A suitor prosecuting a contempt, must use his best endeavor to procure each process to be duly served and executed upon the party prosecuted: otherwise he will lose the benefit of the process returned, and have to pay the costs;¹⁰ he must not make out process into a county in which he knows that the party prosecuted is not;¹¹ but he may abandon any unexecuted process he has issued,

and issue fresh process, if otherwise in a position so to do.¹²

*463 *It seems that in ordinary cases a plaintiff may, at the same time, sue out two or more attachments against the same defendant into different counties; but only one of them must be executed; otherwise the party would be liable to an action. Thus, where a defendant being in contempt, the plaintiff sued an attachment into Kent, and another into London, and arrested the defendant upon each: upon this being shown to the Court, costs were ordered to be taxed by the Master, for the irregularity and vexation; but, in regard that the plaintiff was poor, the Court, upon his motion, ordered the costs to be paid the defendant, out of a sum of 600*l.* decreed to the plaintiff, and resting in Court; and the defendant was set at liberty, without entering his

³ For form, see Vol. III.

⁴ For form, see Vol. III. As to the costs of such appearance, see Ord. XL. 15; and as to a subsequent appearance by the defendant, see Ord. X. 9, *post*, p. 479.

⁵ Braithwaite's Pr. 325. The following fees are payable, in Chancery fee fund stamps, on entering appearances: if not more than three defendants, *7s.*; if more than three, and not exceeding six defendants, *1*4s.**; and the same proportion for every like number of defendants. Regul. to Ord. Sched. 4. In this computation, husband and wife are regarded as one person. Braithwaite's Pr. 325.

⁶ Braithwaite's Pr. 337. If the appearance is, by mistake, entered by the plaintiff's solicitor, as if concerned for the defendant, it may be withdrawn and entered as by the plaintiff; see *ibid.*; and *post*, Chap. XIII., *Appearance*.

⁷ *Mussina v. Bartlett*, 8 Porter, 277. The

general mode of compelling obedience to the orders of the Court, is by attachment. *Matter of O'Reillys*, 2 Hogan, 20. It always rests in the sound discretion of the Court, whether the rule for an attachment shall be absolute or *nisi*, though the latter is the usual and safer course. *Matter of Vanderbilt*, 4 John. Ch. 58.

⁸ Ord. X. 10. The application will be refused, unless the plaintiff can show a sufficient reason for adopting this course of proceeding. *Hackwood v. Lockerby*, 7 De G., M. & G. 238.

⁹ *Per V. C. Kindersley*, *Felkin v. Lord Herbert*, 1 Dr. & S. 608; 8 Jur. N. S. 90.

¹⁰ Ord. XXX. 1.

¹¹ *Boschetti v. Power*, 8 Beav. 180, 184; *Zulueta v. Vincent*, 15 Beav. 273; 16 Jur. 631; see, however, *Hodgson v. Hodgson*, 23 Beav. 604.

¹² *Andrews v. Walton*, 1 Phil. 619; Braithwaite's Pr. 147.

appearance with the Registrar: for the Court said, none should take advantage of his own wrong.¹

An attachment should be directed to the sheriff or other officer of the county or jurisdiction wherein the party, against whom the writ is issued, is likely to be found.² If the defendant resides in the county palatine of Lancaster or of Durham, the attachment must be directed to the Chancellor of the county palatine, or his deputy, commanding him to issue his mandamus to the sheriff of the county to attach the party;³ and, to enforce obedience, it is necessary to obtain an order upon the Chancellor to return the writ, and afterwards an order upon the sheriff to return the mandamus.⁴ Where the defendant is in a city or town that is a county in itself, the writ must be directed to the sheriff of the county of the city or town;⁵ and if the party is already in prison, the writ, must, nevertheless, be directed to the sheriff: who will lodge it with the keeper or jailer, as a detainer against such party.⁶

According to the old practice of the Court, an attachment, as well as all other process of contempt, must have been made returnable in Term time;⁷ and it was also requisite, where it was intended to proceed to a sequestration, or to take a bill *pro confesso*, that there should be fifteen days between the *teste* (or date) and the return of the writ: unless the defendant lived within ten miles of London, in which case, an order might be obtained, by motion or petition of course, to make the several processes returnable immediately.⁸ With the view, however, to save the expense of * the order for a writ returnable immediately, *464 in a town cause, and also to get rid of the delay in the process occasioned by that proceeding, it is provided by the 11 Geo. IV. & 1 Will. IV. c. 36, § 15, rule 3, “that the party prosecuting any contempt shall be at liberty, without order, to sue forth the several writs in process of contempt, returnable immediately, in case the party in contempt resides or is in London, or within twenty miles thereof; and that, in other cases, the party prosecuting a contempt shall be at liberty, without order, to sue forth such several writs, returnable in vacation, provided that there be fifteen days between the *teste* and the return of each of such writs.”¹ The effect of this provision is, to extend the power of issuing attachments, and other process, returnable in vacation, to all cases: with the restriction, that where the party resides above twenty miles from London, there shall be fifteen days between the *teste* and the

¹ Wyatt's Pr. 48.

² Braithwaite's Pr. 158. In London, where there are two sheriffs, if one of them is an interested party, the writ should be directed to the other; and where both, or the sole sheriff in other cases, are interested, it should be directed to the coroner. *Ib.* 151. For forms of directions of writs, see Vol. III.

³ Braithwaite's Pr. 159; and see form in Vol. III.

⁴ See *post*, p. 470.

⁵ Since the 18 & 19 Vic. c. 48, such process

as would otherwise have been directed to the Lord Warden of the Cinque Ports, is directed to the Sheriff of Kent.

⁶ Trotter v. Trotter, Jac. 533; and see *post*, p. 466. For forms of directions of writs, see Vol. III.

⁷ Hinde, 100.

⁸ *Ibid.*

¹ Braithwaite's Manual, 199; Wroe v. Clayton, 16 Sim. 183; 12 Jur. 321; Seton, 1231.

return: and to permit such process to be issued without a previous order to that effect.

It is to be observed, that where an attachment is issued not returnable immediately, but of which the return must take place in Term time, it must still, as before, be made returnable on a general return day; thus, when the last of the fifteen days required by the above rule of the 11 Geo. IV. & 1 Will. IV. c. 36, falls in Term time, the attachment must be made returnable on one of the general return days of the Term occurring after the expiration of the fifteen days.² It was formerly considered, that an attachment could not have a longer return than the last return of the Term following that in which it was *tested*; if made returnable “immediately,” it was only in force until such last return of the following Term; and if executed afterwards, its execution was liable to be discharged for irregularity; but it appears that there is now no such rule in practice.³

A writ of attachment is made out by the solicitor or party prosecuting the contempt,⁴ who must indorse the name and place of business or residence, and address for service (if any) thereon, as in the case of other proceedings.⁵

The form of the writ is in all cases the same; but it must bear an indorsement, stating the particular nature of the contempt in respect of which it is issued.⁶ The names of three, but not more, persons can

be inserted in one writ. The writ must be *tested* on the day on *465 which it is issued; it is sealed at the Record and Writ * Clerks’ Office; and the seal will be affixed, on the Clerk of Records and Writs being satisfied that the writ is correct in form, and that the person presenting the same is, according to the course and practice of the Court, entitled to sue out the same.¹ The attachment is considered as sealed the first moment of the day on which it issues.²

Before the writ will be sealed, a *præcipe*, stating the nature of the contempt in respect of which it is issued, must be entered with the Registrar, and left at the Record and Writ Clerks’ Office. In order to enter the *præcipe*, two copies of it are prepared; and upon one being left with the Clerk at the entering seat, in the Registrar’s Office, the other will be marked by him as entered; and the latter copy must be filed with the Record and Writ Clerk at the time the writ is sealed.³

The manner in which both original and amended bills are filed has before been stated; ⁴ and under no circumstances can an attachment be

² Seton, 1231; Braithwaite’s Pr. 153. For list of general return days, see Vol. III.

³ Wroe v. Clayton, 16 Sim. 183; 12 Jur. 331.

⁴ Ord. III. 1. This writ must be either written or printed on parchment; and should have a left-hand margin of sufficient width to admit of the stamp, and the official seal; the writ must be stamped with a Chancery fee fund stamp of 5s. Regul. to Ord. Sched. 4; Braithwaite’s Pr. 133.

⁵ Ord. III. 2, 5; *ante*, pp. 453–455.

⁶ Braithwaite’s Pr. 159. For forms of indorsements, see Vol. III.

¹ Ord. I. 37.

² Stephens v. Neale, 1 Mad. 550.

³ Smith v. Thompson, 4 Mad. 179; Ord. I. 18; Braithwaite’s Pr. 161. For forms of *præcipe*, see Vol. III.

⁴ *Ante*, pp. 398, 399, 422.

issued for want of appearance or answer, unless the bill be regularly filed.⁵

A writ of attachment, for want of appearance, is indorsed, "By the Court: For not appearing at the suit of A. B., complainant," or as the case may be;⁶ and it will be sealed at the Record and Writ Clerks' Office, upon production of the order authorizing the issue of the writ;⁷ if it appears to the Clerk of Records and Writs that no appearance has been entered for the defendant.⁸ Before the writ is sealed, a *præcipe* must be entered with the Registrar, and left in the manner before explained.⁹

It is particularly requisite that the rule, that a suitor prosecuting a contempt, shall use his best endeavor to procure process to be duly served,¹⁰ should be attended to in cases where it is intended to proceed to take a bill *pro confesso*, against a defendant in contempt for want of an answer: for, by the General Orders, it is necessary that the plaintiff should have exerted due diligence to procure the execution of the writ of attachment, in order that he may proceed, under these Orders, against the defendant as having absconded.¹¹ And if the plaintiff does not proceed under the last-mentioned Orders, then, for the purpose of obtaining a writ of sequestration, immediately upon the return by the sheriff of *non est inventus* to the attachment, an affidavit *466 must be made, that "due diligence was used to ascertain where such defendant was at the time of issuing the writ, and in endeavoring to apprehend him under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued."¹

The first thing to be done, after an attachment has been issued, is to deliver it to the sheriff or other officer to whom it is directed; and it is to be observed, that although it is directed to the sheriff, it may be delivered to the under-sheriff, by whom all the duties of the sheriff which do not require his personal presence are usually executed, or to the deputy-sheriff.² The sheriff or other officer to whom any writ is directed or delivered ought, with all speed and secrecy, to execute such writ;³ and neither he nor his officers can dispute the authority of the Court out of which it issues; but he or his officers are, at their peril, to execute the same, according to the command of such writ.⁴

If the defendant is already in custody, either upon a criminal sen-

⁵ *Leman v. Newnham*, 1 Ves. §§ 51, 53; *Belt Sup.* 42; *Adamson v. Blackstock*, 1 S. & S. 118.

⁶ For forms of indorsements, see Vol. III.

⁷ Ord. X. 10; *ante*, p. 462.

⁸ *Braithwaite's Pr.* 161.

⁹ *Smith v. Thompson*, 4 Mad. 179, *ante*, p. 465. For form of *præcipe*, see Vol. III.

¹⁰ Ord. XXX. 1.

¹¹ Ord. XXII. 2. Where the defendant is out of the jurisdiction the attachment need not be issued; see *Butler v. Matthews*, 19 Beav. 549; *Hodgson v. Hodgson*, 23 Beav. 604. In other cases an affidavit of due diligence to execute the attachment must be made.

¹ Ord. XII. 6.

² *Impey, Off. Sheriff*, 36. By 3 & 4 Will IV. c. 42, § 20, the sheriff of each county is required to name a deputy in London for the receipt of writs, granting warrants, making returns, and accepting rules and orders touching the execution of process. A delivery of a writ to this deputy is a delivery to the sheriff. *Chitty's Arch.* 16. A writ, if directed to the Sheriffs of London, is left at the Secondary's Office, Basinghall Street; and if to the Sheriff of Middlesex, it is left at his office in Red Lion Square.

³ *Impey, Off. Sheriff*, 45.

⁴ *Ib.* 33.

tence or civil process, no further arrest is necessary; but the sheriff must give notice of the attachment to the keeper or jailer in whose custody the defendant is.⁵

Although all writs and processes are ordinarily directed to the sheriffs, yet they never execute the same themselves, but the under-sheriffs usually make out their warrants to their bailiffs or officers for the execution of such writs; ⁶ and it is the duty of such bailiffs or other officers to execute such warrants according to their directions. These warrants must be made according to the nature of the writ, and contain the substance thereof, and be made out in the high sheriff's name, and under the seal of office.⁷

The warrant must be had before the arrest; or the arrest will be illegal, and the party aggrieved may have his action for false imprisonment, and the Court will direct the bail-bond to be cancelled.⁸ The warrant must be: "So that I may have his body before the Queen, in her Court of Chancery."

The bailiff or officer to whom the warrant is directed and delivered ought, with all speed and secrecy, to execute the same *according as it commands him; and he is bound to pursue the effect of his warrant.¹ The bailiff of a hundred may execute a writ out of the hundred where he is bailiff: for he is bailiff all the county over; ² it must, however, be within the county: for the sheriff's bailiwick extends no further.³ It seems, that an arrest may be by the authority of the bailiff, though his be not the hand that arrests, nor in sight, nor within any precise distance of the defendant: it is sufficient that he is arrested.⁴

An arrest on a Sunday is absolutely void.⁵ If, however, a defendant arrested on a Saturday escapes, he may be retaken on a Sunday: for that is not in execution of the process, but a continuance of the former imprisonment; ⁶ and it is said, that a person may be arrested on a Sunday on the Lord Chancellor's warrant, or an order of commitment for contempt: for he is considered as in custody from the time of making the order, and the warrant is directed to the jailer as in the nature of an escape warrant,⁷ under which it has been held, that a defendant may be retaken on the Lord's-day.⁸

The bailiff or other person to whom the execution of the process has been intrusted must, as soon as he has executed the warrant, return it,

⁵ See *ante*, p. 463.

⁶ Impey, Off. Sheriff, 59; Chitty's Arch. 609. For form of warrant, see Chitty's Forms, 350.

⁷ Impey, Off. Sheriff, 59. As to special bailiffs, see Chitty's Arch. 16, 609.

⁸ 4 Bac. Abr. 500; Hall v. Roche, 8 T. R. 187; Chitty's Arch. 610.

¹ Impey, Off. Sheriff, 45.

² *Ib.* 46.

³ Hammond v. Taylor, 3 B. & Ald. 408; Chitty's Arch. 612.

⁴ Blatch v. Archer, Cowp. 65; Chitty's Arch. 610.

⁵ 29 Car. II. c. 7, § 6; Chitty's Arch. 611.

⁶ Impey, Off. Sheriff, 61; Chitty's Arch. 611, n. (d); *ib.* 691.

⁷ *Ex parte* Whitechurch, 1 Atk. 55; see 1 Anne, st. 2, c. 6, § 1; and 5 Anne, c. 9, § 3, which enables the Judge of any Court out of which process has issued, by virtue of which a party has been committed to prison and escapes therefrom, to issue a warrant for his reaprehension; and see Bac. Ab. tit. Escape, E. 3; Chitty's Arch. 692.

⁸ Impey, Off. Sheriff, 61.

together with his answer to the same, to the sheriff: so that he may be ready to certify to the Court how, and in what manner, the warrant has been executed, when called upon.⁹

No arrest can take place under an attachment after the day of the return of the writ;¹⁰ and if the return is allowed to expire before any thing is done upon the writ, the plaintiff must sue out another attachment, but will, in such case, be allowed the costs of only one writ.¹¹ This, however, must be understood as applying only to cases where the first writ has not been delivered to the sheriff: for after delivery to the sheriff, the duty of executing it lies upon him, and he must make his return to the Court accordingly.

A sheriff or other officer employed to make an arrest under an *attachment cannot justify breaking doors in executing the pro- *468 cess;¹ and although the arrest is by a bailiff or other officer, it is considered as the act of the sheriff, who makes his return accordingly.

If the defendant is taken on an attachment for want of appearance or answer, he must either go to prison for safe custody, or put in bail to the sheriff: for the intent of the arrest being only to compel an appearance in Court at the return of the writ, or an answer to the interrogatories, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance or answer.² The sheriff, may, however, if he pleases, let the defendant go at large without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in Court.³

The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, to insure the defendant's appearance at the return of the writ: which obligation is called a bail-bond.⁴ The statute 23 Hen. VI. c. 9, having prescribed in what cases the sheriff may take a bail-bond in actions emanating from Courts of Law, and prohibited the taking a bond in all other cases, a doubt ap-

⁹ Impey, Off. Sheriff, 46.

¹⁰ *Ib.* 59.

¹¹ Harr. by Newl. 118. If the sheriff does not receive the attachment in time to arrest the defendant and bring him into the Court on the return day, at the place where the attachment is returnable, he should not arrest him thereon, but should return the process *tarde*. *Stafford v. Brown*, 4 Paige, 360. Where the sheriff neglected to serve an attachment, until it was too late for the defendant to appear at the time and place where it was returnable, the Court set aside the arrest of the defendant thereon. *Ibid.*

¹ See Chitty's Arch. 613.

² 3 Bla. Com. 290.

³ *Ibid.*

⁴ *Ibid.* Where an attachment is in the nature of mesne process, the sheriff may take bail for the party's appearance; and on a re-

turn *cepi*, the sheriff may be ordered to bring in the body; or he may sue on the bail-bond. Binney's case, 2 Bland, 99; Deakins's case, *ib.* 398.

In New Jersey, when an attachment for a contempt shall be served, the defendant shall be retained in custody thereon, to answer the exigency of the writ, until the return day thereof, unless he shall, with one sufficient surety, at least, give bond, in the penal sum of five hundred dollars to the plaintiff, conditioned for his appearance on the return-day of the attachment, according to the command of such writ, and that he will not depart thence without leave of the Court. Chancery Rule, 133.

[In Tennessee, the proceedings by attachment to compel an answer are regulated by statute. Code, § 4360 *et seq.*; Ch. Rule, VII.]

pears to have been raised whether the sheriff has or has not a right to take a bail-bond upon attachments issuing out of the Court of Chancery. But this question has been set at rest by the decision of the Court of Common Pleas, in *Morris v. Hayward*,⁵ by which it was determined, that a sheriff may take a bail-bond on an attachment out of Chancery, but that he is not compellable to do so; and that whether a bail-bond shall be taken or not is in the discretion of the sheriff, as regulated by the practice of that Court. The consequence is, that an action at Law will not lie against the sheriff, under the above-mentioned statute, for refusing to take bail from a defendant, arrested under an attachment issuing out of the Court of Chancery.⁶

The practice of the Court, however, seems to be, that where a party is taken upon an attachment for a contempt, he may, when the contempt is of a bailable nature, on payment of the costs, which
*469 are 13s. 8d., be admitted to bail, by entering into a bail-bond * to the plaintiff, to the amount of 40*l.* himself, with two sureties in 20*l.* each, to appear or answer, as the case may be, at the return of the writ.¹

It is to be observed, however, that a contempt in not paying costs, or in not obeying a decree or order, is not of a bailable nature; and that the sheriff cannot take bail to an attachment issued on that account.²

Where a sheriff, having taken a defendant into custody upon an attachment, takes bail for his appearance, he may assign the bail-bond to the plaintiff:³ who, if the defendant neglects to appear, or to put in an answer, may put the bail-bond in suit against him. If the attachment be for not answering, the plaintiff may also have a messenger into the county where the defendant lives, to arrest the defendant, and bring up his person to the Court; which is the more effectual way of proceeding.⁴ This, however, will not preclude him from bringing an action, at the same time, upon the bail-bond, against the defendant and his sureties: otherwise, the giving a bail-bond would be quite useless;⁵ and it is to be observed, that if an action is brought on the bail-bond, the defendant cannot obtain an order to restrain the plaintiff from proceeding in it, without first clearing his contempt.⁶

All processes against any person, directed to the sheriff, ought to be duly and truly executed, and returned into the Courts out of which they issued;⁷ and all returns, although made by the under-sheriff, yet must be made in the name of the high-sheriff, and his name must be put

⁵ 6 Taunt. 569; and see *Lewis v. Morland*, 2 B. & Ald. 56; *Chitty's Arch.* 1709.

⁶ *Studd v. Acton*, 1 H. Bla. 468.

¹ *Hinde*, 106.

² *Anon.* Prec. Cha. 331; *Cowdray v. Cross*, 24 Beav. 445. The liability of the sheriff for an escape, is the loss actually sustained; and the Court of Chancery will ascertain the amount. *Moore v. Moore*, 25 Beav.

⁸ 4 Jur. N. S. 250; see also *Sugden v. Hull*, 28 Beav. 263.

³ *Anon.*, 2 Atk. 507.

⁴ *Ibid.*; *Cowdray v. Cross*, 24 Beav. 445. This cannot be done where the attachment is to compel appearance. Ord. X. 10.

⁵ *Beddall v. Page*, 2 Sim. 224.

⁶ 1 Turn. & Ven. 115.

⁷ *Impey*, Off. Sheriff, 333.

thereto, or the return is void.⁸ The sheriff must also return truly, and not contrary to the record; if he does, he falsifies all his proceedings.⁹ If the sheriff takes the party to jail, he should lose no time in so doing: as otherwise, the time may expire within which the plaintiff is bound to bring up the defendant to answer his contempt.¹⁰

The return ought to be made before or upon the day of return named in the writ, if a day certain is named; but if the writ be returnable on a return day not certain, the sheriff need not return it till the *quarto post*.¹¹ An attachment returnable "immediately" should be returned as soon as it is executed; but it is in force till the last return of the Term following the *teste*.¹² If executed after *that time, *470 it is liable to be discharged for irregularity. The party prosecuting the contempt, however, is at liberty to call upon the sheriff, by an order, for his return to an attachment returnable immediately, on the fifth day after it is put into the sheriff's hands.¹

If the sheriff or other officer does not make his return of the writ directed to him, the Court may amerce him.² The amercements are commonly £5, and are to be levied by being estreated into the Exchequer, or by process, out of the Petty Bag, to the succeeding sheriff, to levy and pay them into the Hanaper; but it is usual to give the sheriff a day for that purpose; and if he do not by that time return the writ, the Court will set the amercement.³

The general course of proceeding, however, to obtain or compel the sheriff to return an attachment is as follows: The party prosecuting the contempt applies, in the first instance, to the under-sheriff, or deputy-sheriff,⁴ to make a return to the writ, and either to file it at the Record and Writ Clerks' Office, or to hand it to the applicant.⁵ If the return is not made, the party obtains an order of course, on motion, or petition at the Rolls, directing the sheriff forthwith to make the return.⁶ This order is served on either the sheriff, under-sheriff, or deputy-sheriff;⁷ and if it be not obeyed, the party obtains, on *ex parte* motion, an order *nisi*, that the sheriff do, in six days after personal notice of the order, return the writ, or, in default, stand committed.⁸ This order is served personally on the sheriff; and should the return still be withheld, an order absolute may be obtained, on *ex parte* motion, supported by affidavit of service of the order *nisi*, and of no return.⁶ Where,

⁸ Impey, Off. Sheriff, 334; Chitty's Arch. 619.

⁹ *Ibid*. [An officer's return in a proceeding in Chancery may be impeached. Leftwick v. Hamilton, 9 Heisk. 310.]

¹⁰ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 4; Ord. XII. 3.

¹¹ Makepeace v. Dillon, Fort. 363; Impey, Off. Sheriff, 333; Braithwaite's Pr. 289.

¹² Seton, 1231; Braithwaite's Manual, 199.

¹ Braithwaite's Pr. 289.

² Gilb. Form. Rom. 70.

³ Harr. by Newl. 118.

⁴ *Ante*, p. 466.

⁵ Braithwaite's Pr. 289.

⁶ Seton, 1231. In New York, the officer executing the attachment must return the same by the return day specified therein, without any previous order for the purpose. In case of default, an attachment may forthwith issue against the officer; which will not be bailable. *People v. Elmer*, 3 Paige, 85. But he may return the same at any time during the actual sitting of the Court on the return day thereof, unless he is specially directed by the Court to return it immediately.

⁷ *Ante*, p. 466, n. 2.

however, the first order limits a time for the sheriff to return the writ upon personal service of the order, it seems that he may be attached: in which case two subsequent orders are unnecessary.⁸

Where an attachment has been issued to the Chancellor of the county palatine of Lancaster or Durham, and he omits to return the writ, a peremptory order, which is obtainable on motion or petition of course, must be made upon him⁹ to return it within a certain number of *471 days after service of the order: upon which, if * he returns “that he hath sent his mandate to the sheriff, who hath not returned the same,” another peremptory order may be obtained, in like manner, to the sheriff, commanding him, within a certain number of days after service of the order upon his under-sheriff, to return the mandate.¹

Upon an attachment, there are three ordinary returns: (1.) If the defendant cannot be arrested, the sheriff returns: “The within-named A. B. is not found in my bailiwick;”² this is termed a *non est inventus*, and upon this return, further process of contempt is grounded. (2.) If the defendant is arrested, but the sheriff either accepts bail for his appearance or keeps him in his own custody, he returns: “I have attached the within-named A. B., as within I am commanded, whose body I have ready;” this is called a *cepi corpus*.³ (3.) If the sheriff arrests the defendant, and lodges him in jail, or, finding him there, lodges a detainer against him, he returns: “I have attached the within-named A. B., whose body remains in Her Majesty’s jail for my county of —, under my custody” (or as the case may be).⁴ Either of the two last mentioned returns, when made, puts an end to all the ordinary process;⁵ unless the defendant afterwards escapes or absconds, for in that case, the sergeant-at-arms may be sent, for the purpose of grounding a sequestration.⁶

If the writ is directed to the Chancellor of Lancaster, commanding him to issue his mandate to his sheriff to attach the party, the return is, that he has issued his mandate according to the terms of the writ, and that the sheriff has made the return to him of *non est inventus*, or as the case may be.

The costs of an attachment issued, but not executed, are 11s. 2d.; if executed, 13s. 8d.; and if issued against more than one party, 2s. 6d. is payable for each additional party.⁷

When the sheriff returns *non est inventus*, the plaintiff may, after the

It is therefore irregular to take out an attachment against him *ex parte* during the sittings of the Court on that day. *People v. Wheeler*, 7 Paige, 433. For forms of order, see Seton, 1230, Nos. 1, 2, 3; and for forms of motion paper, petition, and affidavit, see Vol. III.

⁸ Seton, 1231; Ord. XXIII. 10.

⁹ But where the order was erroneously made on the sheriff, it was held, that the sheriff must obey or move to discharge it; *Sugden v. Hull*, 28 Beav. 263.

¹ *Clough v. Cross*, 2 Dick. 555, 558.

² A return, that a defendant is not to be found, is bad. 5 Dowl. 451.

³ *Braithwaite's Pr.* 272.

⁴ *Id.* 281.

⁵ *Frederick v. David*, 1 Vern. 344; *Hinde*, 100.

⁶ See *Hook v. Ross*, 1 Hen. & M. 319, 320.

⁷ *Brown v. Lee*, 11 Beav. 379; *Braithwaite's Pr.* 154.

return day named in the attachment already issued, issue other attachments, for the purpose of obtaining the arrest of the defendant; but as he cannot obtain an order for a messenger, or for the sergeant-at-arms,⁸ and consequently cannot have a writ of sequestration, to compel appearance, there does not seem to be any case in which it will be for the plaintiff's interest to continue a compulsory process, after a return of *non est inventus*.

When the sheriff attached the party, and took bail for him, the old practice was for the plaintiff to move for a messenger to bring *up the defendant; but now, a messenger cannot be obtained to *472 compel appearance;¹ and it would consequently seem that, upon such return, the plaintiff has no other course open to him, except to enter an appearance for the defendant.²

When the sheriff actually arrests the defendant, and sends him to prison for want of appearance, the plaintiff cannot bring him to the bar of the Court; and the only course that appears to be open to him is, to enter an appearance for the defendant under the General Order;³ the provisions of the Act of 11 Geo. IV. & 1 Will. IV.,⁴ enabling the plaintiff to enter an appearance for the defendant, in such a case, being obsolete in practice, though not expressly repealed.⁵

The result, therefore, in every case where the plaintiff prosecutes the contempt for not appearing against the defendant, seems to be: that, if the defendant does not appear, the plaintiff has no other course than to enter an appearance for him; and as the defendant cannot be brought to the bar of the Court, he will, if arrested, be entitled to claim and obtain his discharge at the expiration of thirty days from the time of his being actually in custody or detained; or, if the last of thirty days shall happen out of Term, then, at the expiration of the first four days of the ensuing Term; and the plaintiff must bear the costs of the process of contempt.⁶ The consequence is, that, in practice, an attachment for want of appearance is very seldom issued: the plaintiff, almost invariably, on the time for the defendant appearing having elapsed, at once taking the course of entering an appearance for him, under the General Order.⁷

SECTION IV. — *Against particular Defendants.*

Having now considered the mode of compelling the appearance of a defendant upon whom service has been effected, and who is not entitled to any particular privilege, or under any peculiar disability, the next

⁸ Ord. X. 10.

¹ *Ibid.*

² Ord. X. 4; Braithwaite's Pr. 161.

³ Ord. X. 4; and see Ord. X. 10; Braithwaite's Pr. 280, 284; and *ante*, p. 460.

⁴ Cap. 36, § 11; and § 15, r. 13.

⁵ Braithwaite's Pr. 279; and see Fortescue v. Hallett, 3 Jur. N. S. 806, V. C. K.

⁶ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 5; Braithwaite's Pr. 279, 280.

⁷ Ord. X. 4.

point is, in what manner the appearance of persons so privileged or disabled can be obtained.

In the first place, if the Attorney-General, upon being served with a copy of the bill, does not appear, no personal process issues against him to compel him so to do; but if he will not appear, it seems that it would be considered as a *nihil dicit*.⁸

*473 * If the defendant claim the privilege of Peerage, and do not enter an appearance upon being served, in the manner before explained, with a letter missive and copies of the petition and bill,¹ he must be served with an indorsed copy of the bill; and if he do not then appear, an appearance may be entered for him, as in the case of an ordinary defendant, on an affidavit of both such services;² and the same may be done for a member of Parliament who has been served with a copy of the bill, and has neglected to appear himself.³

The mode of proceeding in these cases was formerly by sequestration;⁴ and it seems that this course is still open to the plaintiff, if he thinks fit to adopt it.

In order to obtain a sequestration against a peer of the realm, or bishop, an affidavit must be made of the service of the letter missive, and of the copy of the petition upon which it has issued, and also of the service of a plain and of an indorsed copy of the bill.⁵ Where the process is required against a member of the Commons' House of Parliament, the affidavit need only verify the service of the copy of the bill.⁶ An *ex parte* motion⁷ must then be made for a sequestration against the defendant's real and personal estate: which the Court orders *nisi*, that is, unless the defendant shall, within eight days after personal service of the order, show unto the Court good cause to the contrary.⁸ The defendant must be served personally with this order, and if he persist in refusing to appear, then an affidavit of service must be made, and counsel instructed to move to make the order absolute.⁹ It is to be observed, that where an order *nisi* for a sequestration against a peer or member of the House of Commons, for want of an answer, has been obtained, it is good cause to show against making such order *nisi* absolute, that the answer has been put in; but if exceptions have been taken to the answer, the time for showing cause will be enlarged, until it shall appear whether the answer is insufficient or not.¹⁰

⁸ *Barclay v. Russell*, 2 Dick. 729. As to the course, where he neglects to answer, see *post*, Chap. X. § 2.

¹ *Ante*, p. 446.

² For form of affidavit, see Vol. III.

³ *Braithwaite's Pr.* 29, n., 337; Ord. X. 4; *ante*, pp. 444, 460, 461.

⁴ Formerly, if a peer of the realm appeared and did not answer, an attachment lay; but now, by order of Parliament, no process lies but a sequestration. *Hinde*, 131.

⁵ For form of affidavit, see Vol. III.

⁶ *Ibid*.

⁷ For form of motion paper, see Vol. III.

⁸ *Hinde*, 81.

⁹ *Ibid*. For form of affidavit of service, and motion paper, see Vol. III.

¹⁰ *Butler v. Rashleigh*, 3 Atk. 740. From the observation of the reporter, appended to this case, it may be inferred that upon the authority of what the Registrar had said in Lord Clifford's case, 2 P. Wins. 385, Lord Hardwicke had allowed the cause shown, as being the course of the Court; but upon reference to the Registrar's book, where the order is entered under the title of *Butler v. Rashleigh*, it appears that the time for showing cause was enlarged till the next seal. *Reg. Lib.* 1750, A. 495, (b).

Personal service of the order *nisi* may be dispensed with in cases where the privileged defendant keeps within his own house, or is *surrounded by his servants to avoid service, or where the party *474 serving the process is denied access, and it is very difficult and almost impossible to serve the order personally. But to dispense with personal service, it is necessary to apply to the Court for leave to substitute a service in lieu of it: grounding such application upon a proper affidavit of the particular circumstances of the case; and the Court will, on such application, exercise a discretion, and make the order, if the facts stated in the affidavit are strong enough to warrant such a proceeding.¹ Thus, where a peer defendant avoided the service of an order *nisi* for a sequestration, the Court of Exchequer made an order that service thereof upon his clerk in Court, and at his dwelling-house, or, if no person should be met with there, by fixing a copy of the order on the door, should be good service.² In *Thomas v. Lord Jersey*,³ a bill was filed against Lord Jersey; upon which a letter missive, with a copy of the bill, was served on the defendant, by leaving it with one of his female servants at his residence in Berkeley-square. His Lordship was then abroad. On his neglecting to appear to the letter missive, a *sub-pœna* was served in the same way; and upon his non-appearance to that, an order *nisi* for a sequestration was issued: when, upon inquiry at his Lordship's house, it appeared that he was still abroad. Thereupon, on an affidavit being made of these facts, Sir Lancelot Shadwell V. C. directed that service of the sequestration *nisi* at his Lordship's town house should be good service; and upon a motion to discharge the V. C.'s orders, Lord Brougham refused the motion.⁴

It seems that the same course of proceeding in suing out and issuing the sequestration is observed, where it is sought against an officer of the Court, as in the case of peers;⁵ with the exception, that the affidavit upon which the order *nisi* is applied for must be confined to the service of the bill: there being no letter missive, as in the case of a peer.

The form of the sequestration issued against peers and other privileged persons is nearly the same as that issued in cases of contempt by ordinary persons, with the exception that it recites the order *nisi*, and the order for making it absolute.⁶

When the order for making the sequestration absolute is drawn up, passed and entered, the plaintiff's solicitor must make out the writ of sequestration.⁷ The Court will not discharge the writ till the party has appeared, and paid the costs of the process; when *he *475 has done so, he may move to discharge the sequestration, upon notice to the adverse party if it be executed.¹

¹ Hinde, 81. For form of motion paper, see Vol. III.

² Mackenzie v. Marquis of Powis, 19 May, 1739; 1 Fowl. Ex. Pr. 173.

³ 2 M. & K. 398; and see Sheffield v. Duchess of Buckingham, Reg. Lib. 1740, fo. 15, 26; 2 De G. & S. 456, n.

⁴ See Attorney-General v. Earl v. Stamford, 2 Dick. 744.

⁵ Corbyn v. Birch, *ib.* 635.

⁶ For form of writ, see Vol. III.

⁷ Ord. III. l.

¹ Hinde, 80; and see *post*, Chap. XXVI. § 7, *Enforcing Decrees and Orders*.

Upon the return of the sequestration against a defendant having privilege of Parliament, the Court may, on the motion or other application of the plaintiff, give him leave to enter an appearance for the defendant, under the stat. 11 Geo. IV. & 1 Will. IV.;² and such proceedings may thereupon be had as if the defendant had actually appeared;³ but this course of proceeding is, in practice, superseded by the General Order.⁴

In the case of infants and persons of unsound mind not so found by inquisition, it is provided by the General Order, that “where, upon default made by a defendant in not appearing to or not answering a bill, it appears to the Court that such defendant is an infant, or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the Court may, upon the application of the plaintiff, order that one of the solicitors of the Court be assigned guardian of such defendant, by whom he may appear to and answer, or may appear to or answer the bill and defend the suit.”⁵ But no such order shall be made unless it appears to the Court, on the hearing of such application, that a copy of the bill was duly served in manner provided by the stat. 15 & 16 Vic. c. 86, and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the bill, and at least six clear days⁶ before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such copy of the bill, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian of such infant;⁷ unless the Court, at the time of hearing such application, shall dispense with such last-mentioned service.”⁸ The plaintiff may, however, obtain an order, appointing a guardian of an infant, although no default has been made in appearing or answering.⁹

With reference to the service of the notice in the case of infants, it has been held that, where the infant’s father was dead, service *at the house of their mother and step-father was sufficient;¹ so also, service on the head of a college, of which the infant was an undergraduate, was held sufficient, where the plaintiff

² 11 Geo. IV. & 1 Will. IV. c. 36, § 12.

³ *Ibid.*

⁴ Ord. X. 4.

⁵ It has been usual to order the solicitor to the Suitors’ Fund to act upon occasions of this kind; see *Thomas v. Thomas*, 7 Beav. 47; *Sheppard v. Harris*, 10 Jur. 24, V. C. K. B.; *ante*, p. 162. As to the costs of the solicitor to the Suitors’ Fund, where so appointed, see Ord. XL. 4; and *Harris v. Hamlyn*, 3 De G. & S. 470; 14 Jur. 55; *Frazer v. Thompson*, 1 Giff. 337; 4 De G. & F. 659; *Robinson v. Aston*, 9 Jur. 224, V. C. K. B.; and see *ante*, p. 162, n. 10.

⁶ Sundays are included; see Ord. XXXVII. 11; and see *Brewster v. Thorpe*, 11 Jur. 6, V. C. E.

⁷ For form of affidavit of service, see Vol. III.

⁸ Ord. VII. 3. For form of order, see *Seton*, 1251; and for form of notice of motion, see Vol. III.

⁹ *Bentley v. Robinson*, 9 Hare Ap. 76.

¹ *Hitch v. Wells*, 18 Beav. 576; and see *Lane v. Hardwicke*, 5 Beav. 222; *Thompson v. Jones*, 8 Ves. 141.

could not learn where the infant's parents lived ;² and the general rule is, that notice should be served at the dwelling-house of the person in whose care the infant is.³

Where the infant has appeared, service on the solicitor who entered the appearance is sufficient.⁴

In the case of persons of unsound mind not so found by inquisition, the Court requires to be satisfied that no relative will undertake his defence, before appointing the solicitor to the Suitors' Fee Fund ;⁵ and where the defendant's family concur in applying for the appointment of some other person, whose fitness is shown by affidavit, the Court will appoint him.⁶

Any appearance entered at the instance of the plaintiff, for a defendant, who, at the time of the entry thereof, is an infant or a person of weak or unsound mind, unable of himself to defend the suit, is irregular and of no validity.⁷

If a married woman is made defendant jointly with her husband, and no appearance for her is duly entered by him or her,⁸ the plaintiff may, within three weeks after service, enter an appearance for her, as of course, upon an affidavit of service of the bill on the husband ;⁹ or where no order has been obtained by her to defend separately,¹⁰ the plaintiff may apply to the Court, on notice to the husband, for leave to issue an attachment against him ;¹¹ and where the husband is plaintiff in the suit, he may, if no appearance has been duly entered for her, enter such appearance, as of course, within three weeks after service of the bill on her, on an affidavit of such service ;⁹ or he may apply to the Court, by motion, on notice to her, for leave to issue an attachment against her.¹¹

* If a corporation aggregate is defendant, and due service of *477 the bill has been effected upon it, then, upon affidavit of such

² *Christie v. Cameron*, 2 Jur. N. S. 635, V. C. W.

³ *Taylor v. Ansley*, 9 Jur. 1055, V. C. K. B., and an affidavit not showing that this had been done was held insufficient, S. C. ; *O'Brien v. Maitland*, 10 W. R. 275, L. C. ; *Lambert v. Turner*, *ib.* 335, V. C. K. ; *Turner v. Sowdon*, 10 Jur. N. S. 1122 ; 13 W. R. 66, V. C. K. ; S. C. *nom.* *Turner v. Snowden*, 2 Dr. & Sm. 265 ; see as to service of notice, where infant out of the jurisdiction, *ante*, pp. 162, 452. [Where service could not be effected on an infant whose interest was merely reversionary, the bill was ordered to be amended by striking out his name as a defendant. *Blackmore v. Howett*, 30 L. J. 161.]

⁴ *Cookson v. Lee*, 15 Sim. 302 ; *Bentley v. Robinson*, 9 Hare Ap. 76 ; [*Ward v. Longsdon*, 9 Hare Ap. 26.] And the same rule doubtless applies to persons of unsound mind not so found.

⁵ *Moore v. Platel*, 7 Beav. 583 ; *Biddulph v. Lord Camoys*, 9 Beav. 548 ; [*McKeverakin v. Cort*, 7 Beav. 347 ; *Biddulph v. Dayrell*, L. J. Ch. 320.]

⁶ *Charlton v. West*, 3 De G., F. & J. 156 ; 7 Jur. N. S. 614 ; *Bonfield v. Grant*, 11 W. R. 275, M. R.

⁷ Ord. X. 5 ; see *Leese v. Knight*, 8 Jur. N. S. 1006 ; 10 W. R. 711, V. C. K. As to appointing guardians *ad litem* of infants and persons of unsound mind, see *ante*, pp. 160, 161, 176.

⁸ Ord. X. 3 ; *Steele v. Plomer*, 1 M'N. & G. 83 ; 2 Phil. 782, n. ; 13 Jur. 177 ; *Travers v. Buckley*, 1 Ves. S. 384, 386 ; 1 Dick. 138 ; *Braithwaite's Pr.* 321, and see *ante*, pp. 179-182.

⁹ Ord. X. 4 ; *Steele v. Plomer*, *ubi sup.* ; *Braithwaite's Pr.* 337. For the practice, and as to applications where the three weeks have expired, see *ante*, pp. 460-462 ; and for forms of affidavit and *præcipe*, see Vol. III.

¹⁰ *Ante*, p. 181.

¹¹ [*Ante*, 182.] Ord. X. 10 ; see *Leavitt v. Cruger*, 1 Paige, 421. For the practice, see *ante*, pp. 462, 564 ; and for forms of notice of motion, *præcipe*, attachment, and indorsement, see Vol. III.

service, an appearance may be entered for the defendant by the plaintiff;¹ or a writ of *distringas*,² instead of the writ of attachment, may, by leave of the Court, be issued³ by the plaintiff, directed to the sheriff, or other officer having jurisdiction in the district of the corporation, commanding him to distrain the lands and tenements, goods and chattels, of the corporation, so that it may not possess them till the Court shall make other order to the contrary; and that in the mean time he (the sheriff) do answer for what he so distrains: so that the defendant may be compelled to appear in Chancery, on the return of the writ, and answer the contempt.⁴ If to this writ the sheriff returns *nulla bona*, an *alias distringas*, which is a writ commanding the sheriff again to distrain the lands and tenements, goods and chattels, of the corporation, may be sued out; and if he returns *nulla bona* to this also, a *pluries distringas*, to the like purport may be issued.⁵

Each such writ must be prepared by the solicitor; a *præcipe* in duplicate must be produced to the entering clerk in the Registrar's office: who will retain one copy, and mark the other as entered, as before explained;⁶ and the writ will thereupon be sealed by the Record and Writ Clerk, upon the entered *præcipe* being filed with him.⁷ Upon sealing the *alias* or *pluries* writ, the previous writ, with the sheriff's return, must be filed or produced to the Record and Writ Clerk.⁸

The return days to be inserted in these writs, are the same as in the case of an attachment.⁹

If the sheriff returns "issues"¹⁰ to the first¹¹ or second *distringas*, or "issues" or *nulla bona* to the third, an order *nisi* for a commission of sequestration may be obtained against the corporation, on an *ex parte* motion by the plaintiff; and upon proof of due service of such order, and of continued default, such order will be made absolute, on a like motion.¹²

*478 * The commission is usually directed to four or more persons,¹ named by the plaintiff: directing them, or any three or two of them, to sequester the rents and profits of the real estate, and the goods and chattels and personal estate of the corporation, until they

¹ Ord. X. 4; Braithwaite's Pr. 337. For forms of affidavit and *præcipe*, see Vol. III.

² *McKim v. Odom*, 3 Bland, 407, 426; *Angell & Ames Corp.* § 667 *et seq.* In *Jones v. Boston Mill Corp.*, 4 Pick. 511, it was said by Parker C. J. that the Supreme Court of Massachusetts, as a Court of Equity, had authority to issue such processes against corporations as may be issued by the English Chancery Court, as *distringas*, sequestration, &c. And see *Holland v. Cruft*, 20 Pick. 321; *Grew v. Breed*, 12 Met. 363.

³ It is conceived that the writ would not now be issued without special order; and see Ord. X. 10.

⁴ *Hinde*, 140, 142.

⁵ *Seton*, 1227, 1261; *Braithwaite's Pr.* 194.

⁶ *Ante*, p. 465.

⁷ A fee of 5s. is payable on sealing each writ. Regul. to Ord. Sched. 4. For forms of these writs and *præcipe*, see Vol. III.

⁸ *Braithwaite's Pr.* 194.

⁹ *Ante*, p. 464.

¹⁰ If the corporation has property, the sheriff usually levies 40s. under the first writ; 4l. under the second; and the whole property of the corporation under the third. *Hinde*, 140.

¹¹ See *Lowton v. Mayor, &c.*, of Colchester, 3 Mer. 546, n.; *Seton*, 1227.

¹² *Seton*, 1227; *Braithwaite's Manual*, 61. For form of order, see *Seton*, 1261, No. 7; and see *post*, Chap. XXVI. § 7, *Enforcing Decrees and Orders*. For forms of motion paper, see Vol. III.

¹ It is not essential that the commissioners should be professional persons.

shall appear to the plaintiff's bill, or the Court make further order to the contrary. The commission is prepared by the plaintiff's solicitor; and will be issued by the Record and Writ Clerk, upon filing with him a *præcipe*, and producing the order directing the commission to issue.²

The return to a writ of sequestration is indorsed thereon;³ and upon such return being made, the party prosecuting the contempt, if he wishes to have another sequestration, or any further or other remedy, must apply, specially, to the Court.⁴ It is not the practice to file the return.⁵

A sequestration cannot be discharged till the corporation have performed what they are enjoined to do, and paid the costs of the several writs of *distringas*, and of the sequestration, including the commissioner's fees; but upon their doing this, they may, upon motion, get the sequestration discharged.⁶

By one or other of these forms of process, appearance may, in almost all cases, be compelled, after service of the copy of the bill has been effected; but as the plaintiff can himself enter an appearance for the defendant, that, as has been already observed,⁷ is the course which is usually adopted in practice; and it is rarely found desirable to carry out process of compelling appearance.

Moreover, the plaintiff may proceed in the suit, by delivering a copy of his interrogatories to a defendant who has made default in appearing.⁸

The affidavits filed for the purpose of proving the service of a copy of a bill upon any defendant must state when, where, and how the same was served, and by whom such service was effected.⁹

The plaintiff having duly caused an appearance to be entered for any defendant, is entitled, as against the same defendant, to the costs of and incident to entering such appearance, whatever may be the event of the suit; and such costs are to be added to any costs which the plaintiff may be entitled to receive from such defendant, or be set off against any costs which he may be ordered *to pay to *479 such defendant; but payment thereof is not to be otherwise enforced, without the leave of the Court.¹

The defendant, on the other hand, notwithstanding an appearance may have been entered for him by the plaintiff, may afterwards enter an appearance for himself in the ordinary way;² but such appearance, by such defendant, is not to affect any proceeding duly taken or any

² Braithwaite's Pr. 240. The writ must be engrossed on parchment, and bear a 20s. stamp. Regul. to Ord. Sched. 4. For forms of *præcipe*, commission, and indorsement, see Vol. III.

³ For form of a return *nulla bona*, see Vol. III.

⁴ Braithwaite's Pr. 291.

⁵ Goldsmith v. Goldsmith, 5 Hare, 123, 129; 10 Jur. 561.

⁶ Harr. by Newl. 150; Hinde, 143.

⁷ Ante, pp. 460, 472.

⁸ Ord. XI. 5; see *post*, p. 438.

⁹ Ord. X. 8; Davis v. Hole, 1 Y. & C. C. 440; 6 Jur. 335.

¹ Ord. XL. 15.

² See *post*, Chap. XIII., *Appearance*.

right acquired by the plaintiff, under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first appearance.⁸ A defendant cannot, however, take any proceeding in a cause until he has himself entered an appearance, notwithstanding the plaintiff has entered one for him.

⁸ Ord. X. 9.

INTERROGATORIES FOR THE EXAMINATION OF THE DEFENDANTS
IN ANSWER TO THE BILL.

FORMERLY, as we have already seen, a bill in Chancery contained an interrogating part, preceding the prayer, which consisted of a repetition of the stating and charging parts of the bill, in the form of questions to be answered by the defendants. This, as has been before observed, is by the late Act of Parliament directed to be omitted from the bill;¹ but, if the plaintiff desires to obtain discovery or admission from any defendant, he may file interrogatories for the examination of such defendant, within eight days from the time limited for the defendant's appearance.² If the defendant appears within the time limited, the plaintiff must deliver an office copy of the interrogatories to the defendant or his solicitor within eight days after such time;³ but if the defendant does not appear within the time allowed, the plaintiff may deliver the interrogatories at any time after the time allowed has expired, but before the appearance of the defendant, or within eight days after his appearance.⁴

The interrogatories must be filed within the time limited by the General Orders, notwithstanding that a demurrer may be pending.⁵

If the plaintiff allows the time for filing interrogatories to expire before he has filed them, he cannot file them without special leave, to be applied for in Court on motion, with notice, or in *Cham- *481
bers on summons.¹ In practice, the application is usually made

¹ 15 & 16 Vic. c. 86, § 10; *ante*, p. 356.

² 15 & 16 Vic. c. 86, § 12; Ord. XI. 2. This order applies to amended, as well as original bills. A defendant need not appear to an amended bill unless he is required to answer it; and the intention of the plaintiff to call for an answer is indicated by service of a duly sealed and *indorsed* copy of the amended bill; see Braithwaite's Pr. 328; Braithwaite's Manual, 159. The interrogatories may be filed with the bill: Braithwaite's Pr. 38; and a sealed copy may be served at the same time as a copy of the bill. *Leaman v. Brown*, 7 W. R. 322, V. C. K.; but in such case, the full time for appearing and for answering, namely, thirty-six days, must be allowed to expire before the attachment for not answering can be sealed. Braithwaite's Manual, 184; and see Cheesborough v. Wright, 28 Beav. 173; see Genl. Sts. Mass. c. 113, § 4; St. 1862, c. 40.

[Where, under the old practice, the interrogatories were annexed to the bill, they were regarded as incorporated in it. *Romaine v. Hendrickson*, 9 C. E. Green, 231.]

³ Ord. XI. 4. If a copy is left at the office of the solicitor by whom the defendant has entered an appearance, it is sufficient. *Bowen v. Price*, 2 De G., M. & G. 899, reversing, *ib.* 1 Drew. 307. The service is effected in the same manner as that of other documents which do not require personal service; see *ante*, p. 455.

⁴ Ord. XI. 5.

⁵ *Harding v. Tingey*, 10 Jur. N. S. 873, V. C. K.

¹ Ord. XI. 3; see for applications of this sort, *Empson v. Bowley*, 2 S. & G. Ap. 3; *Denis v. Rochussen*, 4 Jur. N. S. 298, V. C. W.; *Dakins v. Garratt*, *ib.* 579, V. C. K. As to filing separate sets, see *post*, p. 485.

on summons in Chambers;² and, as a general rule, the plaintiff will have to pay the costs.³ If the application is made before the time has expired, it should be that the time may be extended.⁴

In like manner, interrogatories cannot, without a special order, be delivered after the time limited for so doing has expired; but leave to deliver them after the time has elapsed, or for further time so to do where it has not, may in a proper case be obtained on summons at Chambers.⁴

The notice of motion or summons must be served on the defendants whom it is intended to interrogate, and who have appeared. The order, if made on motion, is drawn up by the Registrar; if made on summons, it is drawn up in Chambers; and where it extends the time to file, or gives leave to file interrogatories, it must be produced to the Record and Writ Clerk, at the time the interrogatories are presented for filing.⁵

Where the defendant is out of the jurisdiction, the Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is, or may probably be found, may order that a copy of the interrogatories may be served on such defendant in such place or country, or within such limits, as the Court shall think fit to direct: and such order must limit a time within which the defendant is to plead, answer, or demur, or obtain from the Court further time to make his defence to the bill.⁶ The application is made by *ex parte* motion or summons, supported by affidavit.⁷ The copies of the bill and interrogatories may be served together;⁸ and therefore, one application embracing both objects is ordinarily made.⁹

If the interrogatories cannot be served on a defendant, within the jurisdiction, in the ordinary way, an *ex parte* application for leave to substitute service may be made by motion, supported by affidavit, as in the case of an application to substitute service of a copy of the bill.¹⁰

Where the plaintiff in an original suit had neglected to file his interrogatories within the time limited, the plaintiff in a cross-suit, *482 *by being the first to file interrogatories, was held entitled to have his bill answered first.¹

The interrogatories are settled and signed by counsel;² and are required to be divided into paragraphs, and numbered in the form given

² Braithwaite's Pr. 36.

³ *Dakins v. Garratt*, 4 Jur. N. S. 579, V. C. K. For forms of notice of motion and summons, see Vol. III.

⁴ Ord. XXXVII. 17; see *Garwood v. Curteis*, 10 Jur. N. S. 199; 12 W. R. 509, V. C. W.; *Bignold v. Cobbold*, 11 Jur. N. S. 152, V. C. S. For form of order, see *Seton*, 1243, No. 3; and for form of summons, see Vol. III.

⁵ Braithwaite's Pr. 36.

⁶ Ord. X. 7 (1) (2); *ante*, p. 452.

⁷ For forms of motion paper, summons, and affidavit, see Vol. III.

⁸ *Leaman v. Brown*, 7 W. R. 322, V. C. K.

⁹ See *ante*, p. 451.

¹⁰ *Ante*, p. 449. For form of motion paper, see Vol. III.

¹ *Garwood v. Curteis*, 10 Jur. N. S. 199; 12 W. R. 509, V. C. W.

² Interrogatories are not specified in Ord. VIII. 1, among the documents requiring counsel's signature; but the form of interrogatories in Ord. Sched. B. assumes that the name of counsel will be attached.

in the General Orders, and the interrogatories which each defendant is required to answer must be specified in a note at the end.³

Where a written bill is allowed to be filed, on an undertaking that a printed bill shall be afterwards filed,⁴ interrogatories may be filed before the filing of the printed bill.⁵

Interrogatories are filed at the Record and Writ Clerks' Office;⁶ and they must be written on paper of the same description and size as that on which bills are printed;⁷ and be intituled in the cause, so as to be in strict agreement with the names of the parties as they appear in the bill, at the time the interrogatories are filed.⁸

The copies for service are prepared by the plaintiff's solicitor, but must be examined with the original, and the number of folios counted, by the Clerks of Records and Writs: who, if the copies are duly stamped and properly written, will mark them as office copies.⁹ The copy for service on any defendant should only contain the interrogatories which such defendant is required to answer.¹⁰ If the copies are intended to be served before appearance, a copy must be served on each defendant, in like manner as the copy of the bill is required to be served;¹¹ but if served after appearance, it is sufficient to serve one copy on each solicitor by whom an appearance has been entered, notwithstanding he may have appeared for more than one defendant.¹²

The interrogatories to be filed, and each copy for service, must be indorsed with the name and place of business of the plaintiff's solicitor, and of his agent, if any; or with the name and place of *residence of the plaintiff, where he acts in person; and, in *483 either case, with the address for service, if any.¹

Under the former practice it was held, that as the object of the interrogatories was to compel an answer to such facts only as were material to the plaintiff's case, it was necessary that every interrogatory should be founded upon statements made in the former part of the bill; therefore, if there was nothing in the prior part of the bill to warrant an interrogatory, the defendant was not compellable to answer it.² This practice was considered necessary for the preservation of form and order in the pleadings, and particularly to keep the answer to the mat-

³ Ord. XI. 1, and Sched. B. For forms of interrogatories and foot-note, see Vol. III.

⁴ See 15 & 16 Vic. c. 86, § 6; *ante*, p. 396.

⁵ *Lambert v. Lomas*, 9 Hare Ap. 29; 18 Jur. 1008.

⁶ Ord. I. 35. No fee is payable for filing. Braithwaite's Pr. 35.

⁷ Ord. 6 March, 1660, r. 16; as to such paper, see *ante*, p. 396. Dates and sums may be expressed by figures.

⁸ Braithwaite's Pr. 35.

⁹ Ord. XI. 4. The copies for service are usually written on brief paper. A fee of 5s. higher scale, or 1s. lower scale, is payable, in Chancery Fee Fund stamps, on marking

each office copy. Regul. to Ord. Sched. 4. The stamp is impressed on, or affixed to, such copy. A *præcipe* is required to be left; for form, see Vol. III.

¹⁰ Ord. XI. 4.

¹¹ See Ord. X. 1; *ante*, p. 442.

¹² Braithwaite's Pr. 37; but if he appears as properly concerned for one defendant, and as agent for another, two copies should be served; see *ib.* 308, n. Any copy sealed for delivery, may be re-sealed, at any time before delivery, and without further fee.

¹ Ord. III. 2, 5; *ante*, pp. 397, 453, 454. For form of indorsement, see Vol. III.

² *Attorney-General v. Whorwood*, 1 Ves. S. 534, 538.

ters put in issue by the bill;³ and it is conceived that this practice still continues. But a variety of questions may be founded on a single allegation, if they are relevant to it; thus, if a bill is filed against an executor for an account of the personal estate of his testator: upon the single allegation that he has proved the will, may be founded every inquiry which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required.⁴ This rule is stated and acknowledged by Lord Eldon, in *Faulder v. Stuart*,⁵ where a defendant declined, by his answer, to set forth the particulars of a certain consideration, which it was alleged in the bill the defendant pretended was paid by him for the purchase of a share in a newspaper, which was the subject of the litigation. His Lordship, upon the question of the sufficiency of the answer being argued before him, said, "It all depends upon this; whether there is such a charge in the bill, as to the payment of the consideration, as entitles the plaintiff to an answer, not only whether it was paid, but as to all the circumstances, when, where, &c. I have always understood that a general charge enabled you to put all questions upon it that are material to make out whether it was paid; and it is not necessary to load the bill, by adding to the general charge, that it was not paid, that so it would appear, if the defendant would set forth when, where, &c. The old rule was, that making that substantive charge, you may, in the latter part of the bill, ask all questions that go to prove or disprove the truth of the fact so stated."⁶

It is to be observed, however, that the interrogatories must, in all cases, be confined to the substantive case made by the bill, and
 *484 that the plaintiff cannot extend his interrogatories in * such a manner as to compel a discovery of a distinct matter, not included in that case; and therefore, where a bill prayed a discovery in aid of an action at Law under the Stock Jobbing Act,¹ as to an advance, by the plaintiff to the defendant, of a sum of money without legal consideration, which it was alleged in the bill was advanced as the premium for liberty "to put upon, deliver, or refuse stock," and in consideration of certain contracts relating to stock, which were void under that Act, and the defendant denied, by his answer, that the plaintiff did advance or pay to the defendant the sum mentioned, or any other sum, as the *premium*, &c. (as charged in the bill), to which answer an exception was taken, because the defendant had not negatived the receipt of the money in every way which had been suggested in the interrogatory: Lord Eldon overruled the exception, because the interrogatory pointed at a case within the fifth and eighth sections of the Act, in respect of which no bill of discovery was given by the Act,

³ 1d. Red. 45.

⁴ *Ibid.*

⁵ 11 Ves. 296, 301; see also *Muckleston*
v. Brown, 6 Ves. 52, 62.

⁶ 11 Ves. 301.

¹ 7 Geo. II. c. 8, repealed by 23 & 24 Vic
 c. 28.

whereas the allegations in the bill related to cases within the first section of the Act, in respect of which a right to file a bill of discovery was given by the second section.²

It may be noticed here that, in *The Attorney-General v. Whorwood*,³ where interrogatories in a bill were directed to particular facts which were not charged in the preceding part, and the defendant, though not bound to answer them, did so, and the answer was replied to: Lord Hardwicke held, that the informality in the manner of charging was supplied by the answer, and that the facts were properly put in issue; "for a matter may be put in issue by the answer as well as by the bill, and, if replied to, either party may examine to it."⁴

Although, upon the authority of the cases above cited, it appears that a plaintiff might formerly ask all questions necessary to make out a general allegation in the bill, yet, in point of fact, it was the common practice to make the interrogating part an exact echo of the stating and charging part of the bill. Now, however, this practice is not so strictly adhered to; for modern bills, being so much more concise than bills formerly were, it is often necessary or desirable, in the interrogatories, to inquire after particulars included in a general allegation in the bill. And it would seem that, to some extent at least, the old rule requiring an allegation in the bill, as a foundation of the interrogatories, has been relaxed: for it has been held, that a defendant may be interrogated as to books and papers, in his possession, relating to the matters in *question in the suit, although there is no alle- *485 gation in the bill that he has any.¹ This, it is conceived, would scarcely have been allowed under the former practice. It has also been determined that, under the new practice, it is not necessary to introduce in the bill allegations suggesting imaginary facts, in order to found an interrogatory; thus, when a bill alleged the existence of a mortgage, known to the plaintiff, but did not allege that there were others, an interrogatory whether there were others was allowed.²

Interrogatories to an amended bill should, in the case of original defendants from whom an answer is required, be confined to the parts added by the amendment, if the amendment is made after answer, or after the expiration of the time within which the plaintiff might have filed interrogatories to the original bill.³ Where, however, in such a

² *Bullock v. Richardson*, 11 Ves. 373, 375.

³ 1 Ves. S. 534.

⁴ *Ib.* 538.

¹ *Perry v. Turpin*, Kay Ap. 49; 18 Jur. 594; *Parkinson v. Chambers*, 1 K. & J. 72; *Mansell v. Feeney*, 2 J. & H. 313, 318; but the Court discourages exceptions to the answer, on the ground that the interrogatory as to books and papers is not sufficiently answered; such discovery being now obtainable in Chambers, under 15 & 16 Vic. c. 86, § 18; see *Law v. London Indisputable Company*, 10 Hare Ap. 20; *Barnard v. Hunter*,

1 Jur. N. S. 1065, V. C. S. [*Rochdale Canal Co. v. King*, 9 Hare Ap. 49, note; *Kidger v. Worswick*, 5 Jur. N. S. 37. Interrogatories as to particular documents must, however, be answered. *Catt v. Tourle*, 18 W. R. 966.]

² *Marsh v. Keith*, 1 Dr. & Sm. 342, 6 Jur. N. S. 1182; and see *Hudson v. Grenfell*, 3 Giff. 388; 8 Jur. N. S. 878; *Piffard v. Beeby*, L. R. 1 Eq. 621; 12 Jur. N. S. 117, V. C. K.

³ *Wich v. Parker*, 22 Beav. 59; 2 Jur. N. S. 582; *Denis v. Rochussen*, 4 Jur. N. S. 298, V. C. W.; *Drake v. Symes*, 2 De G.,

case, it is desired to interrogate the original defendants beyond the amendments, a special application for leave so to do must be made by motion or summons.⁴ In the case of new defendants, added by the amendments, the interrogatories may extend to the whole bill: the bill being, as to them, an original bill; but a new set of interrogatories must be filed, as the old interrogatories, if any, cannot be amended as to the new defendants.⁵ Where the plaintiff, having amended his bill after answer, filed interrogatories to the whole bill, they were, on the application of the original defendants, ordered to be taken off the file; but leave was given to file new interrogatories confined to the amendments;⁶ and where, after a defendant had put in a voluntary answer, the plaintiff amended his bill, it was held that he could only require an answer from such defendant to the amendments.⁷ A second set of interrogatories to the same bill may, if the time for filing interrogatories has not expired, be filed, without order, as against defendants who were not previously interrogated: for instance, if the plaintiff files interrogatories for the examination of two or more of several defendants, and afterwards desires to interrogate the other defendants to the same bill, he may file a second set of interrogatories for the examination of such other defendants.¹ If the time has expired, an order giving leave to file the second set of interrogatories is necessary.

If the interrogatories first filed have not been answered by any defendant, the plaintiff may, under an order, amend such interrogatories, so as to require an answer from such other defendants; but the order to amend must express the object; and the defendant as against whom the interrogatories were first filed, must be served with a copy of the interrogatories as amended.² And, generally, interrogatories may be amended under an order as of course, to be obtained on motion, or on petition at the Rolls, at any time before an answer is put in.³

If the plaintiff desires to waive an answer from the defendant, for whose examination interrogatories have been filed, but who has not answered them, he may, at any time before filing replication, or setting down the cause for hearing, obtain as of course, on motion, or on petition at the Rolls, an order to amend the interrogatories, by striking out so much of the heading, and of the note at the foot thereof, as requires an answer from such defendant;⁴ but if he has been served with a copy

F. & J. 81; Southampton Steamboat Company v. Rawlins, 10 Jur. N. S. 118, M. R.; 12 W. R. 285.

⁴ See *Denis v. Rochussen*, and *Southampton Steamboat Company v. Rawlins*, *ubi sup.*; see also *Attorney-General v. Rees*, 12 Beav. 50, 54.

⁵ *Braithwaite's Pr.* 310.

⁶ *Drake v. Symes*, 2 De G., F. & J. 81. For form of notice of motion in such case, see Vol. III.

⁷ *Denis v. Rochussen*, 4 Jur. N. S. 298, V. C. W.; *Wich v. Parker*, 22 Beav. 59; 2 Jur. N. S. 582; and see *post*, Chap. XVII.

§ 4, *Exceptions to Answer*.

¹ *Braithwaite's Pr.* 35.

² *Ibid.*; *Braithwaite's Manual*, 183.

³ *Braithwaite's Pr.* 309. For form of order on motion, see *Seton*, 1252, No. 2; and for forms of motion paper and petition, see Vol. III.

⁴ *Braithwaite's Pr.* 310, 311. Where the

of the interrogatories, his consent should be obtained; service of the interrogatories, as so amended, upon co-defendants who have answered is unnecessary.

When an order for leave to amend the interrogatories cannot, under the ordinary practice, be obtained as of course, the application for it must be made on summons at Chambers; if, however, the defendants will consent, it may be obtained on petition of course at the Rolls.⁵

Amendments of interrogatories are settled and signed by counsel; and the amendment is made in the same manner as in the case of bills.⁶ Thus, if the amendments exceed two folios of ninety words in any one place, a new ingrossment of the interrogatories must be made and filed; in other cases, the amendments will be made by the Record and Writ Clerk, on the draft, signed by counsel, and the order to amend, being left with him.⁷

An office copy of the interrogatories, as amended, must be served on each defendant who is required to answer them, or on his solicitor, if he has appeared by one. The service is effected in *the *487 same manner as service of the copy of the original interrogatories. A copy of the former interrogatories, which, though stamped for service, has not actually been served when they are amended, may be amended, re-examined, and restamped at the Record and Writ Clerks' Office for service, without further fee, on a *præcipe* for that purpose being left there.¹

Where the interrogatories are amended, each defendant previously served has his full time for answering again, from the date of the service of the copy of the amended interrogatories.²

The costs of preparing interrogatories, which have not been filed in consequence of admissions being subsequently entered into between the parties, will be allowed on taxations as between party and party.³

interrogatories do not extend to other defendants, the application should be to take them off the file. [And this application may be *ex parte*. Stephens v. Louch, W. N. (1860) 144; Hammond v. Hammond, 18 L. T. N. S. 553.] For forms of motion paper and petition, see Vol. III.

⁵ See Braithwaite's Pr. 310.

⁶ Ante, p. 422.

⁷ Braithwaite's Pr. 311. No fee is payable on amending interrogatories. *Ibid.*

¹ *Ibid.* For form of *præcipe*, see Vol. III.

² Braithwaite's Pr. 311. As to the time allowed to answer, see *post*, p. 488.

³ Davies v. Marshall, 1 Dr. & S. 564; 7 Jur. N. S. 669.

PROCESS TO COMPEL, AND PROCEEDINGS IN DEFAULT OF
ANSWER.

SECTION I. — *Against Defendants not privileged, nor subject to Disability.*

WHERE the plaintiff requires the defendant to put in an answer to the bill, whether original or amended, he must, as we have seen, file interrogatories for his examination; and the defendant must put in his plea, answer, or demurrer, not demurring alone, within twenty-eight days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer;¹ but where, using due diligence, he is unable to put in his answer within the time allowed, the Judge, on sufficient cause being shown, may enlarge the time, as often as he deems right, on such (if any) terms as to the Judge seem just.²

If the defendant does not answer within the time allowed, and procures no enlargement of the time, he is subject to the following liabilities:—

1. An attachment may be issued against him.³
2. He may be committed to prison, and brought to the bar of the Court.
3. The plaintiff may file a traversing note, or proceed to have the bill taken *pro confesso* against him.⁴

*489 * It may be remarked, that if the plaintiff has to give security for costs, the day on which the order to give security is served, and the time thenceforward until and including the day on which such

¹ Ord. XXXVII. 4.

² Ord. XXXVII. 8. The application for further time to answer is made on summons in Chambers; see *post*, Chap. XVII. § 3, *Answers*.

³ See *Matter of Vanderbilt*, 4 John. Ch. 58. If the plaintiff makes oath that a discovery is necessary, he is entitled to an order that the defendant answer the bill or be attached; and the Court will not, in that stage of the cause, inquire whether a discovery is necessary. *Stafford v. Brown*, 4 Paige, 360. A *subpœna* returnable on Sunday is irregular, and will not warrant the issuing of an attachment for disobedience thereof, as no Court can be held on that day

for any purpose. *Gould v. Spencer*, 5 Paige, 541.

⁴ This is the express provision of Art. 13 of the 16th Order of May, 1845; Sand. Ord. 983; 7 Beav. xxiii.; 1 Phil. lxviii.; but is omitted in Ord. XXXVIII. 4, corresponding to that Art., though retained in Ord. XXXVII. 6, corresponding to Art. 15 of the 16th Ord. This appears to be an accidental omission; but it is clear that the consequences, though not expressed in the General Order, of a defendant making default in answering, remain the same as before; see Ord. XII., XIII., and XXII. For table of process for want of answer, see *Seton*, 1267.

security is given, are not to be reckoned in the computation of the time¹ allowed the defendant for answering.

Where the defendant thus becomes liable to be attached, the plaintiff's solicitor may prepare a writ of attachment;² the indorsement of which states it to be for not answering.³ To procure the sealing of this writ, an affidavit of the service or delivery of the interrogatories must be produced to the Record and Writ Clerk;⁴ and a *præcipe* must be entered and left in the usual manner.⁵ The writ must be directed to the sheriff or other proper officer, and lodged with the under-sheriff, deputy-sheriff, or other proper person, as before explained.⁶ If the defendant is in prison, the writ must be lodged with the keeper as a detainer.⁷

When there is just reason to believe that any defendant means to abscond before answering the bill, the Court may, on the *ex parte* application of the plaintiff, at any time after an appearance has been entered for him by the plaintiff, order an attachment for want of answer to issue against him; and such attachment is to be made returnable at such time as the Court directs.⁸ Such application should be made by motion, supported by affidavit of the grounds for believing that the defendant means to abscond before answering, and by the Record and Writ Clerks' certificate of an appearance having been entered by the plaintiff.⁹

It is customary for the plaintiff's solicitor to write to the defendant's solicitor, calling for an answer, before the attachment is issued. The effect of such a letter is, that the plaintiff, on whose behalf it is given, precludes himself from issuing the attachment, until the defendant has had a reasonable time, either to put in his answer, or to obtain an order for further time so to do.¹⁰

An order for further time cannot, in strictness, be granted after an attachment; moreover, the writ is considered to issue the first moment of the day on which it is sealed and tested.¹¹ An attachment *is therefore regular, and not to be set aside, if sealed *490 before an order for further time has been obtained.¹ When an

¹ Ord. XXXVII. 14.

² See *ante*, p. 464.

³ For forms of attachment and indorsement, see Vol. III.

⁴ Braithwaite's Pr. 164. An attachment will be issued on an affidavit that the defendant's solicitor has admitted the delivery to him of the interrogatories. *Sidebottom v. Atkins*, 4 Jur. N. S. 942, V. C. S. If no appearance has been entered, an affidavit of the service of the bill is also necessary. Braithwaite's Pr. 165; and if the defendant has obtained an order enlarging the time to answer, it should be shown by the affidavit, or by an office copy of the order, that such time has elapsed. *Ib.* 164. For form of affidavit, see Vol. III.

⁵ *Ante*, p. 465. For form of *præcipe*, see Vol. III.

⁶ *Ante*, p. 466.

⁷ See *ante*, p. 466.

⁸ Ord. XII. 1. [The difference between the common attachment for failing to answer, which is here considered, and an extraordinary or special attachment for contempt, is noted in *Hazard v. Durant*, 11 R. 1. 195.]

⁹ For forms of affidavit and motion paper, see Vol. III.

¹⁰ *Barritt v. Barritt*, 3 Swanst. 395, 396; *Taylor v. Fisher*, 6 Sim. 566. These cases were before the abolition of the Six Clerks; but solicitors have adopted the practice.

¹¹ *Stephens v. Neale*, 1 Mad. 559; *Petty v. Lonsdale*, 4 M. & C. 545, 548; 3 Jur. 1186.

¹ *Kirkpatrick v. Meers*, 2 Sim. 16; *Taylor v. Fisher*, 6 Sim. 566. No service of an order for time is now necessary. 2 Smith's Pr. 131.

attachment has been issued, but has not been executed at the time an application for further time is heard, the plaintiff may consent to an order for further time being made, on the condition that the attachment is not to be thereby prejudiced; but such condition should appear by the order.

The sheriff may either return *cepi corpus*, attached and in prison, or *non est inventus*; ² and it will be convenient to consider, separately, the course to be adopted by the plaintiff, in respect of each one of such returns.

First: If the sheriff attach the defendant, and, taking bail, return accordingly, ³ the plaintiff is entitled, as of course, to move, upon production of the sheriff's return, for an order that the messenger attending the Court may apprehend the defendant, and bring him to the bar of the Court. ⁴ The order, when drawn up, is delivered by the Registrar to the messenger, who thereupon procures the Lord Chancellor's warrant to apprehend the defendant, and proceed to execute the same. If there is a vacancy in the office of messenger, the Sergeant-at-arms will be ordered to bring up the defendant. ⁵

If the plaintiff adopt this course, and the defendant is taken into custody by the messenger, the plaintiff must take care that the defendant be brought to the bar of the Court by the messenger, within ten days after he was so taken into custody, and within thirty days after his arrest by the sheriff: ⁶ otherwise, the defendant is entitled to his discharge, without payment of the costs of the contempt: which, in such case, are to be paid by the plaintiff. But where such defendant does not put in his answer within eight days after such discharge, the plaintiff may cause a new attachment to be issued against him, for want of his answer. ⁸

If the messenger finds the defendant in prison, he lodges the order and warrant with the keeper, as a detainer, and makes his return accordingly; whereupon the plaintiff may cause the defendant to be brought to the bar, under a writ of *habeas corpus*. ⁹

Where the messenger is unable to find the defendant, he makes a return to that effect; and the plaintiff may then obtain an order for the Sergeant-at-arms to apprehend the defendant.

Secondly: If the sheriff arrest the defendant, and commit him

*491 * to prison, or detain him if already in prison, and return accordingly, ¹ the plaintiff is entitled, upon production of the return, to an order for a writ of *habeas corpus cum causis* directed to the keeper of the prison, or other officer in whose custody the defendant is, com-

² For an explanation of these several returns, see *ante*, pp. 470, 471; and as to enforcing a return, see *ib.* p. 470.

³ As to bail, see *ante*, p. 468.

⁴ For form of Order, see Seton, 1260, No. 2; and for form of motion paper, see Vol. III.

⁵ *Maer v. Kensal*, 2 Sim. 16.

⁶ See *post*, p. 491.

⁷ Ord. XII. 2.

⁸ *Ibid.*

⁹ See *post*, p. 493.

¹ The practice here stated will also apply to a case where the keeper of a prison, in which the defendant is confined, certifies that the defendant is in his custody.

manding him to bring the defendant to the bar of the Court.² This order will be made on petition or motion, as of course.³ The writ will be sealed at the Record and Writ Clerks' Office, on production of the order; and must be made returnable on a day certain. Usually one of the days appointed for hearing motions is named; but if the plaintiff is limited in time, another day may be fixed.⁴

The defendant must be brought to the bar of the Court within thirty days after he is lodged or detained in prison under the attachment, or he will be entitled to his discharge, without paying the costs of contempt; which in such case will have to be paid by the plaintiff.⁵ But the plaintiff may, at the expiration of eight days after such discharge, issue fresh process, if the answer be not filed in the mean time.⁶ During vacation, the prisoner may be brought up to the private house of the Judge.⁷

In either of these cases, whether the defendant be brought to the bar of the Court by the messenger, or upon *habeas corpus* by the officer in whose custody he is, the defendant, if he persists in his contempt, will, upon motion of course by the plaintiff, be turned over to Whitecross Street Prison;⁸ or remanded to that prison, if already imprisoned or detained there.⁹ The plaintiff may then either press for an answer, or proceed to take the bill *pro confesso* against the defendant.¹⁰

If the plaintiff determines to press for an answer, he should move for an order that the defendant may remain in custody until he has answered the bill.¹¹ Notice of the motion should be served * on *492 the defendant;¹ and the order will be made, if the Court is satisfied that justice cannot be done to the plaintiff without an answer to the interrogatories from the defendant himself; and the order will not prejudice the plaintiff's rights to take the bill *pro confesso*.²

If the plaintiff determines to proceed to take the bill *pro confesso*

² For form of order, see Seton, 1262, No. 8. The plaintiff, instead of adopting this course, may serve notice of motion, under Ord. XXII. r. 1, to take the bill *pro confesso*, as hereafter explained; see *post*, p. 519.

³ For forms of petition and motion paper, see Vol. III.

⁴ Braithwaite's Pr. 224, 225; and see *post*, p. 492, n. 7. When the writ has been duly executed and returned, it should be filed in the Record and Writ Clerks' Office. *Oldfield v. Cobbett*, 2 Phil. 289. For forms of writ, indorsement, and *præcipe*, see Vol. III.

⁵ Ord. XII. 3.

⁶ *Ibid.* Vacations will be reckoned in computing the thirty days. *Fortescue v. Hallett*, 3 Jur. N. S. 806, V. C. K., where it was held, that the stat. 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 5, which allowed the plaintiff till the fourth day of the ensuing term, if the thirty days expire in vacation, is superseded by the General Order; see also *Flower v. Bright*, 2 J. & H. 590.

⁷ *Clark v. Clark*, 1 Phil. 116.

⁸ For form of order, see Seton, 1262, No. 10.

⁹ *Ibid.* No. 12.

¹⁰ The plaintiff may also, with leave of the Court, file an answer in the name of the defendant, under 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 11; see *post*, p. 472; but this course is practically abolished, as the plaintiff may file a traversing note; see *post*, p. 513.

¹¹ For form of order, see Seton, 1264, No. 14.

¹ *Aveling v. Martin*, 17 Jur. 271, L. J.L., overruling *Maitland v. Rodger*, 14 Sim. 92; 8 Jur. 371. For form of notice of motion, see Vol. III.

² 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 12; Braithwaite's Pr. 276; *Maitland v. Rodger*, *ubi sup.*; *Potts v. Whitmore*, 8 Beav. 317. If the defendant does not appear on the motion, an affidavit of service of the notice must be produced in Court; for form of affidavit, see Vol. III.

against the defendant, he must obtain an order for a writ of *habeas corpus*, directed to the keeper of the prison, commanding him to bring the defendant to the bar of the Court. This order is made on petition or motion as of course, supported by the order handing over or remanding the defendant back to the prison, and the keeper's certificate of his being in custody there.³ The application for the writ may be made as soon as the defendant is ordered to be committed or remanded back to prison;⁴ but there must be at least twenty-eight days between the day on which the defendant was committed or remanded back, and the return of the writ.⁵ The writ will be sealed at the Record and Writ Clerks' Office, on production of the order.⁶ On the return of the writ, the defendant is brought to the bar of the Court; and if he persists in his contempt, he will be remanded to prison, to remain there till he answer the bill and clear his contempt; and the bill will be ordered to be taken *pro confesso* against him at the hearing of the cause.⁷

It should, however, be mentioned here, that although the practice above stated may still be adopted, the General Orders have given the plaintiff an easier mode of obtaining an order to have the bill taken *pro confesso*, in the event of the attachment being executed upon the defendant.⁸

If the plaintiff resorts to the practice above stated, no time should be lost in these proceedings: for, unless the plaintiff, within six weeks after the expiration of two calendar months from the time the defendant was lodged or detained in prison, under the attachment, *493 obtain the order that the defendant remain *in custody until answer or further order, or that the bill be taken *pro confesso*, the defendant is entitled (upon application to the Court) to be discharged, without payment of any costs: unless the Court see good cause to detain him in custody.¹ Where, however, the plaintiff can show that an answer is necessary, the Court may refuse to discharge the defendant, although the plaintiff has neglected to obtain an order to detain him in custody.²

If the defendant, upon the return being made to the attachment by the sheriff, be in jail under sentence for a misdemeanor, he may be brought up before the Court by *habeas corpus* in the manner before explained;³ and thereupon he will be turned over *pro formâ* to White-

³ For forms of order, see Seton, 1263, Nos. 11 and 12; and for forms of petition and motion, see Vol. III.

⁴ *Simpson v. Barton*, 13 L. J. N.S. Ch. 79, M. R.

⁵ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 2.

⁶ Braithwaite's Pr. 224, 225. For forms of writ, indorsement, and *præcipe*, see Vol. III.; and see *ante*, p. 491.

⁷ For forms of order, see Seton, 1266, Nos. 5 and 6. Where, from pressure of business or other cause, the matter is not heard, the Court may direct a new writ of *habeas corpus*

to issue without payment of any fee; see Ord. XXX. 3. The direction, in such case, is signed by the Registrar, and indorsed on the order directing the former writ to issue. Braithwaite's Pr. 224.

⁸ Ord. XXII. 1. As to taking bills *pro confesso*, see *post*, Chap. XI.

¹ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 13. The two months and six weeks run in vacation. *Simmons v. Wood*, 2 Hare, 644.

² *Potts v. Whitmore*, 8 Beav. 317.

³ *Ante*, p. 491.

cross Street Prison; though actually carried back to the prison from whence he came. Thereupon, a second writ of *habeas corpus* issues, similar in all respects to that before mentioned, except in being directed to the jailer or keeper of the prison to which the defendant has been carried back. Upon the return thereof, the defendant is brought into Court, and remanded to the prison from whence he came, without being turned over again to Whitecross Street Prison; and the bill may be taken *pro confesso*, in the same manner in all respects as if the defendant had been all along in the custody of the keeper of the latter prison.⁴

Should it turn out that the defendant is under sentence for felony, there is apparently no power in the Court to order his removal until the expiration of the sentence;⁵ and consequently, in such a case, it seems that, previously to the General Order above referred to,⁶ no order to take the bill *pro confesso* could have been obtained, nor could any answer have been enforced as against a defendant in such a position.

There seems to have been some difference of opinion among the Judges, whether the 13th rule of the statute confers upon the defendant so absolute a right to his discharge that it cannot be waived by any act done by him either previously or subsequent to the expiration of the period specified. Sir Lancelot Shadwell V. C. decided,⁷ that an answer put in by a prisoner, when entitled to his discharge, inasmuch as it prevents the plaintiff from having the bill taken *pro confesso*, deprives the defendant of the right conferred upon him by the statute, of being discharged without payment of the costs of the contempt; and Sir James Wigram V. C.⁸ was of opinion, that an application for time to answer, made by the defendant prior to being entitled to his discharge, * and the acceptance of the time thereupon given, *494 prevented the operation of the statute, and placed the defendant in the situation he would have been in had its provisions never been enacted; whereas, according to Lord Langdale M. R.,¹ a defendant obtaining leave to answer, subsequent to the period when he becomes entitled to his discharge, has still a right to the benefit of the statute: which right he has neither power nor capacity to waive.

Thirdly: If the sheriff is unable to attach the defendant, and return accordingly, there are different modes whereby, under different circumstances, the plaintiff may proceed to take the bill *pro confesso*.

If an affidavit can be made, that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavoring to apprehend him under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued,

⁴ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 4: 5 & 6 Vic. c. 22, § 7; 25 & 26 Vic. c. 104, § 2; Braithwaite's Pr. 283.

⁵ Rogers v. Kirkpatrick, 3 Ves. 573.

⁶ Ord. XXII. 1.

⁷ Williams v. Newton, 11 Sim. 45.

⁸ Woodward v. Conebeer, 2 Hare, 506; 8 Jur. 642.

¹ Haynes v. Ball, 4 Beav. 101.

then, upon *ex parte* motion, supported by such an affidavit, and the sheriff's return, the plaintiff is entitled to a writ of sequestration.² But the affidavit must be precisely in the words, or at least go to the full extent, of the language just mentioned; and hence it is often impossible, from the conduct of the defendant, to frame an affidavit in the proper terms.³

Where such an affidavit can be made, another course for the plaintiff to adopt is, upon the sheriff returning *non est inventus*, to move, as of course, upon such affidavit, for the Sergeant-at-Arms to apprehend the defendant.⁴ If the Sergeant-at-Arms arrest the defendant, he must bring him to the bar of the Court within ten days thereafter. If he find him in prison, he lodges the order and warrant with the keeper as a detainer, and returns accordingly, then the same course, with respect to bringing the defendant to the bar of the Court, must be pursued, as if the defendant had been apprehended by the messenger, and within the same time.⁵ On the other hand, if the Sergeant-at-Arms return that the defendant cannot be found, so as to be apprehended, then, upon motion of course, supported by production of such return, the plaintiff is entitled to an order for a writ of sequestration.⁶

In either of the above cases, that is, whether the writ of *495 sequestration * is ordered upon motion, supported by the affidavit mentioned above, or upon a return of *non est inventus* by the Sergeant-at-Arms, it would seem that the plaintiff may at once obtain an order to take the bill *pro confesso*; which is granted on motion of course.

According to the old practice of the Court, independent of recent Statutes and Orders, an order to have the bill taken *pro confesso* was of course, upon the issuing of the writ of sequestration, even though it was not executed.¹ In consequence of this rule, it does not seem that it ever has been the ordinary practice to execute writs of sequestration upon *mesne process*; and an opinion appears at one time to have prevailed, that such an execution was irregular. The opinion seems to have arisen, in consequence of what was said by Sir Thomas Clarke M. R.,² in *Heather v. Waterman*,³ and *Vaughan v. Williams*,⁴ where he expressed an opinion, that when a bill had been taken *pro confesso*, on a sequestration for want of an answer, the execution of the sequestration was unnecessary and improper. These cases appear to have been

² Ord. XII. 6; Braithwaite's Pr. 287; see Seton, 1260, No. 1; and for forms of affidavit, motion paper, writ of sequestration, and *præcipe*, see Vol. III. [A sequestration will not be issued on an attachment returned before the return day. *Martin v. Kerridge*, 3 P. W. 241; *Re Brown*, 16 W. R. 962.]

³ *Storer v. Great Western Railway Company*, 1 Y. & C. C. 180.

⁴ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 1; Braithwaite's Pr. 286; but see Seton, 1260, No. 1. The order must be delivered to the Sergeant, or his deputy, by the Registrar.

Ord. XXX. 2. For form of motion paper, see Vol. III.

⁵ *Storer v. Great Western Railway Company*, 1 Y. & C. C. 180; Braithwaite's Pr. 286; *ante*, pp. 491, 492.

⁶ Braithwaite's Pr. 287. The return is filed at the Report Office. For form of order, see Seton, 1261, No. 4; and for form of motion paper, see Vol. III.

¹ Wyatt's Pr. 352; Harr. by Newl. 146.

² Misprinted "Sewell," in 1 Dick. 335.

³ 1 Dick. 335.

⁴ *Ib.* 354.

cited by Mr. Dickens, the Registrar, in the notes handed up by him to the Lords Commissioners of the Great Seal, in *Rowley v. Ridley*,⁵ in support of the distinction taken by him between sequestration in *mesne process* and for a duty, namely, that a sequestration in *mesne process* ought not to be executed; but upon reference to those cases, it appears that they go no further than to show that, when the plaintiff intends to proceed to have the bill taken *pro confesso* against the defendant, the execution of the sequestration is unnecessary, and therefore improper: because the object of executing the sequestration being merely to compel an answer from the defendant, the same purpose is effected by taking the bill *pro confesso* against him (by which process the plaintiff obtains the same decree that he would have been entitled to, had the defendant put in his answer and admitted the whole case made by the bill); and this being accomplished, the process drops as a matter of course, and the sequestrators become accountable, not to the plaintiff or the Court, but to the defendant.⁶

In fact, the practice appears to be that a plaintiff, upon obtaining a sequestration against a defendant for want of an answer, * has an option whether he will proceed to take the bill *pro con-* *496 *fesso*, or to compel an answer. If the circumstances of the case are such that justice can be obtained by taking the bill *pro confesso*, he ought not to cause the sequestration to be executed; but if his case is such that an answer from the defendant is necessary, he may. It should be observed, however, that the cases in which a plaintiff can have occasion to compel an answer from a defendant, instead of taking the bill *pro confesso* against him, are comparatively few, and are in general confined to bills of discovery, where the answer is wanted to be read at Law, or to obtain some admission from him on which to found some application to the Court; and that, unless in such cases, the proper course to adopt is that of taking the bill *pro confesso*. For these reasons, the writ of sequestration is very rarely executed, upon *mesne process*; and it will be more convenient to treat of the practice upon the execution of a writ of sequestration hereafter, in the section concerning the proceedings to enforce decrees.¹

If the plaintiff desires to take the bill *pro confesso* against a defendant who has not been arrested on the attachment, or by the Sergeant-at-Arms, his better course is to proceed as against an absconding defendant, under the General Order on the subject of taking bills *pro confesso*:² which will be considered in the next chapter.³

⁵ 2 Dick. 622. It appears from the statement of this case by Lord Redesdale, then the Solicitor-General, in *Simmonds v. Lord Kinnaird*, 4 Ves. 735, 739, that the case is erroneously reported; and in the note of the same case, in 3 Swanst. 306, n. (b), Lord Thurlow is reported to have said that he could see no foundation, either in the reason of the thing, or in the history of the Court, for supposing that a sequestration to compel an ap-

pearance or answer should not be executed. See also *Goldsmith v. Goldsmith*, 5 Hare, 129, 127; 10 Jur. 561.

⁶ See *Goldsmith v. Goldsmith*, 5 Hare, 123; 10 Jur. 561; from which case it appears that sequestration will be executed in a proper case.

¹ Post, Chap. XXVI. § 7.

² Ord. XXII.

³ Post, p. 518 *et seq.*

SECTION II. — *Against Particular Defendants.*

The course which has been stated, in the preceding section, is applicable to the case of an ordinary defendant, not possessed of any particular privilege, and not subject to any disability. It remains to consider the practice to be adopted, for the purpose of compelling an answer from defendants of particular descriptions.

First: If the defendant is privileged from arrest, either by right of peerage, or as a member of Parliament, and the bill is for relief: as soon as the time for answering has expired, the plaintiff, instead of issuing an attachment, may move, as of course, for a sequestration *nisi*, on an affidavit of the delivery of the interrogatories, and the Record and Writ Clerk's certificate that no answer thereto has been put in.⁴ The order must be served personally upon the defendant; and at the expiration of the time limited in such order *nisi* for showing cause,⁵ the plaintiff may move, as of course, to make the order absolute, upon *497 proof by affidavit of service of the *order *nisi*, and by the Record and Writ Clerk's certificate that no answer has been filed, and the Registrar's certificate that no cause has been shown.¹

Upon the order for the sequestration being made absolute, the plaintiff is entitled² to have the bill taken *pro confesso*, as in the case of unprivileged parties against whom sequestration has issued.³

If, however, the bill is for discovery,⁴ it is not necessary for the plaintiff to obtain a sequestration; but after the time for answering has expired, and an appearance has been entered by the defendant, or by the plaintiff on his default,⁵ the plaintiff may apply at once to have the bill taken *pro confesso*,⁶ and thereupon the Court is empowered to make an order, that the bill be so taken, unless the defendant shall, within eight days after being served with the order, show good cause to the contrary.⁷ The order is obtained on *ex parte* motion, supported by an affidavit of the delivery of the interrogatories, and the Record and

⁵ For form of order, see Seton, 1261, No. 5; and for forms of motion paper and affidavit, see Vol. III.

⁶ As to showing cause, see Magan v. Magan, 16 Jur. 587, V. C. K.

¹ Braithwaite's Pr. 297; see Matter of Vanderbilt, 4 John. Ch. 58. For form of order, see Seton, 1261, No. 6; and for forms of motion paper and affidavit, see Vol. III.

² Jones v. Davis, 17 Ves. 368; Logan v. Grant, 1 Mad. 626.

³ See *ante*, pp. 494, 495; and see Braithwaite's Pr. 297.

⁴ Jones v. Davis, *ubi sup.*; and see *post*, Chap. XXXIV. § 2, *Bills of Discovery*.

⁵ Either under 11 Geo. IV. & 1 Will. IV. c. 36, § 12, or Ord. X. 4-7, it would seem. Braithwaite's Pr. 298.

⁶ See O'Brien v. Manders, 2 Irish Eq. 39;

Wilson v. Shawe, Craw. & Dix, 62; Stafford v. Burn, 4 Paige, 560.

If a defendant, after appearing, will not answer, the bill will be taken *pro confesso*. Caines v. Fisher, 1 John. Ch. 8. And where the bill is for relief only, and states sufficient ground, the process for contempt to compel an answer is not necessary. *Ibid.* In New Jersey, a decree *pro confesso* may be taken at any time, after the time limited for the defendant to plead, answer, or demur, has expired. It may be taken without notice, and of course, unless it appear that some prejudice will thereby accrue to the adverse party. Oakley v. O'Neill, 1 Green Ch. 287; see Nesbit v. St. Patrick's Church, 1 Stockt. (N. J.) 76. [So in Tennessee, Code, § 4369; Anonymous, 1 Tenn. Ch. 2.]

⁷ 11 Geo. IV. & 1 Will. IV. c. 36, § 13.

Writ Clerk's certificate of default;⁸ and the order will be confirmed, in like manner as an order for a sequestration is made absolute.⁹ When such order has been pronounced, the bill, or an examined copy thereof, may be taken and read in any Court of Law or Equity as evidence of the same facts, and on behalf of the same parties, as could an answer admitting the contents of the bill.¹⁰

Where the Attorney-General, being a defendant to a suit, fails to answer within a reasonable time, an order may be obtained that he put in his answer within a week after service thereof; or in default, that, as against him, the bill may be taken *pro confesso*.¹¹

In the case of a corporation aggregate, not answering within the time limited, the plaintiff may issue the same writs of *distringas* successively, and in the same manner as it is before stated may be done to compel appearance;¹² and should the corporation stand out *process till the order absolute for sequestration issue, then the *498 plaintiff, upon obtaining such order, may move, as of course, to have the bill taken *pro confesso*.¹

Upon default made in answering by an infant defendant, or by a defendant of weak or unsound mind not so found by inquisition, the Court will, upon the special motion of the plaintiff, order a solicitor to be assigned guardian, by whom such defendant may answer the bill and defend the suit.² The practice as to this motion, and the affidavit required in support of it, are similar to the practice, before explained, in the case of default in appearance.³ Even when the infant is a married woman, a guardian must be appointed to put in an answer on her behalf.⁴ As we have seen, however, no answer should now be required from an infant defendant.

In general, when a husband and wife are made defendants to a cause, and no special order has been made with respect to the plaintiff's right to demand an answer, or affecting the liabilities of either husband or wife for not duly answering, the plaintiff is entitled to have their joint answer, within the ordinary period after service of the interrogatories; and in default of such joint answer being put in, the husband alone incurs all the ordinary consequences of contempt.⁵ Their respective

⁸ For forms of motion paper and affidavit, see Vol. III.

⁹ *Ante*, pp. 496, 497.

¹⁰ 11 Geo. IV. and 1 Will. IV. c. 36, § 14.

¹¹ *Groom v. The Attorney-General*, 9 Sim.

325. Now, however, it is unusual to ask for any answer from the Attorney-General. For form of motion paper, see Vol. III.

¹² See *ante*, p. 477; *McKim v. Odom*, 3 Bland, 407, 426.

¹ *Braithwaite's Pr.* 297. *Angell & Ames, Corp.* § 667 *et seq.* For form of order, see *Seton*, 1266, No. 4; and for form of motion paper, see Vol. III.

² *Ord.* VII. 3.

³ *Ante*, p. 475. Where the infant had appeared, service of the notice of motion on

the solicitor who had entered the appearance was held sufficient. *Cookson v. Lee*, 15 Sim. 302. In *Bentley v. Robinson*, 9 Hare Ap. 76, a guardian was appointed for an infant not in default, on the application of the plaintiff; no answer being required. Where the infant has already appeared by a guardian *ad litem*, the guardian may be proceeded against in the same manner as other persons, to compel an answer. 1 Hoff. Ch. Pr. 182.

⁴ *Coleman v. Northcote*, 2 Hare, 147, and cases cited, *ib.* 148, n.; 7 Jur. 523; and see *ante*, pp. 163, 183.

⁵ *Gee v. Cottle*, 3 M. & C. 180; *Steele v. Plomer*, 2 Phil. 782, n. (a); 1 M.N. & G. 83; better reported 13 Jur. 177; see *Metler v. Metler*, 4 C. E. Green (N. J.), 457; *Bird*

rights and liabilities are, however, often varied upon the application, either of the plaintiff, or of the husband, or the wife; and the circumstances under which such an application may be made to the Court, and the course of practice in relation thereto, have been fully explained in a former part of this treatise.⁶

When a husband is willing to answer jointly, it must not be supposed that the wife is bound to acquiesce in any answer the husband may please to put in; nor is the husband justified in * using menaces, to constrain her consent to an answer contrary to her belief: for such conduct, a husband is punishable as for a contempt, and the wife, thus conscientiously dissenting, may, upon application to the Court, obtain an order to answer separately.¹

The separate answer of a married woman cannot (except where her husband is a plaintiff)² be filed without a previous order for that purpose;³ nor can she be viewed as a substantial party to the suit, until such order be obtained; and she is entitled to compute the full time for answering from the date of the order allowing her to answer separately, without regard to any orders for time previously granted to her husband.⁴

Where an order for a married woman to answer separately has been obtained, the plaintiff may proceed to compel an answer by attachment; and this right would seem to exist in the plaintiff, whatever be the object of the suit, whether relating to the separate estate of the wife or not.⁵ The attachment will not, however, be issued without an order; which may be obtained on an *ex parte* motion,⁶ where the order to answer separately has been obtained by the married woman, but where it has been obtained by the plaintiff, or the husband, notice of the motion should, it seems, be given to her.⁷

Where the husband is positively unable to conform to the ordinary practice of putting in a joint answer, an order will be granted, upon his application, for him to answer separately, and he is then exonerated

v. Davis, 1 McCarter (N. J.), 477. The plaintiff may stipulate to receive the joint answer sworn to by the husband alone. *Leavitt v. Cruger*, 1 Paige, 422.

⁶ *Ante*, pp. 180, 181; see *Collard v. Smith*, 2 Beasley (N. J.), 45. If the wife be absent, the husband may obtain time to issue a commission to obtain the wife's oath to the answer, and if she refuse to answer, the bill may be taken *pro confesso* against her. *Leavitt v. Cruger*, 1 Paige, 422; *Ferguson v. Smith*, 2 John. Ch. 139. But in New Jersey, if the husband be served, and the wife be out of the State, it is necessary to have an order of publication against her, unless the husband appear for her. *Halst. Dig.* 170-174; *Chancery Rule*, 23.

¹ *Ex parte Halsam*, 2 Atk. 50; *ante*, p. 181.

² *Ante*, p. 182.

³ *Garvey v. Whittingham*, 1 S. & S. 163;

but no such order is necessary whenever the wife is to be considered as a *feme sole*; *ante*, p. 178.

⁴ *Jackson v. Haworth*, 1 S. & S. 161, *ante*, p. 183.

⁵ *Dubois v. Hole*, 2 Vern. 613; and see *Ottway v. Wing*, 12 Sim. 90; *Travers v. Buckley*, 1 Ves. S. 384, 386; 1 Dick. 138; *Kipp v. Hanna*, 2 Bland, 26.

⁶ *Thicknesse v. Acton*, 15 Jur. 1052, V. C. T.; *Home v. Patrick*, 30 Beav. 405; 8 Jur. N. S. 351; *Bull v. Withey*, 9 Jur. N. S. 594, V. C. S. For forms of motion paper and affidavit, see Vol. III.

⁷ *Graham v. Fitch*, 2 De G. & S. 246; 12 Jur. 833; *contra*, *Taylor v. Taylor*, 12 Beav. 271; and see *Bushell v. Bushell*, 1 S. & S. 164; and cases cited 12 Beav. 271, n. For form of order, see *Seton*, 1256, No. 7; and for forms of notice of motion and affidavits, see Vol. III.

from all liability for his wife's default; ⁸ but the motion for this purpose should be made before he is in contempt, as the Court will not, after he has made default, give him an indulgence to the prejudice of the plaintiff's interests. ⁹ To support such an application, the husband must show, by his own affidavit, that his wife lives apart, and that he has no influence over her, or otherwise prove his inability to answer for her. ¹⁰ Notice of the motion should be given to the plaintiff, and also to the wife. ¹¹ It seems, too, that the order ought to direct the wife to answer separately, * as well as the husband: otherwise the plain- *500 tiff may have to apply again, before he can bring the wife before the Court.

In all cases where the husband wishes to answer separately, an order to that effect ought in strictness to be obtained, before his answer is put in. There are cases, however, where he has answered separately without order, and then applied to the Court that he might not be liable to process, on account of his wife's default in answering; and the application being made before any notice of the irregularity in filing the answer, the Court has made the order. ¹ But such a course is irregular, and, upon motion of the plaintiff, the separate answer of the husband will be ordered to be taken off the file. ²

If the impossibility of obtaining a joint answer arises, not from the refusal of the wife, but from the lunacy of the husband, an order for the wife to answer separately will be made, upon a like application of the plaintiff. ³ In such a case, however, as well as in other cases where it appears to the Court that the defendant is a person of weak or unsound mind, not found such by inquisition, the Court may, upon the application of the plaintiff, appoint one of the solicitors of the Court guardian of the defendant, by whom he may appear to and answer the bill: ⁴ but, in such a case, no answer shall be required.

It now remains to be considered in what manner the Statutes and General Orders protect a defendant unable, from poverty, to put in an answer; and prevent a party, under such circumstances, being uselessly detained in custody.

If a defendant is brought up in custody for want of his answer, ⁵ and makes oath in Court, ⁶ that he is unable, by reason of poverty, to em-

⁸ *Garey v. Whittingham*, 1 S. & S. 163; *Braithwaite's Pr.* 165; see *Leavitt v. Cruger*, 1 Paige, 422.

⁹ *Gee v. Cottle*, 3 M. & C. 180, 182; *ante*, p. 498. For form of affidavit, see Vol. III.

¹⁰ *Barry v. Cane*, 3 Mad. 472; *ante*, pp. 177, 457.

¹¹ *Bunyan v. Mortimer*, 6 Mad. 278; *Garey v. Whittingham*, *ubi sup.* For form of notice of motion, see Vol. III.

¹ *Barry v. Cane*, *ubi sup.*; *Pavie v. A'Court*, 1 Dick. 13; *ante*, p. 180.

² *Gee v. Cottle*, *ubi sup.*; and see *Nichols v. Ward*, 2 M'N. & G. 140; *ante*, p. 177. For form of notice of motion, see Vol. III.

³ *Estcourt v. Ewington*, 9 Sim. 252; 2 Jur. 414.

⁴ Ord. VII. 3; *ante*, pp. 176, 475. A female defendant, unmarried, above *sixty years of age*, who had been deaf and dumb from her infancy, was admitted to appear and defend by guardian. *Markle v. Markle*, 4 John. Ch. 168. Where a lunatic has appeared by Committee, the practice to compel an answer by committee is the same as in case of other persons. 1 Hoff. Ch. Pr. 182.

⁵ *Ante*, pp. 490, 491.

⁶ The oath is administered by the Registrar; see 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 6.

play a solicitor to put in his answer, the Court, if not satisfied of the truth of that allegation, may direct an inquiry as to the truth thereof;⁷ and may appoint a solicitor to conduct such inquiry on the behalf of such defendant; and if it is ascertained, by means of such inquiry, or if the Court is satisfied without such inquiry,⁸ that such defendant is unable, by reason of poverty, to employ a solicitor to put in his answer, the Court may assign a solicitor and counsel for such defendant, *501 to enable him to put in *his answer.¹ It would seem, that the application must be made by the defendant, and not by the plaintiff.²

When an inquiry is thus directed, an order to that effect is drawn up;³ a certified copy of it is left at the chambers of the Judge to whose Court the cause is attached; and a summons to proceed on the inquiry is thereupon taken out,⁴ and served on the plaintiff's solicitor. On the return of the summons, an affidavit by the defendant of his poverty, or other evidence thereof, is adduced on his behalf;⁵ the plaintiff's counter evidence, if any, is heard; and the Chief Clerk makes his certificate of the result of the inquiry; which is afterwards completed in the ordinary way.⁶

If the certificate is in favor of the defendant, he may apply, by *ex parte* motion, that a counsel and solicitor may be assigned him to put in his answer, and defend the suit, *in formâ pauperis*.⁷ The counsel and solicitor to the Suitors' Fund are usually assigned him. The order may also direct a *habeas corpus* to issue, to bring up the defendant for the purpose of taking the bill *pro confesso*, in the event of the answer not being put in in the mean time.⁸ When the answer has been put in, the defendant may apply, on motion, supported by the Record and Writ Clerk's certificate of the answer being filed, that he may be discharged out of custody as to his contempt in not answering, and that the plaintiff's costs of such contempt may be paid out of the Suitors' Fund.⁹

Where, however, the defendant, though the certificate is in his favor, neglects to apply for the assignment of counsel and a solicitor,¹⁰ or

⁷ Pending the inquiry, it seems that time does not run against the plaintiff. *Potts v. Whitmore*, 8 Beav. 317, 319.

⁸ *Davies v. Nixon*, 11 W. R. 62, V. C. K.

¹ Ord. XII. 4; and see 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 6; see also 23 & 24 Vic. c. 149, § 4, which is in nearly the same words as Ord. XII. 4.

² See *Watkin v. Parker*, 1 M. & C. 370; *Garrod v. Holden*, 4 Beav. 245. These cases were, however, decided on the 6th Rule of 11 Geo. IV. & 1 Will. IV. c. 36, § 15. In *Bayly v. Bayly*, 11 Beav. 256, it was held, that the 7th Rule applied to a defendant defending in a representative character, after a successful inquiry under the 6th.

³ For form of order, see *Seton*, 1273, No. 12; and for form of order, without inquiry, *ib.* 1272, No. 11.

⁴ For form of summons, see Vol. III. By

Ord. XII. 5, notice in writing of the order, and of every summons to proceed thereon, must be served on the solicitor to the Suitors' Fund.

⁵ See *Williams v. Parkinson*, 5 Sim. 74, 75.

⁶ See *post*, Chap. XXIX., *Proceedings in the Judge's Chambers*. The solicitor to the Suitors' Fund usually conducts the inquiry on behalf of the defendant.

⁷ For form of motion paper, see Vol. III.

⁸ *Welford v. Daniell*, 9 Sim. 652.

⁹ For form of order, see *Seton*, 1273, No. 15; and for form of motion paper, see Vol. III. By Ord. XII. 5, notice in writing of the application must be served on the solicitor of the Suitors' Fund, two clear days at least before it is intended to be made.

¹⁰ *Tattershall v. Crampton*, cited *Seton* 1273.

where the Chief Clerk certifies that the defendant is not too poor to put in his answer, or where, by reason of the obstinacy of the defendant in withholding information as to his means, the inquiry has failed,¹¹ the plaintiff may move *ex parte*¹² * for a *habeas corpus* to bring *502 the defendant to the bar;¹ and on his being brought up, may apply to have the bill taken *pro confesso*; and an order may be made accordingly, in the manner before explained.²

In order to prevent the possibility of any prisoner being suffered to remain in neglected imprisonment, without reaping the benefit of the provisions above mentioned, for the relief of defendants whose only reason for non-compliance with the rules of the Court is poverty, it is enacted that, in the last week of each of the months of January, April, July, and October in every year, the solicitor to the Suitors' Fund for the time being, or some other officer of the Court of Chancery to be appointed by the Lord Chancellor from time to time, shall visit Whitecross Street Prison,³ and examine the prisoners confined there for contempt, and shall report his opinion on their respective cases to the Lord Chancellor; and thereupon it shall be lawful for the Lord Chancellor, if he shall think fit, to assign a solicitor to any such prisoner, not only for defending him *in formâ pauperis*, but generally for taking such steps on his behalf as the nature of the case may require; and to make all or any such orders as the Lord Chancellor was empowered to make, after the like report of a Master under the seventh rule of the 11 Geo. IV. & 1 Will. IV. c. 36, § 15.⁴

It is further enacted, that when any person shall be committed to any prison, other than Whitecross Street Prison,⁵ under any writ or order of the Court of Chancery, the jailer or keeper of the prison in which such person shall be confined shall, within fourteen days after such person shall have been in the custody of such jailer or keeper, make a report to the Lord Chancellor, containing the name and description of such prisoner, with the cause and date of his commitment, and a copy of the writ or order under which he was committed; and if such prisoner shall make oath, before one of the visiting Justices of such jail, or a commissioner for taking oaths in the Court of Chancery, that he is unable by reason of poverty to employ a solicitor, the report shall contain a statement to that effect; and it shall thereupon be lawful for the Lord Chancellor to direct the solicitor to the Suitors' Fund to ascertain the truth of such statement, and if true to take such * steps, *503

¹¹ Williams v. Parkinson, 5 Sim. 74.

¹² For form of order, see Seton, 1273, No. 14; and for form of motion paper, see Vol. III.

¹ As to the mode of issuing the writ, see *ante*, p. 491; and for forms of the writ, indorsement, and *præcipe*, see Vol. III.

² Bull v. Falkner, 11 Jur. 235, V. C. K. B. For form of order in such case, see Seton, 1273, No. 14; and see *ante*, p. 492.

³ Substituted for the Queen's Prison, by 25 & 26 Vic. c. 104, § 2.

⁴ 23 & 24 Vic. c. 149, § 2. For form of order, see Seton, 1272, No. 9; and see *ib.* 1284, No. 16. The solicitor to the Suitors' Fund is usually assigned the solicitor; and the counsel to that fund is usually assigned the defendant's counsel. The order may also be made by the Lords Justices. 25 & 24 Vic. c. 149, § 13; and it may be obtained on motion of course. Layton v. Mortimore, 2 De G., F. & J. 353; and see *ante*, p. 154.

⁵ See 23 & 24 Vic. c. 149, § 2.

on behalf of any such prisoner, as the nature of the case may require; and the Lord Chancellor may thereupon, if he shall see fit, make such order or orders as he is empowered to make under the second section of the Act, which is above set forth.¹

By the seventh rule of the 11 Geo. IV. & 1 Will. IV. c. 36, § 15, the Court is authorized to order that the costs of the contempt of any such prisoner shall be paid out of the Suitors' Fund,² and that any such prisoner, having previously done such acts as the Court shall direct, shall be discharged out of custody; but, if any such defendant become entitled to any funds out of the cause, the same are to be applied, under the direction of the Court, in the first instance to the reimbursement of the Suitors' Fund.³ Applications to the Court under these provisions must be made to the Lord Chancellor or Lords Justices;⁴ and as they are entirely framed for the relief of defendants, no such order can be made on the application of the plaintiff.⁵

It is also provided, that it shall be lawful for the solicitor to the Suitors' Fund, or other officer visiting the prison, to examine the prisoners and all other persons whom he may think proper, upon oath, and to administer an oath or oaths to any such prisoner and other persons accordingly, and to cause any officers, clerks, and ministers of any Court of Law or Equity to bring and produce upon oath before him any records, orders, books, papers, or other writings belonging to the said Courts, or to any of the officers within the same, as such officers.⁶

If it appears to the satisfaction of the Court, that any prisoner is an idiot, lunatic, or of unsound mind, the Court may appoint a guardian to put in his answer and discharge the defendant: providing for the costs as shall seem just: and if the Court shall see fit, the defence may be made by such guardian *in formâ pauperis*.⁷

The above provisions prevent the possibility of a defendant being detained in custody in consequence of his not being able, by reason of poverty, or of insanity or imbecility of mind, to put in his
*504 answer in the ordinary way. But it frequently happens * that a defendant is obstinate, and refuses either to appear or to put in his answer, although he has not the excuse of poverty or want of intellect to justify his refusal. In such cases, the plaintiff may obtain justice, in one or other of the modes above pointed out.

¹ 23 & 24 Vic. c. 149, § 5. The like order assigning a solicitor and counsel may be made in this case as under § 4, *ante*, pp. 500, 501; and by the Lords Justices, as well as by the Lord Chancellor. 23 & 24 Vic. c. 149, § 13. For form of order under § 5, see Seton, 1272, No. 10.

² And this may be done where the defendant is an executor. Bayly v. Bayly, 11 Beav. 256.

³ See also 23 & 24 Vic. c. 149, § 6, which contains similar provisions as to costs, and provides also that any costs to which the defendant may become entitled in the suit or proceedings, shall be paid into the Suitors'

Fund. For orders under these sections, see Seton, 1273, Nos. 15, 16. In Ward v. Woodcock, 5 L. T. N. S. 816, L. C., an order for payment of the plaintiff's costs of defendant's contempt, in disobeying an injunction, was refused.

⁴ 23 & 24 Vic. c. 149, § 13.

⁵ Watkin v. Parker, 1 M. & C. 370; Garrod v. Holden, 4 Beav. 245; *ante*, pp. 500, 501, note.

⁶ 23 & 24 Vic. c. 149, § 3.

⁷ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 9. As to the appointment of guardians *ad litem*, and as to defending in *formâ pauperis*, see *ante*, pp. 154, 155, 176.

SECTION III. — *Effect of a Contempt upon the Proceedings in the Cause*

Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of the Court, he places himself in this further predicament; *viz.*, that of not being in a situation to be heard, in any application which he may be desirous of making to the Court.¹ Lord Chief Baron Gilbert lays it down, that “upon this head it is to be observed, as a general rule, that the contemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt, and paid the costs: as, for example, if he comes to move for any thing, or desires any favor of the Court.”² Thus, in *Lord Wenman v. Osbaldiston*,³ where a defendant, being in contempt for not putting in his examination pursuant to an order, to avoid a sequestration moved the Court that, upon his undertaking to pay in a week’s time what should appear to be due to the plaintiff, all further process of contempt should be stayed, the Court declined making any order upon the motion, but directed the appellant to clear his contempt, and then move; and this determination of the Court was affirmed by the House of Lords, upon appeal.

But where, after a petition had stood over at the request of the respondent’s counsel, for his convenience, the petitioner incurred a contempt, which had not been cleared when the petition came on again, it was held, that the petitioner was, nevertheless, entitled to be heard;⁴ and, it seems, that a party who is in contempt for *non- *505 payment of costs, is not thereby prevented from moving for leave to defend *in formâ pauperis*.¹

The rule, that a party in contempt cannot move till he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily, and asks for an indulgence; and, therefore, a defendant cannot object to a cause being heard because the plaintiff is in contempt.²

¹ Where a party is in contempt, the Court will not grant an application in his favor, which is not a matter of strict right, until he has purged his contempt. *Johnson v. Pinney*, 1 Paige, 466; *Rogers v. Paterson*, 4 Paige, 450; *Ellingwood v. Stevenson*, 4 Sandf. Ch. 366. He will not be allowed to contradict the allegations in the bill, or bring forward any defence, or allege any new fact. *Mussina v. Bartlett*, 8 Porter, 277; *Saylor v. Mockbie*, 9 Iowa (1 With.), 209. Nor is he allowed to appear and contest the plaintiff’s demand, before the Clerk and Master, to whom the bill may be referred to take an account; but the inhibition can at any time be removed by filing a full and complete answer. *Mussina v. Bartlett*, 8 Porter, 277; see *Rutherford v. Metcalf*, 5 Hayw. 58. A defendant, against whom there is *prima facie* evidence of being guilty of a breach of an injunction, cannot be heard upon a

motion to discharge a *ne exeat* against him in the same cause, until he has purged himself of the contempt. *Evans v. Van Hall*, 1 Clarke, 223. A party in contempt may move by counsel to set aside the order against him; for every other purpose he must appear *in vinculis*. *Odell v. Hart*, 1 Moll. 492; see *Lane v. Ellzey*, 4 Hen. & M. 504.

² *Gilb. For. Rom.* 102; *Vowles v. Young*, 9 Ves. 172, 173.

³ 2 Bro. P. C. ed. Toml. 276; 2 Eq. Ca. Ab. 222, Pl. 1.

⁴ *Bristowe v. Needham*, 2 Phil. 190; 1 C. P. Coop. t. Cott. 286.

¹ *Oldfield v. Cobbett*, 1 Phil. 613, 614.

² *Ricketts v. Mornington*, 7 Sim. 200; and see the cases on this subject collected in 1 C. P. Coop. t. Cott. 208; see also *Futvove v. Kennard*, 2 Giff. 110; *Fry v. Ernest*, 9 Jur. N. S. 1151; 12 W. R. 97; V. C. W.; *Story v. Official Manager of the National Insurance*

In like manner it has been held, that a mortgagor, defendant to a bill of foreclosure, who is in contempt, could not move, under the 7 Geo. II. c. 20, for a reference to take an account of the principal and interest due upon the mortgage.³ And so, where a party in contempt had applied for and obtained the costs of an abandoned motion, under Lord Eldon's order,⁴ Sir Lancelot Shadwell V. C., upon motion, discharged the order.⁵

So also, where a motion had been refused with costs, it was held, that the motion could not be renewed, though on different grounds, until the costs had been paid.⁶

It is to be observed, however, that the rule, that a party cannot move till he has cleared his contempt, is confined to proceedings in the same cause; and that a party in contempt for non-obedience to an order in one cause, will not be thereby prevented from making an application to the Court in another cause relating to a distinct matter, although the parties to such other cause may be the same;⁷ and this privilege has been carried to the extent of allowing a defendant, in each of two creditors' suits to administer the same estate, to move in one of them, in which he was not in contempt, to stay proceedings in the other, in which he was.⁸

And although it is the general rule of the Court that parties must clear their contempt before they can be heard, yet the rule must not be understood as preventing their making application to the Court to discharge, on the ground of irregularity, the order, by their non-obedience to which their contempt has been incurred; therefore, where a defendant, in custody for a contempt in not obeying an order to pay in money, applied to the Court to discharge him out of custody, on the ground of irregularity in the order (it having been made pending an abatement of the suit), he was not only heard, but the order for his discharge was made: though, under the circumstances, without costs.¹ In such cases, it is to be observed that, in making his application, the party in contempt ought to confine his motion to the object of getting rid of the order of which he complains; and that if he embraces other matters in his notice of motion, he will not be allowed to

Society, 2 N. R. 351, V. C. W. [A plaintiff in contempt is entitled to prosecute his suit, and to make use of the process of the Court for that purpose. *Wilson v. Bates*, 3 M. & C. 197, 204. He may obtain an order to amend his bill. *Chatterton v. Thomas*, 36 L. J. Ch. 592. So, a defendant in contempt is entitled to take any measure necessary for his defence. *Fry v. Ernest*, 12 W. R. 97. He is therefore entitled to the production of documents. *Haldane v. Eckford*, L. R. 7 Eq. 425. And to appeal. *Hazard v. Durant*, 11 R. I. 195.]

³ *Hewitt v. McCartney*, 13 Ves. 560.

⁴ Gen. Ord. 5 Aug., 1818; Sand. Ord. 706; Beav. Ord. 3, now Ord. XL 23.

⁵ *Ellis v. Walmsley*, 4 L. J. Ch. 60; S. C. *nom. Ellice v. Walmsley*, 1 C. P. Coop. t. Cott.

207, where the cases are collected as to the proceedings, for his own advantage, which a party in contempt cannot take.

⁶ *Oldfield v. Cobbett*, 12 Beav. 91, 95.

⁷ *Clark v. Dew*, 1 R. & M. 103, 107; *Gompertz v. Best*, 1 Y. & C. Ex. 619; *Taylor v. Taylor*, 1 M. & G. 397, 409; 12 Beav. 220, 228; *Fry v. Ernest*, 9 Jur. N. S. 1151; 12 W. R. 97, V. C. W.

⁸ *Turner v. Dorgan*, 12 Sim. 504; 6 Jur. 356; *Morrison v. Morrison*, 4 Hare, 590; 9 Jur. 103; 1 C. P. Coop. t. Cott. 215, 217.

¹ *Wilson v. Metcalfe*, MSS. In matters of contempt, exceptions may be taken on the question of jurisdiction, where it is distinctly raised and adjudicated upon as matter of law. *Androsoggin and Kennebec R.R. Co. v. Androsoggin R.R. Co.*, 49 Maine, 392.

go into into such other matters till he has shown that the order upon which his contempt has been incurred was irregular.²

A plaintiff is entitled to sue out an attachment against a defendant for want of answer, although he is himself in custody for a contempt in non-payment of costs to him.³

It is also to be observed, that the circumstance of a party being in contempt, will not prevent his being heard in opposition to any special application which the other side may make, upon notice duly served upon him; and where a plaintiff had obtained, from a Vice-Chancellor, an order for payment of a sum of money into Court, against a defendant, who was in contempt, the Lord Chancellor allowed him to move to discharge that order, on the ground that it was a rehearing of the original application.⁴ So also, where there is any irregularity in the prosecution of the decree or order obtained under the contempt, a party in contempt may be heard to obtain redress.⁵

Although a party cannot move until he has cleared his contempt, yet he may give notice of his motion before he has done so;⁶ and a party to whom costs are awarded, may proceed in the taxation, notwithstanding he may be in contempt.⁷

Although a defendant, not appearing or answering within the regular time, is frequently said to be in contempt, yet it does not seem that the contempt is actually incurred until the writ enforcing obedience to the orders of the Court has been sealed. Thus, after the regular time for answering has expired, provided no attachment has issued against a defendant, he may file a joint demurrer and answer:⁸ which, had process actually commenced, might have been taken off the file for irregularity.⁹

* It seems, that a party in contempt can apply for the purpose *507 of removing scandal from the records of the Court.¹ Although it was held by Lord Cottenham, in *Wilson v. Bates*,² that a plaintiff in contempt is not precluded from availing himself of the ordinary process to enforce an answer, it appears that the fact of his being in con-

² *Ibid.*; 1 C. P. Coop. t. Cott. 216; 4 Hare, 595.

³ *Wilson v. Bates*, 9 Sim. 54; 2 Jur. 107; 3 M. & C. 197, 204; 2 Jur. 319; and see 1 C. P. Coop. t. Cott. 220, where the cases are collected as to the proceedings, for his own advantage, which a party in contempt may take. [And see *Freese v. Swayze*, 11 C. E. Green, 437. See *ante*, 505, n. 2.]

⁴ *Parker v. Dawson*, 5 L. J. Ch. 108; see also *Ex parte Chadwick*, 15 Jur. 597, V. C. K. B.: *Reeve v. Hodson*, 10 Hare Ap. 41; *Bickford v. Skeeves*, 10 Sim. 193, 196; S. C. *nom.* *Bickford v. Skewes*, 3 Jur. 818; *Futvoye v. Kennard*, 2 Giff. 110.

⁵ *King v. Bryant*, 3 M. & C. 191, 195; 2 Jur. 106.

⁶ *Chuck v. Cremer*, 1 C. P. Coop. t. Cott. 247.

⁷ *Newton v. Ricketts*, 11 Beav. 67.

⁸ *East India Company v. Henchman*, 3 Bro. C. C. 372; *Sowerby v. Warder*, 2 Cox, 268.

⁹ *Curzon v. De la Zouch*; 1 Swanst. 185; 1 Wils. C. C. 469; see also *Attorney-General v. Shield*, 11 Beav. 441, where it was held, that taking an office copy of the answer was not a waiver of the objection. But if the plaintiff retain the office copy till the time for pleading to the answer for insufficiency has elapsed, the contempt will be waived. *Herrett v. Reynolds*, 2 Giff. 409; 6 Jur. N. S. 880.

¹ *Everett v. Prythergh*, 12 Sim. 363; *Cattell v. Simons*, 5 Beav. 396; *Ayck. Ch. Pr.* (Lond. ed. 1844) 197, 198; 1 *Smith, Ch. Pr.* (2d Am. ed.) 569, 570; *Howard v. Newman*, 1 Moll. 221.

² 3 M. & C. 197, 204; 2 Jur. 319; see also *Bickford v. Skewes*, *ubi sup.*

tempt may be made the ground of a special application by the defendant to stay proceedings in the cause, until such contempt has been cleared.³ And in general, whenever a party in contempt is entitled to be heard, there exists a right of appeal, and applications may be made with immediate reference to the motion upon which he is so privileged to be heard, or for the purpose of obtaining evidence in support of it.⁴

SECTION IV.—*In what manner Contempts in Process may be cleared, waived, or discharged.*⁵

An ordinary contempt in process, as it is a matter merely between the parties, may be cleared by the contemnor doing the act, by the non-performance of which the contempt was incurred, and paying to the other party the costs he has occasioned by his contumacy.

Where process has been issued against a defendant in contempt for want of appearance or answer, but has not been executed, the defendant should enter his appearance or put in his answer, and pay or tender to the plaintiff's solicitor the costs of the contempt, if the amount of such costs can be liquidated: as in the case of an attachment;⁶ but if the amount of the costs cannot be ascertained, he should tender such a sum as will cover their probable amount.⁷ If the plaintiff's solicitor accept the costs so tendered, it will be at the plaintiff's own risk if he afterwards puts the process into execution. If his solicitor refuse to accept the costs when tendered, it is necessary, in order that the defendant may, upon payment or tender of the plaintiff's costs of the contempt, be discharged from his contempt, that he should
*508 obtain an order for that purpose: * otherwise, the contempt will continue.¹ An order of this nature is made on motion of course, or on petition of course at the Rolls,² upon the Record and Writ Clerk's certificate of the defendant's appearance or answer.³

Where the process has been carried into effect, and the defendant is in actual custody, he cannot be discharged without an order: which must be obtained in a similar manner,⁴ and which will direct the defendant to be discharged, upon payment or tender of the costs of the

³ *Bradbury v. Shawe*, 14 Jur. 1042, V. C. K. B.; *Futvoye v. Kennard*, *ubi sup.* For form of notice of motion in such case, see Vol. III.

⁴ *Cattell v. Simons*, *ubi sup.* [*Hazard v. Durant*, 11 R. I. 195.]

⁵ See *Lowe v. Blake*, 3 Desaus. 269; *Snel-ling v. Watrous*, 2 Paige, 314.

⁶ *Wilkin v. Nainby*, 4 Hare, 473, 475; 10 Jur. 735. The amount payable to clear a contempt, on an attachment executed, is 13s. 8d.: *Brown v. Lee*, 11 Beav. 379; if not executed, 11s. 2d.: *Braithwaite's Pr.* 154; and 2s. 6d. extra for each additional defendant: *ibid.*

⁷ *Wilkin v. Nainby*, *ubi sup.*; *Broughton v. Martyn*, 4 Bro. C. C. 296.

¹ *Green v. Thomson*, 1 S. & S. 121.

² For forms of motion paper and petition see Vol. III.

³ *Green v. Thomson*, and *Wilkin v. Nainby*, *ubi sup.*

⁴ *Gray v. Campbell*, 1 R. & M. 323; *Edmonson v. Heyton*, 2 Y. & C. Ex. 3. But a defendant in contempt for want of answer, cannot file an answer and demurrer. *Curzon v. De la Zouch*, 1 Swanst. 185, 193; *Vigers v. Lord Audley*, 2 M. & C. 49, 52; 1 Jur. 51; *Attorney-General v. Shield*, 11 Beav. 441, 446. For forms of motion paper and petition, see Vol. III.

contempt. These costs are either fixed or taxed costs, according to the stage which the contempt process has reached: thus, if the defendant has merely been arrested on the attachment, the costs as we have seen,⁵ are of a fixed amount; but if he has been brought up by the messenger, or upon *habeas corpus*, or by the Sergeant-at-arms,⁶ he is liable to pay taxed costs.⁷ If the parties can agree upon the amount, the defendant should pay it; but if they cannot, he should tender to the plaintiff such a sum as will cover the amount which will probably be allowed on taxation.

It would appear, moreover, that strictly in all cases of contempt (except where, the defendant not being in custody, the plaintiff is willing to accept the answer and the costs tendered), the defendant ought, upon filing an answer, to obtain an order for his discharge, on payment or tender of costs: as otherwise, the plaintiff may move to have the answer taken off the file for irregularity.⁸

It is to be observed, that where process of contempt has been issued against a defendant for want of an answer, he is entitled to be discharged from his contempt immediately upon his putting in an answer, and paying or tendering the costs of his contempt; and the Court will not detain him in custody till the sufficiency of his answer has been decided upon:⁹ unless he has already put in three answers, which have been found insufficient.¹⁰ If, however, the plaintiff takes exceptions to the answer, and the answer is held insufficient, he will be entitled to resume the process of contempt where it left off;¹¹ and so he will, where the defendant submits to answer the exceptions.¹² Nor will the acceptance of costs be considered * as a waiver of the *509 contempt by the plaintiff: for, where a defendant, in contempt for want of answer, obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, the plaintiff cannot be compelled, in case the answer is insufficient, to recommence the process of contempt against the defendant, but is at liberty to take up the process at the point to which he had before proceeded.¹

But although a plaintiff does not now, by accepting the costs from a defendant upon his putting in an answer, forfeit his right to recommence the process of contempt at the point where it left off, yet if, after answer put in, he accepts the answer, or takes a step in the cause, he waives the contempt and cannot renew the process, or take any other advantage of it. Thus, if a plaintiff reply to the answer,² or move

⁵ *Ante*, p. 466, n. (m).

⁶ *Ante*, pp. 448, 449, 452.

⁷ *Wilkin v. Nainby*, 4 Hare, 473, 475; 10 Jur. 735; *Braithwaite's Pr.* 154.

⁸ *Haynes v. Ball*, 5 Beav. 140; *Wilkin v. Nainby, ubi sup.*; *Coyle v. Alleyne*, 16 Beav. 548.

⁹ *Dupont v. Ward*, 1 Dick. 133; *Child v. Brabson*, 2 Ves. S. 110; *Borham v. De Tastet*, 1 V. & B. 324, 327.

¹⁰ *Bailey v. Bailey*, 11 Ves. 151.

¹¹ *Anon.*, 2 P. Wms. 481; *Wallop v. Brown*, 4 Bro. C. C. 212, 223; *Bromfield v. Chichester*, 1 Dick. 379; *Bailey v. Bailey*, and *Boehm v. De Tastet, ubi sup.*; *Coulson v. Graham*, 1 V. & B. 331; *Taylor v. Salmon* 3 M. & C. 109.

¹² *Waters v. Taylor*, 16 Ves. 417.

¹ Ord. XII. 7.

² *Haynes v. Ball*, 5 Beav. 140.

upon an admission contained in it,³ he waives the contempt; and so, where a messenger had been ordered, upon a return of *cepi corpus*, and in the mean time the defendant filed his answer, which the plaintiff accepted, and then applied for his costs by motion, it was held, that the acceptance of the answer precluded him from his right to costs.⁴ And where a defendant, who was in contempt, put in an answer, without paying or tendering the costs, and the plaintiff replied to the answer, but did not proceed with the cause for three terms, whereupon the defendant moved to dismiss the bill for want of prosecution: upon the plaintiff's objecting that the defendant could not make the motion, in consequence of his being still in contempt, Lord Eldon held, that the contempt was gone, and that the defendant was in a situation to make the motion.⁵ It has been held, however, that the mere fact of the plaintiff bespeaking a copy of the answer, does not operate as a waiver of the contempt.⁶

Where the plaintiff accepted the answer, without insisting upon the costs of the contempt, Lord Eldon held that the plaintiff had not thereby given up his right to the costs, as costs in the cause, but had only waived his right to enforce them by means of the process of contempt.⁷

And where a defendant, in contempt for want of an answer, had put in three insufficient answers, and, pending a reference of the fourth, put in a fifth answer, which was accepted by the plaintiff, upon *510 which a motion was made that the *defendant might pay the costs of the contempt, and of the four insufficient answers, Sir Thomas Plumer V. C. held, that he could not accede to the motion.¹

In the case of *Livingstone v. Cooke*,² it appears that Sir Lancelot Shadwell V. C. decided, that a mere order to amend the bill did not operate as a waiver of the contempt: upon the ground that it creates no obstacle to the defendant putting in his answer; it was admitted, however, that an order to amend, and for the defendant to answer the exceptions at the same time, does operate as a waiver of the contempt, as it prevents the defendant from putting in his answer. Where the defendant has been brought to the bar of the Court for his contempt, and refuses to answer, it is provided, by the 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 10, that the Court may, upon motion or petition, of which due notice must be given personally to the defendant, authorize the plaintiff to amend his bill, without such amendment operating as a discharge of the contempt, or rendering it necessary to proceed with the process of

³ *Hoskins v. Lloyd*, 1 S. & S. 393; *Chuck v. Cremer*, 1 C. P. Coop. t. Cott. 247; and see *Woodward v. Twinaine*, 9 Sim. 301; 14 Jur. 20; *Herrett v. Reynolds*, 2 Giff. 409; 6 Jur. N. S. 880; *ante*, p. 506, n. 9.

⁴ *Smith v. Blofield*, 2 V. & B. 100.

⁵ *Anon.*, 15 Ves. 174; and the practice is the same, whether the defendant be actually in custody or not. *Oldfield v. Cobbett*, 1 Phil. 557.

⁶ *Woodward v. Twinaine*, and *Herrett v. Reynolds*, *ubi sup.*

⁷ *Anon.*, 15 Ves. 174; see also *Smith v. Blofield*, *ubi sup.*

¹ *Const v. Ebers*, 1 Mad. 530, 531. It seems, however, that according to the practice, in taxation as between party and party, the costs of the contempt, even where there is a decree for the plaintiff with costs, will not be allowed him as costs in the cause. *Attorney-General v. Lord Carrington*, 6 Beav. 454, 460.

² 9 Sim. 468; but see *Symonds v. Duchess of Cumberland*, 2 Cox, 411.

contempt *de novo*:³ but after such amendment, the plaintiff may proceed to take the amended bill *pro confesso*, in the same manner as if it had not been amended: provided, that if the defendant desires to answer the amended bill, the Court shall allow him such time as seems just for that purpose; but if he shall not put in a sufficient answer within the time limited, the process for taking the bill *pro confesso* may be resumed and carried on. It would appear, that an order to discharge a defendant in custody for a contempt, upon the plaintiff's amending his bill, where the amendment is not made under the above statute, may be obtained *ex parte*, and without payment of costs.⁴

It is to be observed, that a step taken in the cause must, in order that it may have the effect of a waiver of contempt, be in the cause itself in which the contempt has been incurred; therefore, where a plaintiff was in contempt for non-payment of some costs, the filing of a cross-bill by the defendant was held not to be a waiver of the contempt by the defendant, so as to permit the plaintiff to make a motion in his own cause.⁵

Where any of the processes of contempt before referred to have been irregularly issued, the defendant should apply to the Court on motion, and notice to the plaintiff,⁶ supported by affidavit, to *set them aside or discharge them with costs; and we have *511 seen, that the circumstance of his being in contempt will not preclude his making such an application.¹

Where a sole plaintiff died, leaving a sole defendant in custody for contempt, he was ordered to be discharged from prison, on his own motion, supported by affidavit proving these facts.²

It is to be observed, that the Court will not permit the regularity of its process to be decided upon by any other tribunal; and therefore, in *Frowd v. Lawrence*³ where a defendant, who had been taken into custody upon an attachment which was irregularly issued, obtained an order to discharge the attachment with costs, and afterwards commenced an action against the plaintiff and the sheriff, for false imprisonment, and another action against the plaintiff for maliciously suing out the attachment: Lord Eldon, upon the authority of *Bailey v. Devereux*,⁴ and *May v. Hook*,⁵ made an order for an injunction to restrain the defendant from proceeding with his actions at Law. His Lordship, however, held that, by such an injunction, the Court does not intend that the persons concerned in issuing the attachment are not to make the party satisfaction; but only that it should not be done by an action at Law: because "it is impossible, from the nature of the thing, that

³ See *ante*, p. 386. It is presumed the application cannot be made by summons, notwithstanding 15 & 16 Vic. c. 80, § 26. For form of notice of motion, see Vol. III.

⁴ *Gray v. Campbell*, 1 R. & M. 323; *Ball v. Etches*, *ib.* 324.

⁵ *Gompertz v. Best*, 1 Y. & C. Ex. 619; and see *ante*, p. 464.

⁶ For form of notice of motion, see Vol. III.

¹ *Ante*, p. 506.

² *Terrell v. Souch*, 4 Hare, 535.

³ 1 J. & W. 655.

⁴ 1 Vern. 269; 1 J. & W. 660, n.

⁵ Cited 2 Dick. 619; reported 1 J. & W. 663, n.

they can try the regularity of an attachment in a Court of Law;" and he, therefore, ordered, that the injunction should be without prejudice to any application that the defendant might be advised to make for compensation, or for the costs at Law. The same principle was afterwards acted upon by Lord Lyndhurst, in *Ex parte Clarke*.⁶ It seems, however, that leave will be given to bring an action for the damages suffered by the irregular process, if the Court considers that the question can be better adjudicated upon at Law.⁷

It is to be remarked that, in *James v. Philips*,⁸ where the irregularity in the process had been occasioned by one of the Registrars of the Court not entering the attachment, although he or his agent had received the usual fee for so doing, the Court ordered the Master to tax the defendant's costs out of pocket, and directed that they should be paid by the plaintiff, who was reported to have been guilty of the irregularity, but that they should be paid over to the plaintiff by *512 the Registrar; after this the Registrar died, and the costs having been taxed at £58, the matter came on again upon petition, when the Court being of opinion that, as the Registrar had received his fee, his omitting to enter the attachment was a breach of contract, and not a mere personal neglect, made an order for payment, by the administratrix, out of the Registrar's assets; and there being no one in Court to admit assets for her, it was ordered that she should be examined as to assets.

If a party wishes to discharge a process for irregularity, he must make his application before he complies with it: otherwise, he will be considered as waiving the irregularity.¹ Thus, where a defendant has been taken upon process of contempt for non-appearance, he must not enter his appearance in the ordinary way: otherwise, his appearance will cure the defect; he must, however, submit himself to the jurisdiction of the Court, in such a manner that, if his objection is held invalid, the plaintiff shall not be deprived of the benefit of his process.² The Court, therefore, before the Orders of August, 1841, required the defendant, before moving to discharge the attachment, to enter a conditional appearance with the Registrar;³ the effect of which was, to enable the plaintiff, in case the Court should decide that the process had been regularly issued, to send the Sergeant-at-Arms at once, with-

⁶ 1 R. & M. 563, 570; and see *Moore v. Moore*, 25 Beav. 8; 4 Jur. N. S. 250; *Walker v. Micklethwait*, 1 Dr. & S. 49; see also *Arrowsmith v. Hill*, 2 Phil. 609, 612; *Ex parte Van Sandau*, 1 Phil. 445, 448, n.; 9 Jur. 193.

⁷ *Whitehead v. Lynes*, 11 Jur. N. S. 74; 13 W. R. 306, M. R.; 34 Beav. 161; and on appeal, 12 L. T. N. S. 332, L. C.

⁸ 2 P. Wms. 657. As to the responsibility of public officers, see *Tobin v. The Queen*, 16 C. B. N. S. 310; 10 Jur. N. S. 1029.

¹ *Anon.*, 3 Atk. 567; *Floyd v. Nangle*, *ib.*

569; *Bound v. Wells*, 3 Mad. 434; *Robinson v. Nash*, 1 Anst. 76.

[In pleading, a positive step on the basis of the regularity of a previous pleading, waives any irregularity therein. *Seifreid v. People's Bank*, 2 Tenn. Ch. 17; *Fulton Bank v. Beach*, 2 Paige, 307; S. C. 6 Wend. 36; *Steele v. Plomer*, 2 Phil. 780; *Seifreid v. People's Bank*, 1 Baxt. 200.]

² For the manner in which a conditional appearance is entered, see *post*, p. 536; and see *Seton*, 1249.

³ *Davidson v. Marchioness of Hastings*, 2 Keen, 509.

out any intervening proceeding; but the 7th of those Orders⁴ provided, that no order should thereafter be made for the Sergeant-at-Arms to take the body of a defendant, to compel appearance. Accordingly, in the case of *Price v. Webb*,⁵ Sir James Wigram V. C. directed, that the order for liberty to enter the conditional appearance should be made, upon the consent of the defendant to submit to any process which the Court might direct to be issued against him, for want of appearance, in case the *subpœna* should not be set aside for irregularity.

It is to be observed, that a subsequent appearance by a party cannot be construed to have a relation back, so as to bring him into contempt for disobeying a writ or other process issued before his waiver of the informality had made the process valid against him; and therefore, where an attachment was issued against a defendant for non-appearance to a *subpœna*, which had been issued against him, and in which he was described by a wrong name, it was held, by the Court of Exchequer, that his appearance for the purpose of discharging the attachment would not relate back, so as to cure the defect in the *subpœna*, and bring him into contempt for not appearing in time.⁶

*It should be noticed also, that the principle of waiver applies *513 only to an irregular, and not to an erroneous order; and therefore, where an order had been made that service upon the attorney should be good service, and service was accordingly effected upon the attorney, who thereupon entered an appearance, but it was found, afterwards, that the affidavit upon which the order for substituted service had been made was insufficient, whereupon the defendant moved to set aside that order and all the subsequent proceedings: Sir John Leach V. C. made the order, on the ground that the original order was erroneous, and not irregular; and that, being erroneous, the defect was not cured by the subsequent appearance of the party.¹

SECTION V.—*Process by Filing a Traversing Answer, or Traversing Note.*²

Having considered the various means which the practice of the Court affords, for the purpose of compelling an answer from the defendant, it remains to state particular cases in which the plaintiff may himself, if he thinks fit, file an answer for a defaulting defendant, or a “Traversing Note,” which has the effect of an answer.

Where the defendant is not required to, and does not answer, the

⁴ Now Ord. X. 10.

⁵ 2 Hare, 511; and see Braithwaite's Pr. 321, and *post*, p. 536.

⁶ Robinson v. Nash, 1 Anst. 76.

¹ Levi v. Ward, 1 S. & S. 334; see Whittington v. Edwards, 3 De G. & J. 243.

² See Stump v. Beatty, 8 Dana, 14; Chiles v. Boon, 3 B. Mon. 82.

plaintiff's bill, he is to be considered to have traversed the case made by the bill;³ it is only in those cases, therefore, in which the defendant has been required to answer, and is in default, that the plaintiff can file an answer for him, or a traversing note.⁴

By the 11 Geo. IV. and 1 Will. IV. c. 36, § 15, rule 11, it is enacted, "That in every case where the defendant has been brought to the bar of the Court, to answer his contempt for not answering, and shall refuse or neglect to answer within the next twenty-one days, the plaintiff shall be at liberty, with the leave of the Court, upon ten days' previous notice to the defendant,⁵ after the expiration of such twenty-one days, unless good cause be shown to the contrary, instead of proceeding to have the bill taken *pro confesso*, to put in such an answer to the bill as hereinafter is mentioned, in the name of the defendant, without oath or signature; and thereupon the suit shall proceed, in the same manner

*514 as if such answer were really the answer of the defendant, *with which the plaintiff was satisfied; and the costs of the contempt, and of putting in such answer, may be provided for in like manner as if the defendant himself had put in such answer; and such answer, besides the formal parts thereof, shall be to the following effect: that the defendant leaves the plaintiff to make such proofs of the several matters in the bill alleged, as he shall be able, or be advised, and submits his interests to the Court."

The application must be supported by production of the contempt orders, the keeper's certificate of the defendant being in custody, the Record and Writ Clerk's certificate of no answer having been filed, and an affidavit of service of the notice of motion.

The practice under this rule is not of so much importance as it was formerly; because the plaintiff has now a remedy of a similar kind, though more generally applicable: for after the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to any original or supplemental bill, or bill amended before answer, which he has been required to answer, if such defendant has not filed any plea, answer, or demurrer, the plaintiff may file a note at the Record and Writ Clerk's Office, to the following effect: "The plaintiff intends to proceed with his cause, as if the defendant had filed an answer, traversing the case made by the bill."¹ In the case of a bill amended after answer, upon the like default, he may file a note to the following effect: "The plaintiff intends to proceed with his cause, as if the defendant had filed an answer, traversing the allegations introduced into the bill by amendment."² And, after the expiration of the time allowed to a

³ 15 & 16 Vic. c. 86, § 26. Issue is to be joined in such case, by filing replication. Ord. XVII. 1; or the cause may be set down to be heard on motion for decree, see *post*, p. 516; but not on bill and answer. Braithwaite's Pr. 70.

⁴ *Heath v. Lewis*, 17 Jur. 1090, M. R.;

Ord. XVII. 1; and *post*, Chap. XXI., *Replication*.

⁵ For form of order, see Seton, 1264, No. 13; and for form of notice of motion, see Vol. III.

¹ Ord. XIII. 1.

² Ord. XIII. 2.

defendant to put in his further answer to any bill, the plaintiff (if such defendant shall not have put in any further answer) may file a note to the following effect: "The plaintiff intends to proceed with his cause as if the defendant had filed a further answer, traversing the allegations in the bill whereon the exceptions are founded."³

When a copy of the traversing note has been duly served, it has the same effect "as if the defendant against whom such note is filed had filed a full answer or further answer, traversing the whole bill, or those parts of the bill to which the note relates, on the day on which the note was filed."⁴

When a traversing note has been filed, a copy thereof must be served upon the defendant against whom the same is filed, in the manner directed for the service of documents not requiring personal service.⁵

*The rule last referred to applies only to cases where the de- *515
fendant has appeared by a solicitor, or personally; and not to cases where the plaintiff has entered an appearance for him.¹ It has been held, however, that in such a case the Court can, under its general jurisdiction, make a special order for service of the traversing note on the defendant.²

The application should be made *ex parte*; and be supported by an affidavit of service of the bill and interrogatories, and by the Record and Writ Clerk's certificate that the plaintiff has appeared for the defendant, and has filed the traversing note. It seems usual, though not essential, to prove by affidavit that the defendant is within the jurisdiction.³

In a proper case, the Court will order substituted service of the traversing note,⁴ on application by *ex parte* motion, supported by the affidavit and certificates above mentioned;⁵ but leave to serve the note on a defendant out of the jurisdiction will not be given.⁶

A traversing note is to be intituled in the cause,⁷ and written on paper of the same description and size as that on which bills are printed.⁸ It must be underwritten or indorsed with the name and place of business of the plaintiff's solicitor, and of his agent, if any, or with the name

³ Ord. XIII. 3.

⁴ Ord. XIII. 6; but it has not the same effect, for the purpose of evidence, as an answer on oath. *Martin v. Norman*, 2 Hare, 596, 598.

⁵ Ord. XIII. 5; III. 4, 6, *ante*, pp. 454, 455. No time is limited within which the note is to be served; but it is in practice treated, in respect of notice, as an answer, and as within the operation of Ord. III. 9; so that the copy should, if possible, be served on the day on which the note is filed. *Braithwaite's Manual*, 144; *Veal's Pr.* 24.

¹ *Anon.*, 1f Jur. 28 L. C.; *Braithwaite's Pr.* 68.

² *Moss v. Buckley*, 2 Phil. 628; 12 Jur. 487; and for the order in that case, see *Seton*,

1246, No. 10; and see *Laurie v. Burn*, 6 Hare, 308; 12 Jur. 598; *Horlock v. Wilson*, 12 Beav. 545; see also *Scott v. Wheeler*, 13 Beav. 239.

³ For forms of motion paper and affidavit, see Vol. III.

⁴ *Wallis v. Darby*, 6 Hare, 618; *Scott v. Wheeler*, *ubi sup.*; *Hunt v. Niblett*, 25 Beav. 124; 4 Jur. N. S. 444.

⁵ For forms of motion paper and affidavit, see Vol. III.

⁶ *Anderson v. Stather*, 11 Jur. 96, V. C. K. B. [But see, *contra*, *Martigny v. Smith*, 18 W. R. 108.]

⁷ For forms of traversing notes, see Vol. III.

⁸ Ord. 6 Mar., 1860, r. 16. As to such paper, see Ord. IX. 3; *ante*, p. 361.

and place of residence of the plaintiff, where he acts in person; and, in either case, with the address for service, if any.⁹ The names of several defendants may be included in one traversing note, notwithstanding that they have appeared by separate solicitors.¹⁰

After service of a copy of the traversing note, the defendant cannot plead, answer, or demur to the bill, or put in any further answer thereto, without the special leave of the Court; and the cause is to stand in the same situation as if such defendant had filed a full answer or further answer to the bill, on the day on which the note was filed.¹¹

Where the plaintiff filed a traversing note, knowing that the defendant's answer was sworn, though not filed, the traversing
*516 *note was ordered to be taken off the file, upon payment of costs by the defendant.¹

Where a defendant wishes to put in a plea, answer, or demurrer, or a further answer, after a traversing note has been filed, he should apply, on motion, with notice to the plaintiff, for leave so to do, and for that purpose that the note may be taken off the file. The order will only be made on payment of costs by the defendant.² The application should be supported by an affidavit explaining the delay, and that the defendant is advised to put in the proposed defence.

It seems that a traversing note cannot be filed in the case of an infant defendant;³ but inasmuch as it is only necessary to file it, in those cases in which an answer has been required, and none put in, a case could scarcely now arise in practice, in which it could be desired to file a traversing note against an infant defendant: no answer being usually required in such a case. Where a married woman is co-defendant with her husband, a traversing note cannot be filed against her separately, unless an order for her to answer separately has been obtained.

Due service of the traversing note must be proved against the defendant at the hearing, if he does not appear.⁴

Where a demurrer or plea to the whole bill is overruled, the plaintiff, if he does not require an answer, may immediately file his note, in manner above pointed out, as the case may require, and with the same effect: unless the Court, upon overruling such demurrer or plea, gives time to the defendant to plead, answer, or demur; and in such case, if the defendant does not file any plea, answer, or demurrer, within the time so allowed by the Court, the plaintiff, if he does not then require an answer, may, on the expiration of such time, file such note.⁵

When a traversing note has once been filed, the plaintiff cannot,

⁹ Ord. III. 2, 5; *ante*, pp. 453, 454. No fee is payable on filing a traversing note. Braithwaite's Pr. 67.

¹⁰ *Ibid*.

¹¹ Ord. XIII. 7.

¹ Rigby v. Rigby, 6 Beav. 265.

² Towne v. Bonnin, 1 De G. & S. 128; 11

Jur. 261. For form of notice of motion, see Vol. III.

³ Emery v. Newson, 10 Sim. 564.

⁴ Evans v. Williams, 6 Beav. 118; and see Reg. Regul. 15 March, 1860, §. 25. For form of affidavit of service of a traversing note, see Vol. III.

⁵ Ord. XIII. 4.

without notice to the parties affected by it, obtain an order to take it off the file.⁶

The filing of a traversing note does not prevent a cause being heard on motion for decree; but, for that purpose, the traversing note is equivalent to an answer.⁷

⁶ *Simmons v. Wood*, 5 Beav. 390. For form of notice of motion in such case, see Vol. III.

75; 18 Jur. 320. As to motions to dismiss for want of prosecution, where a traversing note has been filed, see Ord. XXXIII. 10.

⁷ *Manière v. Leicester*, 5 De G., M. & G.

TAKING BILLS PRO CONFESSO.

SECTION I. — *Preliminary Order.*

IN preceding chapters, the reader's attention has been drawn to the method which the Court adopts, to compel a refractory defendant to appear to, and answer the bill. By means of the process there pointed out, the plaintiff may, if the defendant is not a privileged person, take his body as a security for his obedience; or if he be a privileged person, or manages to keep out of the way so successfully as to avoid an arrest, the plaintiff may proceed to compel his submission, by taking from him the enjoyment of his property and effects, until he submits. It is obvious, however, that in a Court of Equity, where the nature of the relief to be granted frequently depends upon the discovery to be elicited from a defendant by his answer, the mere taking a party into custody, or sequestering his property, cannot always answer the object of doing that justice to the plaintiff which it is the business of Equity to secure. The Court has, therefore, adopted a method of rendering its process effectual, by treating the defendant's contumacy as an admission of the plaintiff's case, and by making an order that the facts of the bill shall be considered as true, and decreeing against the defendant according to the equity arising upon the case stated by the plaintiff. This proceeding is termed, taking a bill *pro confesso*.¹

It seems that this practice is not of very ancient standing, and that the custom formerly was to put the plaintiff to make proof of the substance of his bill;² but the course of taking the bill *pro confesso* *518 has now, for some time, been the established practice of * the Court.¹ And this practice has been very materially extended and facilitated by Acts of Parliament and General Orders of the Court.

¹ A rule for an answer where process has not been rightly served, and a decree *pro confesso*, for want of an answer, are irregular. *Treadwell v. Cleaveland*, 3 McLean, 283.

² See *Rose v. Woodruff*, 4 John. Ch. 547, 548; *post*, 526, note; *Pierson v. David*, 4 Iowa, 410; *Johnson v. Donnell*, 15 Ill. 97; *Corradine v. O'Connor*, 21 Ala. 573; *Attorney-General v. Carver*, 12 Ired. (N. C.) 231;

Smith v. Trimble, 27 Ill. 152; *Steehens v. Bichnell*, 27 Ill. 444. The defendant may, in such case, without demurring, take advantage of any matter which would be a good cause of demurrer. *Wilson v. Waterman*, 6 Rich. Eq. (S. C.) 255.

¹ *Hawkins v. Crook*, 2 P. Wms. 556; *Johnson v. Desmoneere*, 1 Vern. 223; *Gibson v. Seevengton*, *ib.* 247. In New Hampshire, if the defendant, having received due

Considerable difference formerly existed in the practice of taking bills *pro confesso*, in cases where the defendant was in custody, and in those where he was not; but the General Orders have so far assimilated the practice in the two cases, that it will be most convenient to state the general rules applicable to all cases in which a bill is taken *pro confesso*: remarking any peculiarities resulting from the particular circumstances in which a defendant may be placed,

Where a decree is intended to be sought against a defendant, by taking the bill *pro confesso*, an order for that purpose must be obtained upon motion, of which notice must be given;² and then the cause must be set down to be heard;³ and it cannot be heard on the same day on which the order to have it taken *pro confesso* is made.⁴

Where the defendant is beyond seas, or has absconded to avoid being served, and it is intended to proceed to have the bill taken *pro confesso*, without any appearance having been entered by him, or on his behalf, the proceedings must be taken under the stat. 11 Geo. IV. & 1 Will. IV. c. 36, § 3.⁵ The mode prescribed by that Act must be strictly complied with;⁶ and it seems that the Act applies to all cases where a party goes abroad, to avoid process.⁷

notice, shall neglect to enter his appearance at the return term, or shall neglect to deliver to the plaintiff's solicitor his plea, answer, or demurrer, within two calendar months after service of the bill, the bill may be taken *pro confesso*, and a decree entered accordingly. Rule 16 of Chancery Practice, 38 N. H. 608. Rule 18 of the Equity Rules of the United States Court, [as recently modified by the Supreme Court, provides that the defendant shall, unless the time shall be otherwise enlarged for cause shown, file his plea, demurrer or answer on the rule day next succeeding that of entering his appearance, and in default the plaintiff may enter an order, as of course, in the order book, that the bill be taken for confessed, and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the Court at any time after the expiration of thirty days from and after the entry of such order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff may have process of attachment against the defendant to compel an answer, and the defendant, when arrested on such process, shall not be discharged therefrom unless upon filing his answer, or otherwise complying with such order as the Court or Judge thereof may direct as to pleading to, or fully answering the bill, within a period to be fixed by the Court or Judge, and undertaking to speed the cause. See *infra*, 525, n. 4. See Code of Tennessee, § 4369, where a bill may be taken for confessed, and § 4371, as to the effect of the *pro confesso* order. *Stone v. Duncan*, 1 Head, 103. A *pro confesso* order can only be taken when strictly in accordance with law, and the rules of practice. *Lanum v. Steel*, 10 Hum. 280.]

² Ord. XXII. 1; 11 Geo. IV. & 1 Will.

IV. c. 36, §§ 3, 15; and see *Collins v. Collyer*, 3 Beav. 600; *Brown v. Home*, 8 Beav. 607. For forms of order, see *Seton*, 1265-1267, Nos. 1-7; and for forms of notice of motion, see Vol. III.

³ See *Pendleton v. Evans*, 4 Wash. C. C. 335; *Rose v. Woodruff*, 4 John. Ch. 547. An order to take a bill *pro confesso*, unless the defendant answers it by a day given, cannot be anticipated, and a decree *pro confesso* passed in anticipation of such day *Fitzhugh v. McPherson*, 9 Gill & J. 52.

It is error to take a bill *pro confesso* against several defendants, when process has been served only upon one. *Robertson v. Crawford*, 1 A. K. Marsh. 449. As to what service of the *subpoena* is necessary before a bill can be taken as confessed, see *Sawyer v. Sawyer*, 3 Paige, 263; *Sullivan v. Weaver*, 10 Ohio, 275; *Treadwell v. Cleaveland*, 3 McLean, 283.

⁴ Ord. XXII. 6; *Brown v. Home*, *ubi sup.*

⁵ See *ante*, pp. 456, 457.

⁶ Short v. Downer, 2 Cox, 84; see *Baker v. Keen*, 4 Sim. 498, where the proceedings are set out in detail.

⁷ *Mawer v. Mawer*, 1 Cox, 104; 1 Bro. C. C. 388; *Henderson v. Meggs*, 2 Bro. C. C. 127; *James v. Dore*, 1 Dick. 63. Rule 5, of the Rules for Practice in Chancery in Massachusetts, provides for notice to defendants in Equity suits; who reside out of the Commonwealth, and the method to be pursued to entitle the plaintiff in such cases to obtain an order to have his bill taken for confessed. In Maine, where the rights of a defendant in Equity, who resides out of the State, and has had notice of the suit, but does not appear and answer, will not be prejudiced by the decree, the bill may be taken *pro confesso* as to him. *Adams v.*

It has already been observed, that the General Order, enabling * a plaintiff to enter an appearance for an absconding defendant,¹ applies to the same circumstances as those provided for by the Act; and although it seems that this order has not superseded the Act,² it is undoubtedly the usual practice, in all cases where it is intended to take a bill *pro confesso* against a defendant, to enter an appearance for him, and to proceed under the provisions of the General Order.

Where any defendant, whether within or not within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him,³ and the plaintiff is unable, with due diligence,⁴ to procure a writ of attachment, or any subsequent process for want of answer, to be executed against such defendant, by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant is, for the purpose of enabling the plaintiff to obtain an order to take the bill *pro confesso*, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court.⁵ And where any defendant who, under the last-mentioned rule, may be deemed to have absconded to avoid, or to have refused to obey, the process of the Court, appears in person or by his own solicitor, the plaintiff may serve upon such defendant or his solicitor a notice, that on a day in such notice named (being not less than fourteen days after the service of such notice), the Court will be moved that the bill may be taken *pro confesso* against such defendant;⁶ and the plaintiff must, upon the hearing of such motion, satisfy the Court that such defendant ought, under the provisions of the last-mentioned rule, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time, or upon such further notice as, under the circumstances of the case, the Court may think proper.⁷

Stevens, 49 Maine, 362; see *Evarts v. Beeker*, 8 Paige, 506; *Christy v. Christy*, 6 Paige, 170.

¹ Ord. X. 6; *ante*, p. 459.

² *Wilkin v. Nainby*, 4 Hare, 476; 10 Jur. 735; *Dresser v. Morton*, 1 C. P. Coop. t. Cott. 376; see, however, *Fortescue v. Hallett*, 3 Jur. N. S. 806; 5 W. R. 747, V. C. K.

³ Where a defendant had been duly served with the bill and interrogatories, but did not appear or answer, and withdrew himself beyond the jurisdiction, the Court ordered notice to be given to him, that unless an answer was put in within fourteen days from the service of the notice, an appearance would be entered for him, and proceedings taken to have the bill taken *pro confesso*. *Grover and Baker Sewing Machine Company v. Millard*, 8 Jur. N. S. 713, V. C. W.

⁴ Ord. XXII. 2. The sheriff's officer must

swear that he has used due diligence *Yearsley v. Budgett*, 11 Beav. 144.

⁵ Ord. XXII. 2.

⁶ For form of notice, see Vol. III. Short notice of motion allowed, where a defendant, who had obtained further time, refused to put in his answer, and an attachment could not be executed against him. *Wedderburne v. Thomas*, 10 Jur. N. S. 92, V. C. W.

⁷ Ord. XXII. 3. If a defendant, after appearing, will not answer, the bill will be taken *pro confesso*. *Caines v. Fisher*, 1 John. Ch. 8. And where the bill is for relief only, and states sufficient ground, the process for contempt to compel an answer is not necessary. *Caines v. Fisher*, *supra*. In New Jersey, a decree *pro confesso* may be taken at any time after the time limited for the defendant to plead, answer, or demur has expired. It may be taken without notice, and, of course, unless it appear that some prejudice will thereby accrue

* The last-mentioned rule gives the Court a discretion as to ordering a bill to be taken *pro confesso*; and in the exercise of this discretion, the Court refused to make the order, where the defendant had always been resident abroad, and had not absconded, and there was no evidence of his refusal to obey the order of the Court.¹

Where any defendant who, under the above-mentioned rule, may be deemed to have absconded to avoid, or to have refused to obey, the process of the Court, has had an appearance entered for him by the plaintiff,² and does not afterwards appear in person or by his own solicitor, the plaintiff may cause to be inserted in the London Gazette, a notice, that on a day in such notice named³ (being not less than four weeks after the first insertion of such notice in the London Gazette), the Court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff must, upon the hearing of such motion, satisfy the Court that such defendant ought, under the provisions of the above-mentioned rule, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court; and that such notice of motion has been inserted in the London Gazette, at least once in every entire week, reckoned from Sunday morning to Saturday evening, which shall have elapsed between the time of the first insertion thereof, and the time for which the notice is given; and the Court, if so satisfied, and if an answer has not been filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time, or upon such further notice, as under the circumstances of the case the Court may think proper.⁴

It seems that, where it is intended to take the bill *pro confesso* under the foregoing rules, interrogatories must have been filed;⁵ but where the defendant has absconded, or cannot be found, the delivery may be dispensed with.⁶

*Where the defendant is out of the jurisdiction, it is not neces- *521

to the adverse party. *Oakley v. O'Neill*, 1 Green Ch. 287; see *Nesbit v. St. Patrick's Church*, 1 Stockt. (N. J.) 76. For form of order to take the bill *pro confesso* in this case, see Seton, 1265, No. 2.

¹ *Zulueta v. Vinent*, 15 Beav. 272; 16 Jur. 631; see, however, *Hele v. Ogle*, 2 Hare, 623, under 1st Order of April, 1842, Sand. Ord. 196; Beav. Ord. 195.

² Under Ord. X. 4, 6, or 7; see *ante*, pp. 459, 460.

³ Which may be any day in term; but must, it is presumed, be on a seal day out of term. *Chaffers v. Baker*, 5 De G., M. & G. 482; 1 Jur. N. S. 32. In *Millar v. Elwin*, 25 Beav. 674; 4 Jur. N. S. 600, however, it seems that the advertisement was for a day out of term, which, at the time the advertisement was issued, could not have been known to be a seal day.

⁴ Ord. XXII. 4. For form of order, see Seton, 1265, No. 3. Where the defendant has absconded, it must be shown that he cannot be found at the time of making the application. *Wilkinson v. Turner*, 14 W. R. 813, M. R.

⁵ *Buttler v. Mathews*, 19 Beav. 549.

⁶ *Anon.*, 4 Jur. N. S. 583, V. C. W.; S. C. *nom.* *Baker v. Dean*, 6 W. R. 719; *Buttler v. Mathews*, 19 Beav. 549; *Anthony v. Cowper*, 11 Jur. N. S. 73; 13 W. R. 286, M. R.; 34 Beav. 77. Sometimes the filing of the interrogatories has been directed to be advertised; see *Anon.*, *ubi sup.*; but this does not seem to be necessary. *Anthony v. Cowper*, *ubi sup.*; *Darlow v. Sincock*, 1 W. N. 154, V. C. K.; S. C. *nom.* *Darlow v. Sincock*, 14 W. R. 383.

sary to issue an attachment, in order to take the bill *pro confesso* against him under these rules.¹

The plaintiff having advertised, in the Gazette, his notice of motion to take the bill *pro confesso*, may save it on the day mentioned in the advertisement, until next motion day, without mentioning such saving expressly to the Court.² And where the advertisement gave six weeks' notice, instead of four, it was held, that the insertion of the advertisement for the first four of the six weeks was sufficient.³

Upon the motion, the plaintiff must show, by affidavit, that proper inquiries have been made after the defendant, and the means which the deponent had of knowing the parties, and the facts to which he deposes,⁴ and that the case is within the rules above referred to.⁵ Thus, it must appear by affidavit⁶ that interrogatories have been filed, and also delivered where delivery is necessary; that due diligence has been used to execute the attachment or other process for want of answer, where process has issued;⁷ and that notice of the motion has been served on the defendant or his solicitor; or, if not so served, the Gazettes containing the notice must be produced.⁸ The sheriff's return to the process, if issued, is also required; and also the Record and Writ Clerk's certificate that the defendant has not put in his answer; and if the plaintiff has entered an appearance for the defendant, that fact should appear by the certificate.⁹

If the defendant puts in his answer, after service of the notice of motion, but before the motion has been brought on, it may be brought on for the purpose of obtaining the costs.¹⁰

In determining the question, whether the bill should be ordered to be taken *pro confesso* "immediately," or at some future time, or upon some further notice, the Court is guided by the circumstances of the case; but, in general, it does not direct the bill to be taken *pro confesso* immediately.¹¹

Where a cause had been set down to be heard *pro confesso*, and had been struck out, in consequence of the absence of counsel, it *522 *was permitted to be restored to the paper, on the application of the plaintiff alone.¹

It is to be observed, generally, that, in proceeding to take a bill *pro confesso*, the greatest care must be taken to bring the case strictly within

¹ Buttler v. Mathews, 19 Beav. 549, and cases there referred to; Hodgson v. Hodgson, 23 Beav. 604; Braithwaite's Pr. 295; and see Anon., 9 L. T. N. S. 674, M. R., for practice where there is delay between the making and drawing up of the order.

² Torr v. Torr, Johns. 660. Where, for want of business, the Court did not sit on the day in term mentioned in the notice, the motion was permitted to be made on the succeeding day. Postlethwaite v. Travers, 1 N. R. 354, V. C. S. *dub.*

³ Millar v. Elwin, 25 Beav. 674; 4 Jur. N. S. 600.

⁴ Harrison v. Stewardson, 2 Hare, 533,

534, n.; see also Anstey v. Hobson, 2 W. R. 46, V. C. S.; Robson v. Earl of Devon, *ib.* 485, V. C. S.

⁵ Ord. XXII. 2, 3.

⁶ For form of affidavit, see Vol. III.

⁷ Yearsley v. Budgett, 11 Beav. 144; *ante*, p. 519, n. 4.

⁸ See Seton, 1265, Nos. 2, 3.

⁹ *Ibid.*

¹⁰ Spooner v. Payne, 2 De G. & S. 439, 445; 12 Jur. 642.

¹¹ Courage v. Wardell, 4 Hare, 481; 9 Jur. 1055.

¹ Harvey v. Renon, 12 Jur. 445, V. C. K. B.

the General Orders ;² and all formalities must be scrupulously complied with. Thus, an advertisement in the Gazette, which omitted the defendant's name as a party to the cause, although the notice was addressed to him, and stated that application would be made to have the bill taken *pro confesso* against him, was held insufficient.³

And so, after an order to take the bill *pro confesso* has been obtained, the bill cannot be amended, even to the extent of correcting a clerical error, without vitiating the proceedings, and rendering the order useless.⁴ If, however, a defendant, who has been brought to the bar of the Court for his contempt in not answering, refuses or neglects to answer (not being idiot, lunatic, or of unsound mind), the Court may, upon motion or petition, of which due notice must be given personally to the defendant, authorize the plaintiff to amend his bill without such amendment operating as a discharge of the contempt, or rendering it necessary to proceed with the process of contempt *de novo* ; and after such amendment, the plaintiff may proceed to take the amended bill *pro confesso*, in the same manner as if it had not been amended.⁵

We have before seen, that where a defendant is in actual custody for contempt in not putting in his answer, it is incumbent upon the plaintiff not to detain the defendant in prison beyond a certain limited time, without bringing him to the bar of the Court.⁶ If, however, the plaintiff determines at once to take the bill *pro confesso*, he need not bring the defendant to the bar ; but may, upon the execution of an attachment for want of answer, or at any time within three weeks afterwards, serve the defendant with a notice of motion, to be made on some day not less than three weeks after the day of such service, that the bill may be taken *pro confesso* against him ; and the Court may thereupon order the bill to be taken *pro confesso* against him.⁷ The motion must be supported by the sheriff's return to the attachment, the Record and Writ Clerk's certificate that the defendant has not put in his answer, and an affidavit of service of the notice of motion.⁸

*As before stated,¹ a sequestration is the first compulsory *523 process which issues against a peer or member of Parliament.

Upon the order for the issuing of the writ being made absolute, then, by the original practice of the Court, if the defendant persists in his contempt, an order to have the bill taken *pro confesso* may be obtained, upon motion of course.² In the case, however, of a bill for discovery,

² Buttler v. Mathews, 19 Beav. 549.

³ Jones v. Brandon, 3 Jur. N. S. 1146, V. C. W.

⁴ Weightman v. Powell, 2 De G. & S. 570; 12 Jur. 958. [And if a bill is materially amended where the defendant has failed to appear, a decree *pro confesso* taken on the same day, and without serving new process, is irregular, and a sufficient ground for opening the decree founded thereon, and granting a rehearing. Harris v. Deitrich, 29 Mich. 366.]

⁵ 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 10; *ante*, pp. 425, 510.

⁶ *Ante*, pp. 490, 491.

⁷ Ord. XXII. 1. For form of order, see Seton, 1265, No. 1; and for form of notice of motion, see Vol. III. The times of vacation are reckoned in the three weeks, at the expiration of which the motion may be made. Kitchin v. Hughes, 11 Jur. N. S. 902; 14 W. R. 93, V. C. K.

⁸ For form of affidavit, see Vol. III.

¹ See *ante*, pp. 473, 496.

² Lord Wellesley v. Earl of Mornington, cited Seton, 1256. For form of order, see *ib.* No. 4; and for form of motion paper, see Vol. III.

upon the expiration of the time for answering, an order *nisi* to take the bill *pro confesso* may be obtained at once, where the defendant is in contempt for want of answer, without any order for a writ of sequestration; and such order will be made absolute, unless the defendant shows good cause to the contrary, as before explained.³

In like manner, in the case of corporations aggregate, after an order absolute for a sequestration has been made, the plaintiff may obtain, upon motion of course, an order to take the bill *pro confesso* against the corporation.⁴

Although no compulsory process issues against the Attorney-General, we have seen that an order may be obtained, on *ex parte* motion, for him to put in his answer, within a certain time, or that the bill shall be taken *pro confesso*.⁵

Where a husband and wife are defendants to a bill, the husband is, as we have seen,⁶ liable to process for want of a joint answer, unless he obtains an order to answer separately; and the bill may be taken *pro confesso* against him, as against any other defendant.⁷ Where the decree sought to be obtained affects the wife's inheritance, and the husband does not answer, it seems doubtful how far such a decree can be had against the wife.⁸

The preliminary order for taking the bill *pro confesso*, having been obtained by one or other of these means, it remains only to be observed, that the mere putting in an answer by the defendant, will not be a sufficient ground for moving to set it aside;⁹ and where, upon that ground, a motion was made to discharge an order for taking a bill *pro confesso*, it was refused with costs.¹⁰

Notwithstanding that, at one time, there seems to have been some doubt upon the subject,¹¹ it is now clearly settled that, for *524 *the purpose of having the bill taken *pro confesso*, an insufficient answer is to be treated as no answer, and that the whole bill is taken *pro confesso*, in the same manner as it is where no answer at all has been put in.¹ And so also, where a husband and wife are defend-

³ *Ante*, p. 496; 11 Geo. IV. & 1 Will. IV. c. 36, §§ 12, 13. For form, see Vol. III.

⁴ *Ante*, p. 497; *Brickwood v. Harvey*, 8 Sim. 201; 2 Jur. 297; *Braithwaite's Pr.* 297. For form of order, see *Seton*, 1266, No. 4; and for form of motion paper, see Vol. III.

⁵ *Ante*, p. 497; *Peto v. Attorney-General*, 1 Y. & J. 509; *Groom v. Attorney-General*, 9 Sim. 325. For form of notice of motion, see Vol. III.

⁶ *Ante*, pp. 180, 498.

⁷ *Ge v. Cottle*, 3 M. & C. 180; and see *Bilton v. Bennett*, 4 Sim. 17.

⁸ *Ante*, p. 185; and see *Alexander v. Osborne*, 11 Jur. 444, L. C.

⁹ *Carter v. Torrance*, 11 Geo. 654; *Hunter v. Robbins*, 21 Ala. 585; *James v. Cresswicke*, 7 Sim. 143.

¹⁰ *Williams v. Thompson*, 2 Bro. C. C. 280; 1 Cox, 413.

¹¹ *Hawkins v. Crooke*, 2 P. Wms. 556; 2 Eq. Ca. Ab. 178, pl. 4.

¹ *Davis v. Davis*, 2 Atk. 24; *Turner v. Turner*, cited 4 Ves. 619; *Dangerfield v. Claiborne*, 3 Hen. & M. 17; *Caines v. Fisher*, 1 John. Ch. 8; *Clason v. Morris*, 10 John. 524; *Buckingham v. Peddicord*, 2 Bland. 447; *Mayer v. Tyson*, 1 Bland. 560. A bill, answered in part only, may be taken as confessed in other parts not answered. *Weaver v. Livingston*, Hopk. 493; *Pegg v. Davis*, 2 Blackf. 184; [*Smith v. St. Louis Mutual Life Ins. Co.*, 2 Tenn. Ch. 605. The result of the authorities is, as stated in the case last cited, that while the plaintiff may take the whole bill for confessed, he may also, if he prefers, limit the *pro confesso* to that part of the bill not answered].

ants, and the husband puts in an answer without his wife joining in it, and without an order to warrant such a proceeding, the Court treats the answer as a nullity, and will make an order for taking the bill *pro confesso*.² It has likewise been held, that where, after a full answer, a bill has been amended, and the amended bill is not answered, the plaintiff is entitled to an order to have the bill taken *pro confesso* generally:³ and where an order was made for the clerk in Court to attend with the record of the bill, in order to have it taken *pro confesso*, as to the amendments only, Lord Apsley discharged the order: being of opinion, that the original and amended bills were one record, and that the amendments not being answered, the record was not answered.⁴

If the plaintiff receives the costs of the contempt, or accepts the answer, by taking a copy of it or otherwise, or takes exceptions to it, he will waive the process; the reason of which is, that he cannot, after an answer is actually filed, have a decree *pro confesso* without, in the first instance, moving to take the answer off the file, which he cannot do after any of the above-mentioned acts.⁵

But although the mere gratuitously putting in an answer will not be sufficient to discharge the order for taking a bill *pro confesso*, yet, wherever an order of this nature has been made, and the defendant comes in upon any reasonable ground of indulgence, and pays the costs, the Court will attend to his application, unless the delay has been extravagantly long.⁶ It is not, however, a *matter of course *525 to discharge the order for taking the bill *pro confesso*; and the Court, before doing so, will require to see the answer proposed to be put in, in order that it may form a judgment as to the propriety of it, and will not put the plaintiff to the peril of having just such an answer as the defendant shall think proper to give.¹

If a defendant is in custody for want of his answer, and is willing to

² *Bilton v. Bennett*, 4 Sim. 17; *Leavitt v. Cruger*, 1 Paige, 421; see *New York Chem. Co. v. Flowers*, 6 Paige, 654; *Collard v. Smith*, 2 Beasley (N. J.), 43, 45; *Allen v. Smith*, *ib.* 45; *ante*, 182. Where a joint answer by husband and wife is put in, it must be sworn to by both. If not so sworn to, and no valid defence is set up therein, it will, on motion, be taken off the files for irregularity, and the bill be taken as confessed. *New York Chem. Co. v. Flowers*, 6 Paige, 654; *Collard v. Smith*, 2 Beasley (N. J.), 43. So where an answer is not signed by the defendant, although an answer on oath is waived. *Dennison v. Bassford*, 7 Paige, 370.

³ *Jopling v. Stuart*, 4 Ves. 619; *Trust & Fire Ins. Co. v. Jenkins*, 8 Paige, 589; [*Turner v. Turner*, 1 Dick. 316; *Lea v. Vanbibber*, 6 Humph. 18.]

⁴ *Bacon v. Griffith*, 4 Ves. 619, n.; [*S. C.* 2 Dick. 473].

⁵ *Sidgier v. Tyte*, 11 Ves. 202; *Coyle v. Alleyne*, 16 Beav. 518.

⁶ *Williams v. Thompson*, 2 Bro. C. C.

280; 1 Cox, 413; see *Robertson v. Miller*, 2 Green Ch. 451, 453, 454; *Wooster v. Woodhull*, 1 John. Ch. 541; *Parker v. Grant*, 1 John. Ch. 630; *Emery v. Downing*, 2 Beasley (N. J.), 59; *Oram v. Dennison*, 2 Beasley (N. J.), 438. But even after a decree *pro confesso*, order of reference, and report of Master, the decree will be opened, and the defendant let in to answer, if the equity of the case requires such relaxation of the rules of the Court. *Williamson v. Sykes*, 5 Beasley (N. J.), 182.

By the practice in New Jersey, the defendant's application for this purpose, may be made either by petition properly verified, or upon motion sustained by affidavit. The former mode is more usual and formal, but either may be resorted to. *Emery v. Downing*, 2 Beasley (N. J.), 60.

¹ *Hearne v. Ogilvie*, 11 Ves. 77; *Emery v. Downing*, 2 Beasley (N. J.), 59. [*See Pittman v. McClellan*, 55 Miss. 299.] A decree *pro confesso* will not be set aside to allow a plea to be filed. *Bank of St. Mary v. St. John*, 25 Ala. 566.

submit to have the bill taken *pro confesso* against him, he may apply to the Court, upon motion with notice to be served on the plaintiff,² to be discharged out of custody; and thereupon the Court may order the bill to be taken *pro confesso* against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just: unless it appears from the nature of the plaintiff's case, or otherwise to the satisfaction of the Court, that justice cannot be done to the plaintiff without discovery, or further discovery, from such defendant.³

SECTION II. — *Hearing, Decree, and Subsequent Proceedings.*

The preliminary order having been obtained, the next subject for investigation is the manner in which the cause is heard, and the decree perfected.⁴

² For form of notice of motion, see Vol. III.

³ Ord. XXII. 5; see also 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 12; and for a case where the Court thought that justice required that discovery should be obtained from the defendant, see *Maitland v. Rodger*, 14 Sim. 92; 8 Jur. 371.

⁴ Under 19th Equity Rule of the United States Courts, [as recently modified by the Supreme Court,] after an order that the bill be taken *pro confesso*, the cause proceeds *ex parte*, and the [Court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree shall be deemed absolute unless the Court shall, at the same term, set aside the same and enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the Court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the Court shall direct for the purpose of speeding the cause. See *ante*, 518, n. 1.]

The bill being taken *pro confesso* against a defendant does not preclude him from disputing the amount of the plaintiff's demand in the Master's office. *Clayton v. Chichester*, *Craw. & Dix*, 73; *Pendleton v. Evans*, 4 Wash. C. C. 391. But the plaintiff is not in such case bound to prove the contract stated in the bill. *Douglass v. Evans*, 1 Tenn. 18. The allegations in the bill are thereby impliedly admitted, and the Court may decree thereupon. *Baltzel v. Hall*, 1 Litt. 98, *Attorney-General v. Carver*, 12 Ired. 231; *Harmon v. Campbell*, 30 Ill. 25. But the neglect of a defendant to answer a bill, upon which a decree *pro confesso* is passed, amounts to an admission only of the allegations in the bill. *Robinson v. Townsend*, 3 Gill & J. 413. If the charge in the bill be not stated with sufficient certainty, the plaintiff cannot, even after a decree *pro confesso*, have a final decree,

unless he establish his demand by satisfactory evidence. *Pegg v. Davis*, 2 Blackf. 281; see *Platt v. Judson*, 3 Blackf. 237; *Atkins v. Faulkner*, 11 Iowa (3 With.), 326. So upon a bill taken *pro confesso*, and an order of reference thereupon to a Master, such allegations of the bill as are distinct and positive are to be taken as true, without proof. But not such as are indefinite. *Williams v. Corwin*, *Hopk.* 471; *Platt v. Judson*, 3 Blackf. 235; *Atkins v. Faulkner*, *ubi supra*; but see *Singleton v. Gale*, 8 Porter, 270; *Wilkins v. Wilkins*, 4 Porter, 245, where it is said, that before a decree is pronounced on a bill *pro confesso*, the Court must be satisfied by sufficient evidence, of the justice of the plaintiff's demand. See also, *Levert v. Redwood*, 9 Porter, 80. [*Infra*, 531, n. 8.] In an anonymous case, 4 Hen. & M. 476, it was held, that on a bill taken *pro confesso*, a plaintiff cannot obtain a final decree without filing his documents, and proving his case; see, however, the *quære* upon this point in *Coleman v. Lyne*, 4 Rand. 454. In *Larkin v. Mann*, 2 Paige, 27, it was held, that if a bill be taken *pro confesso*, the proof of the plaintiff's title may be made before a Master, on reference. But if an issue of fact is joined in the cause, the plaintiff may make the necessary proof and produce the abstract of the conveyances, before the examiner. In *Pendleton v. Evans*, 4 Wash. C. C. 391, it was held, that if a bill, being for the balance of an account, is taken *pro confesso*, the amount must be referred to a Master. The decree is always *nisi*. See *Robertson v. Miller*, 2 Green Ch. 451; *post*, 531, note.

Where a bill against heirs does not allege, that any estate has descended, taking it *pro confesso* will not amount to a confession that any has. *Carnel v. Day*, 2 Litt. 397.

Where, to a bill against resident and non-resident defendants, the resident defendants answer, denying all the equity of the bill, and it is taken *pro confesso* against the others, without proof, no decree can be taken, even against the latter. *Cunningham v. Steele*, 1 Litt. 58. [*Infra*, 532, note.] If a bill is taken

* A defendant, against whom an order to take a bill *pro confesso* is made, is at liberty to appear at the hearing of the cause; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits, as stated in the bill.¹

At the hearing of the cause, the Court, upon reading the bill, and taking it to be true, will make such decree as seems just;² and in the case of any defendant who has appeared at the hearing, and waived all objection to the order to take the bill *pro confesso*, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on him, or after the execution of a writ of attachment against him, the decree is to be absolute.³

Formerly, it was necessary that the Record itself should actually be produced and read in Court, and the Clerk of Records and Writs attended in Court with the record for that purpose; now, however, the bill may be read at the hearing from a printed copy (or, where amended, without a reprint, a partly written and partly printed copy) stamped with a proper stamp, by one of the Clerks of Records and Writs, indicating the date of the filing of such bill (and of the amendment, when amended), without the attendance of the Clerk of Records and Writs.⁴

* A decree, founded on a bill taken *pro confesso*, is to be *527 passed and entered as other decrees;¹ and thereupon an office copy of it must (unless the Court dispenses with service thereof) be served on the defendant against whom the order to take the bill *pro confesso* was made, or his solicitor; and where the decree is not absolute,² such defendant, or his solicitor, is to be at the same time served with a notice, to the effect, that if such defendant desires permission to answer the plaintiff's bill, and set aside the decree, application for that purpose must be made to the Court within the time specified in the

pro confesso against a defendant, who is absent from the State, he may, under the statute of New York, come in after the decree and answer and defend the suit. *Davoue v. Fanning*, 4 John. Ch. 199. A decree is erroneous, if taken against infants, by default, without proof, though there be a guardian *ad litem*. *Massie v. Donaldson*, 8 Ohio, 377; see *Carneal v. Streshlev*, 1 A. K. Marsh. 471; *Chaffin v. Kimball*, 23 Ill. 26. For forms of decree when bill is taken *pro confesso*, see *Brown v. Home*, 8 Beav. 610; *Seton*, 1128, No. 1. As to setting down the cause for hearing, see *post*, Chap. XXIII.

¹ Ord. XXII. 7; *Greaves v. Greaves*, 12 Beav. 422; and for form of decree in that case, see *Seton*, 1128, No. 2; see note above.

² Ord. XXII. 8. The Court will only make such a decree as it would have made, if the defendant had appeared. *Brierly v. Ward*, 15 Jur. 277, V. C. K. B., which was a foreclosure suit; see *Haynes v. Ball*, 4 Beav. 103; *Stanley v. Bond*, 6 Beav. 421; *Simmonds v. Palles*, 2 Jo. & Lat. 489. [The decree on default will only be such as would

be authorized by the state of the pleadings, had there been no default. *Hardwick v. Bassett*, 25 Mich. 149; *McDonald v. Mobile Life Ins. Co.*, 56 Ala. 468. *Inf.* 531, n. 8. And should not be entered unless the plaintiff, on the face of his bill, is entitled to equitable relief. *Hazard v. Durant*, 11 R. I. 195.

A *pro confesso* order will not justify a personal decree, even for costs, against a mere agent. *Boyd v. Vanderkemp*, 1 Barb. Ch. 287. Nor against an officer merely having process in his hands. *McGavock v. Elliott*, 3 Yerg. 373. And see *ante*, 298, n. 7.]

³ Ord. XXII. 8; *Grover & Baker Sewing Machine Company v. Millard*, 8 Jur. N. S. 713, V. C. W. Notice of an order *pro confesso* must be given before final decree. *Wampler v. Wollinger*, 13 Md. 337.

⁴ Ord. 13 July, 1861. No fee is payable, on stamping the copy.

¹ Ord. XXII. 10.

² Ord. XXII. 8, *ubi sup.* Decree against a bare trustee made absolute in the first instance, and service on him dispensed with. *Leite v. Vicini*, 12 W. R. 837, M. R.

notice, or that, otherwise, such defendant will be absolutely excluded from making any such application.³

If such notice is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant, is three weeks after service of such notice; but where such notice is to be served out of the jurisdiction of the Court, such time is to be specially appointed by the Court, on the *ex parte* application of the plaintiff.⁴

In pronouncing the decree, the Court may, either upon the case stated in the bill, or upon that case, and a petition presented by the plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant, against whom the bill has been ordered to be taken *pro confesso*, to be appointed, with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appears to be just) direct payment to be made out of such real or personal estate of such sum of money, as at the hearing, or any subsequent stage of the cause, the plaintiff appears to be entitled to: provided that, unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, in case the Court afterwards thinks fit to order restitution to be made.⁵ But no proceeding is to be taken, and no receiver appointed under the decree, nor any sequestrator, under any sequestration issued in pursuance thereof, is to take possession of, or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process is to issue to compel performance of the decree, without leave of the Court, to be obtained on motion, with notice served on such defendant, or his solicitor, unless the Court dispenses with such service.⁶

*528 * Any defendant, waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the Court may direct, may, before enrolment of the decree, have the cause reheard, upon the merits stated in the bill: the petition for rehearing being signed by counsel, as other petitions for rehearing.¹

In cases where a decree is not absolute under Rule 8, the Court may order the same to be made absolute, on the motion of the plaintiff, made, —

1. After the expiration of three weeks from the service of a copy of

³ Ord. XXII. 11; see *ante*, 524 and note. For form of notice, see Vol. III.

⁴ Ord. XXII. 12. A list of times for the different colonies, and foreign countries, according to their distance from England, is kept in the Registrar's office; and the proper time is inserted by the Registrar in the order, in drawing it up. For form of order, see Seton, 1130, No. 1; and for forms of motion paper, and affidavit in support, see Vol. III.

⁵ Ord. XXII. 9; see *Lett v. Randall*, 7 Jur. 1075; *Torr v. Torr*, John. 660.

⁶ Ord. XXII. 13. The motion, of which

notice is to be thus given, is not for the appointment of a receiver (which may be done under the decree, without notice), but that the receiver may take possession. *Dresser v. Morton*, 2 Phil. 285; and see *Brown v. Home*, 10 Beav. 400, where leave was given to plaintiff, under this rule, to issue process of contempt. For forms of orders under this rule, see Seton, 1131, 1132, Nos. 3, 4, 5; and for forms of notice of motion, see Vol. III.

¹ Ord. XXII. 14. And see *post*, Chap. XXXII., *Rehearings and Appeals*.

the decree on a defendant, where the decree has been served within the jurisdiction.

2. After the expiration of the time limited by the notice provided for by Rule 11, where the decree has been served without the jurisdiction.

3. After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof.²

And such order may be made, either on the first hearing of such motion, or on the expiration of any further time which the Court may, on the hearing of such motion, allow to the defendant for presenting a petition for leave to answer the bill.³

Where a defendant was out of the jurisdiction, service of an office copy of the order, limiting the time within which he might apply for leave to answer the bill, and set aside the decree, was held to be a sufficient notice under the rule above referred to.⁴

The application to the Court, to dispense with service of the decree, should be made after the expiration of the three years mentioned in Rule 15.⁵

Where proceedings are to be taken in Chambers under the decree, the defendant must be served with the summons to proceed upon the decree, as well as with the decree; and no proceedings ought to be taken in Chambers, until the expiration of the time limited for setting aside the decree.⁶

*Where the decree is not absolute under Rule 8, and has not *529 been made absolute under Rule 15, and a defendant has a case upon merits not appearing in the bill, he may apply to the Court by petition, stating such case, and submitting to such terms with respect to costs and otherwise, as the Court may think reasonable, for leave to answer the bill; and the Court, if satisfied that such case is proper to be submitted to the judgment of the Court, may, if it thinks fit, and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill;¹ and if permis-

² Ord. XXII. 15. This period will not be dispensed with. *Darlow v. Sinnock*, 1 W. M. 154, V. C. K.

³ For form of order, see *Seton*, 1130, No. 2; and for forms of motion paper, and affidavit in support, see Vol. III.

⁴ *Trilly v. Keefe*, 16 Beav. 83; 16 Jur. 442.

⁵ *Vaughan v. Rogers*, 11 Beav. 165; *James v. Rice*, 5 De G., M. & G. 461; 18 Jur. 818. It was dispensed with before the expiration of the three years, however, in *Kemp v. Latter*, 16 Jur. 770, M. R.; *Benbow v. Davies*, 12 Beav. 421; and see *Brierly v. Ward*, 15 Jur. 277, V. C. K. B. These cases are, it is conceived, overruled by *James v. Rice*; and see *Thurgood v. Cane*, 11 W. R. 297, M. R.

[The final decree, it has been held, may be made in a foreclosure suit, although the decree has not been served and is not absolute. *London Monetary Advance Co. v. Bean*, 18 L. T. N. S. 52.]

⁶ *Golden v. Newton*, Johns. 720; and see

King v. Bryant, 3 M. & C. 191, 196; 2 Jur. 106; [*Merriman v. Goodman*, 15 W. R. 1132.]

¹ [For instances of decrees *pro confesso*, or final decrees thereon being set aside, and defendants let in to answer on proof of surprise, see *Van Deventer v. Stiger*, 10 C. E. Green, 224; *Miller v. Wright*, 10 C. E. Green, 340;] see *Wooster v. Woodhull*, 1 John. Ch. 539; *Parker v. Grant*, 1 John. Ch. 630; *Williamson v. Sykes*, 2 Beasley (N. J.), 182; *Robertson v. Miller*, 2 Green Ch. 431; *Emery v. Downing*, 2 Beasley (N. J.), 59, 60; *Oram v. Dennison*, 2 Beasley (N. J.), 238; *ante*, 524, note.

[Where a bill has been taken for confessed and set for hearing, and the defendant, by leave of Court, files an answer to which the plaintiff replies, the plaintiff is entitled to have the cause heard at that term unless the defendant show good cause for a continuance. *Gardner v. Landcraft*, 6 W. Va. 36; *Scales v. Nichols*, 3 Hayw. 229.]

sion be given to put in an answer, leave may be given to file a separate replication to such answer; and issue may be joined, and witnesses examined, and such proceedings had, as if the decree had not been made, and no proceedings against such defendant had been had in the cause.²

The rights and liabilities of any plaintiff or defendant, under a decree made upon a bill taken *pro confesso*, extend to the representatives of any deceased plaintiff or defendant, and to any persons claiming under any person who was plaintiff or defendant at the time when the decree was pronounced; and with reference to the altered state of parties, and any new interests acquired, the Court may, upon motion or petition, served in such manner, and supported by such evidence as, under the circumstances of the case, the Court deems sufficient, permit any party, or the representative of any party, to file such bill, or adopt such proceedings as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered, and the rights of the parties duly ascertained and determined.³

The Act of 11 Geo. IV. & 1 Will. IV. c. 36, is not, as has been before observed, repealed; ⁴ and although the general practice is, in all cases where bills are intended to be taken *pro confesso*, to proceed under the

General Orders which have been above referred to, yet, special *530 cases may still occur under the Act; ⁵ * but they will probably be so rare that it is not thought desirable, in the present work, to refer to the provisions of the Act in detail.

It may be observed that, under the Act, a decree did not become absolute against a defendant who was out of the realm, or had absconded, and had never been served with a copy of it, until the expiration of seven years from the date of the decree; ¹ whereas, under the 15th Rule above referred to, the Court may, in the same case, order the decree to become absolute, after the expiration of three years from the date of the decree.²

The provisions of the statute applied only to cases where the defendant absconded to avoid being served with process.³ In cases falling within the ordinary course of the Court, unaffected by the statute, a decree made, upon taking a bill *pro confesso*, was absolute in the first instance, and no day was given for showing cause against it.⁴

The General Order, however, applies, as we have seen,⁵ as well to suits where the defendant absconds, as to other cases where the plaintiff is enabled to have his bill taken *pro confesso* for want of answer. It

² Ord. XXII. 16. In *Inglis v. Campbell*, 2 W. R. 396, V. C. K., which was a foreclosure suit, permission was given under this rule, on payment of the costs of the application and of the suit.

³ Ord. XXII. 17.
⁴ *Ante*, p. 518; *Wilkin v. Nainby*, 4 Hare, 476; 10 Jur. 735.

⁵ 11 Geo. IV. & 1 Will. IV. c. 36, §§ 3-8 inclusive.

¹ 11 Geo. IV. & 1 Will. IV. c. 36, §§ 5, 8.

² Ord. XXII. 15.

³ *Ante*, p. 518.

⁴ *Landon v. Ready*, 1 S. & S. 44; *Ogilvie v. Hearne*, 13 Ves. 563; *Knight v. Young*, 2 V. & B. 134.

⁵ *Ante*, p. 518.

introduces, as we have seen,⁶ some peculiarities into the manner of proceeding under a decree obtained by the bill being taken *pro confesso*; but, in all other respects, a decree *pro confesso* is executed in the same manner as a decree made upon a regular hearing.

With respect to bills for discovery, the General Order does not make any distinction between such bills, and bills for relief;⁷ but the Stat. 11 Geo. IV. & 1 Will. IV. c. 36, gives an additional facility in obtaining the order to take a bill for discovery *pro confesso*, as against a person having privilege of Parliament: for, in the case of a bill for relief, no order to take the bill *pro confesso* can be obtained against a privileged defendant, until the writ of sequestration has issued; but under the 13th section of that Act, in the case of a bill for discovery, the Court may, upon the application of the plaintiff, as soon as the time for answering has expired, although no sequestration has issued, order the bill to be taken *pro confesso*, unless the defendant shall, within eight days after being served with such order, show good cause to the contrary. With this exception, there does not seem to be any difference between the case of a bill for discovery and one for relief, so far as regards the practice in obtaining an order to take the bill *pro confesso*; but after the preliminary order is obtained, there does not seem to be *any necessity for a further hearing of the cause, unless it *531 is rendered necessary by the General Order.¹

There is a case of *Logan v. Grant*,² before Sir Thomas Plumer V. C., by the report of which it would appear, that he considered that the 45 Geo. III. c. 124, § 5,³ which is identical in language with the 13th section, just referred to, applied to bills for relief, as well as to those for discovery, and that he made an order to take a bill *pro confesso*, upon this construction of the Act. In the case before him, a sequestration had issued, so that by the ordinary practice of the Court, independent of the statute, the plaintiff was entitled to have his bill taken *pro confesso*:⁴ consequently there was no occasion for any decision upon the statute. The words of the 13th section seem clearly applicable only to bills for discovery; and this is the construction which was put, by Lord Eldon, upon the 5th section of the former Act, above mentioned.⁵

After the order has been pronounced for taking a bill *pro confesso*, the bill, or an examined copy thereof, is to be taken and read, in any Court of Law or Equity, as evidence of the facts, matters, and things therein contained, in the same manner as if such facts, matters, and things, had been admitted to be true, by the answer of the defendant put in to such bill,⁶ and such bill, so taken *pro confesso*, is to be received and taken in evidence of such and the same facts, and on behalf of such and so

⁶ *Ante*, pp. 525-528

⁷ See *Caines v. Fisher*, 1 John. Ch. 8.

¹ Ord. XXII. 6.

² 1 Mad. 626, *ex relatione*.

³ Repealed by 11 Geo. IV. & 1 Will. IV. c. 36, § 1.

⁴ *Ante*, p. 453.

⁵ *Jones v. Davis*, 17 Ves. 368.

⁶ See *Stafford v. Brown*, 4 Paige, 360; *Atkins v. Faulkner*, 11 Iowa (3 With.), 326; *ante*, 526, note.

many persons, as the answer of the defendant to the bill could and might have been read and received in evidence of, in case such answer had been put in by the defendant thereto, and had admitted the same facts, matters, and circumstances, as in such bill stated and set forth; and in like manner, every other bill of discovery taken *pro confesso*, under any of the provisions of the Act, is to be taken and read in evidence of the facts, and matters, and things therein contained, to the extent aforesaid.⁷ It may be observed, that this last provision for making the bill evidence, is not confined to privileged defendants, but it applies to all cases where the bill is taken *pro confesso* under the provisions of the Act. It does not seem that there is any direct order or statute, by which a bill taken *pro confesso*, otherwise than under the Act, is made evidence against the defendant.⁸

⁷ 11 Geo. IV. & 1 Will. IV. c. 36, § 14.

⁸ See *ante*, 526, note. But it is discretionary with the Court, where a bill is taken as confessed, to require proof of all or any portion of the allegations in the bill; *Smith v. Trimble*, 27 Ill. 152; *Steehens v. Bichnell*, 27 Ill. 444; [*Forbes v. Memphis, &c. R. Co.*, 2 Woods, 323; *Hazard v. Durant* (Sup. Ct. R. I.), 1 *Memph. L. J.* 266;] or the Court may take the allegations as confessed, and enter the decree without proof. *Harmon v. Campbell*, 30 Ill. 25. But it is open to the defendant on error to show that the averments in the bill do not justify the decree. *Gault v. Hoagland*, 25 Ill. 266. [A decree *pro confesso* is an admission only of the facts which are well pleaded, and cannot aid or supplement defective averments, such as the averment of a legal conclusion, not of the facts necessary to sustain the conclusion. *McDonald v. Mobile Life Ins. Co.*, 56 Ala. 468; *Winham v. Crutcher*, 3 Tenn. Ch. 666; *ante*, 525, 526, notes.]

In all suits for the foreclosure or satisfaction of a mortgage, in New Jersey,
*532 *when the plaintiff's bill shall be ordered to be taken as confessed, or the defendant shall make default at the hearing, and the whole amount of the debt intended to be secured by the mortgage shall have become due, no order of reference to a Master to ascertain and report the sum due to the plaintiff shall be necessary, unless specially directed by the Court; but a report by a Master being made of the amount due upon the mortgage, the same, if no cause is shown to the contrary, shall be filed of course, and without any motion or rule for that purpose, or for confirmation, and a decree made accordingly. So, in all cases, where the plaintiff's bill shall be taken as confessed against the mortgagor, and other defendants claiming to be incumbrancers file their answer or answers setting up said incumbrances, if the order of priority shall not appear, upon the face of the plead-

ings, to be disputed by the parties, either plaintiff or defendant, and the amounts respectively claimed as due do not appear to be denied, and a report be made upon an order of reference to a Master, it shall not be necessary to enter a rule *nisi* to confirm the report, or to set the cause down for a hearing upon it; but a decree final may be entered thereon, as of course, upon the coming in of the Master's report. *Chancery Rules of New Jersey*, 21, 23.

[A decree *pro confesso* taken against a defendant is an admission of the facts stated in the bill, and entitles the complainant to relief without further proof. *Jones v. Beverley*, 45 Ala. 161; *Stone v. Duncan*, 1 Head, 103; *Code of Tenn.* § 4371. And the cause stands for hearing, in Tennessee, immediately after the *pro confesso* order. *Claybrook v. Wade*, 7 *Coldw.* 555.]

A *pro confesso* decree against one defendant will not justify a final decree against that defendant until the case is disposed of as to the other defendants, and if a co-defendant jointly interested answer and disprove the plaintiff's case, the bill will be dismissed as to all of the defendants. *Clason v. Morris*, 10 *John.* 524; *Lingan v. Henderson*, 1 *Bland*, 236, 266; *Petty v. Hannum*, 2 *Humph.* 102; *Cherry v. Clements*, 10 *Humph.* 552; *Hennessee v. Ford*, 8 *Humph.* 499; *Smith v. Cunningham*, 2 *Tenn. Ch.* 572; *Aikin v. Harrington*, 7 *Eng.* 391; *Frow v. De La Vega*, 15 *Wall.* 552.

It is error, it seems, on a *pro confesso* order, in a suit to enforce a vendor's lien, to render a final decree without a reference to the Master to compute the amount. *Freeman v. Ledbetter*, 43 *Miss.* 165. But where a decree has been rendered against adults and infants on a *pro confesso* order without proof, and is reversed for that reason as to the infants, the decree as to the adults will not thereby be set aside. *Ingersoll v. Ingersoll*, 42 *Miss.* 155.]

THE DEFENCE TO A SUIT.

IN the preceding chapters, the attention of the reader has been principally directed to the case on the part of the plaintiff, the method of submitting it to the Court, and the means provided by the practice of the Court for compelling the defendant to submit himself to its jurisdiction; or, in case of his refusal, of depriving him of the benefit of his contumacy, by giving to the plaintiff the relief to which the justice of his case appears to entitle him. The line of conduct to be pursued by a defendant, who is willing to submit himself to the authority of the Court, and to abide its decision upon the matter in litigation, will now be considered.

The first step to be taken by or on behalf of a defendant who intends to defend the suit, is to enter an appearance within the proper time, at the office of the Clerks of Records and Writs.¹ Unless the suit is defended by the defendant in person, this is done by his solicitor. A special authority is not necessary to enable a solicitor to undertake the business; a general authority to act as solicitor for his client is sufficient:² although a solicitor ought not to take upon himself to enter an appearance for a defendant without some authority; and where a solicitor, without any instruction, had caused an appearance to be entered for an infant defendant, the appearance was ordered to be set aside, and the solicitor to pay the costs.³ The retainer need not be in writing;⁴ but if it is not, and his authority is afterwards challenged, the solicitor runs a risk of having to pay the costs, if he have only assertion to offer against assertion.⁵

The defendant will know whether or not an appearance is required, by the copy of the bill with which he is served: if it bears an indorsement commanding his appearance, he must appear; but if there is no such indorsement, his appearance is not required.⁶

* The defendant having appeared to the bill, the next point *534

¹ Ord. I. 35; [see *infra*, 536].

² Wright v. Castle, 3 Mer. 12; *ante*, p. 307.

³ Richards v. Dudley, Rolls, sittings after Trinity Term, 1837; and see Leese v. Knight,

8 Jur. N. S. 1006; 10 W. R. 711, V. C. K.; see Amer. Ins. Co. v. Oakley, 9 Paige, 496.

⁴ Lord v. Kellett, 2 M. & K. 1. For form of retainer, see Vol. III.

⁵ Wiggins v. Poppin, 2 Beav. 403, 405.

⁶ See *ante*, p. 446; *post*, p. 538.

for consideration in the ordinary course of the cause is, the nature of the defence to be put in.¹ It was formerly incumbent upon a defendant, unless he pleaded or demurred to the bill, to put in an answer of some description; but now, since the Chancery Amended Act of 1852, unless interrogatories are filed, and a copy of them duly served on him or his solicitor, the defendant is not obliged to put in an answer.² He may, however, put one in, if he thinks fit, even though no interrogatories are served:³ the answer in such case being called voluntary.⁴ The propriety of putting in a voluntary answer depends upon the circumstances of each case; and, in general, where the defendant relies upon a case which does not appear upon the bill, he should put in a voluntary answer. If he does not do so, he will be considered to have traversed the case made by the bill.⁵ The defendant will, therefore, in general have to see whether any answer is called for from him, and if not, whether the circumstances of the case require that he should put in a voluntary answer.

It may, however, happen from some cause, either apparent upon the face of the bill itself, or capable of being concisely submitted to the Court, that the plaintiff is not entitled to the relief or part of the relief which he has prayed: in such cases, the defendant may, according as his objection goes to the whole or to part of the relief, submit the grounds upon which he considers the plaintiff not entitled to what he seeks, in a concise form to the Court, and pray the judgment of the Court whether the plaintiff is entitled to the relief prayed by his bill, to which the defendant objects. This species of defence, if the objection appears upon the face of the bill itself, is made by *Demurrer*:⁶ but if it depends upon any matter not in the bill, it must be submitted to the Court in the form of a *Plea*.⁷ If the defence submitted to the Court, in either of the above forms, is admitted, or held upon argument to be good, the effect of it, if it be a demurrer, is to put the bill, or that part of it which has been demurred to, out of Court: or, if it be a plea, to limit the matter in dispute to the question whether the point raised by it be true or not: in which case, if the defendant succeeds in establishing the point raised by the plea, by evidence at the hearing, the bill, so far as it is covered by the plea, will be dismissed. If the demurrer or plea be held upon argument to be bad, the effect of the judgment of the Court, in general, is, that the defendant must defend

*535 the cause, and put in an answer to the *interrogatories, if any have been served: he may, however, if his first defence has been by demurrer, be admitted, under certain circumstances, to dispute

¹ In Massachusetts, "a defence in Equity shall be made by demurrer, plea, or answer. Genl. Stat. c. 114 § 5; see Story Eq. Pl. § 493 et seq.

² In Tennessee, defence is made by plea in abatement, motion to dismiss, demurrer, plea in bar, answer, and cross-bill. Code, § 484. And it must be made in one order prescribed, the adoption of a different defence

being a waiver of those which precede. *Cooke v. Richards*, 11 Hark. 711.]

³ 15 & 16 Vic. c. 36, § 12.

⁴ *Id.* § 13.

⁵ See forms of answers, Vol. III.

⁶ 15 & 16 Vic. c. 36, § 28.

⁷ See forms of demurrer, Vol. III.

⁸ See forms of plea, Vol. III.

the right of the plaintiff to the relief prayed, by means of a plea; or by demurrer less extensive than the first.

If the defendant thinks proper to relinquish any claim he may have to the property in question in the suit, he can do so by putting in a species of answer called a *Disclaimer*; by which he disclaims all interest in the matters in question in the suit.¹

¹ See forms of disclaimer, Vol. III.

APPEARANCE.

APPEARANCE is the process by which a person, against whom a suit has been commenced, submits himself to the jurisdiction of the Court; and he will not be permitted to take any step in the cause until an appearance has been entered on his behalf.¹ Even if he desires to object to the regularity of the proceeding by which the plaintiff has sought to compel his appearance, he must first enter what is called a conditional appearance.² Where, however, a defendant had appeared by counsel

¹ Even if he denies the jurisdiction of the Court. *Felkin v. Lord Herbert*, 1 Dr. & Sm. 608; 8 Jur. N. S. 90. [A person may enter his appearance specially to object to the jurisdiction of the Court. *Rubber Co. v. Goodyear*, 9 Wall. 807, 811; *Merrill v. Houghton*, 51 N. H. 61. Or to plead in abatement to an attachment. *Boon v. Rahl*, 1 Heisk. 12.] In Maine, each defendant shall enter his appearance on the docket on the return day. And upon proof of neglect, when there has been personal notice, a default may be entered, the bill be taken as confessed, and a decree be entered accordingly. Rule 4, of Chancery Practice. In Massachusetts, "the day of appearance shall be the return day of the writ or *subpoena*, when personal service shall be made on the defendant, or he shall have had personal notice of the suit; or the return day of any order issued under the fourth or fifth rule, when no personal service shall be made. And, if the defendant shall not appear and file his answer, plea, or demurrer, within one month after the day of appearance, the plaintiff may enter an order to take his bill for confessed; and the matter thereof may be decreed accordingly unless good cause be shown to the contrary." Rule 9, of the Rules of Practice in Chancery. By the 17th Equity Rule of the United States Courts, the appearance day of the defendant shall be the rule day to which the *subpoena* is made returnable; provided, he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable. By the 16th rule, "upon the return of the *subpoena*, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the Court, and shall state the time of the entry."

A demurrer to the bill, signed by the At-

torney-General of a State, is a sufficient appearance by such State, in a suit brought against it. *New Jersey v. New York*, 6 Peters, 323. Where a defendant puts in an answer, which is read in Court, by consent of the opposite counsel, and ordered to be filed, and a decretal order is made thereon in favor of the defendants, it is an appearance on the records of the Court. *Livingston v. Gibbons*, 4 John. Ch. 94.

[Filing an answer by counsel is an appearance. *Proudfit v. Pickett*, 7 Coldw. 563. So is the filing of an agreement by solicitor and making an application thereon. *Pugsley v. Freedman's Savings & Tr. Co.*, 2 Tenn. Ch. 130. So is the filing of a petition for the removal of a cause from the State to the Federal Court. *Sweeny v. Coffin*, 1 Dill. 75. Compare *Freidlander v. Pollock*, 5 Coldw. 490.

The formal entry of appearance has, throughout the United States, ceased to be important, because service of process on a defendant to appear is made equivalent to actual appearance. *Sweeny v. Coffin*, 1 Dill. 75; *Fowlkes v. Webber*, 8 Humph. 530.]

² *Ante*, pp. 453, 512; *Robinson v. Nash*, 1 Anst. 76; *Anon.*, 3 Atk. 567; *Floyd v. Nangle*, *ib.* 569; *Mackreth v. Nicholson*, 19 Ves. 367; *Bound v. Wells*, 3 Mad. 434; *Davidson v. Marchioness of Hastings*, 2 Keen, 509; *Price v. Webb*, 2 Hare, 511; *Johnson v. Barnes*, 1 De G. & S. 129; 11 Jur. 261; *Lewis v. Baldwin*, 11 Beav. 154; *Maclean v. Dawson*, 4 De G. & J. 150, 152; 5 Jur. N. S. 663; *National Assurance Company v. Carstairs*, 9 Jur. N. S. 955, M. R.; *Foley v. Maillardet*, 1 De G., J. & S. 389; *Hinde*, 144; *Braithwaite's Pr.* 321. An appearance entered with the Record and Writ Clerk would waive the irregularity. *Braithwaite's Pr.* 321; and *ante*, p. 512. For the mode in which a conditional appearance is entered, see *post*, p. 537.

at the hearing of a motion, and by the order then made all further proceedings were stayed, he was allowed to apply to the Court for the purpose of having the order carried into effect, without having entered any appearance.³

* An ordinary appearance is entered in the Record and Writ Clerks' Office.¹ For this purpose, a *præcipe* (forms of which may be obtained in the office) must be filled up with the name of the defendant, and underwritten with the name and place of business of his solicitor, and of the agent of such solicitor, if any, or with the name and place of residence of the defendant where he enters the appearance in person, and, in either case, with the address for service, if any;² and such *præcipe* must be left at the seat of the Record and Writ Clerk to whose division the cause is attached.³ An appearance by a defendant served within the jurisdiction should be entered within eight days after service of the bill; it will, however, be accepted at the Record and Writ Clerks' Office at any time; and, if before decree, without order.⁴

A conditional appearance is entered with the Registrar.⁵ For this purpose, an order, giving leave to enter the appearance, is necessary. The order is obtained on an *ex parte* motion or on petition of course at the Rolls;⁶ but the defendant must, by his counsel, consent to submit to any process which may be issued against him on such appearance.⁷ The appearance is entered by the defendant's solicitor attending at the entering seat in the Registrars' office, and signing an entry in the Registrars' Book. The entry will be made by the entering clerk, on the order being produced to him.⁸ If the process is discharged for irregularity, the order discharging the process should also discharge the appearance.⁹

When an appearance has been entered, notice of it must be given on the same day to the plaintiff's solicitor, or to the plaintiff if he acts in person,¹⁰ before two o'clock on Saturday, and seven o'clock on any

³ *Betts v. Barton*, 3 Jur. N. S. 154, V. C. W.

¹ Ord. I. 35. By the 17th of the Equity Rules of the United States Courts, the appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

² Ord. III. 2, 5.

³ Any number of defendants may be included in one *præcipe*; and the names of all the defendants so included must be set forth, notwithstanding the same solicitor appears for all. Where a solicitor who is himself a defendant, and defends in person, is concerned for co-defendants, the appearance for himself must be entered on a separate *præcipe*, unless he be in the same interest with them. *Braithwaite's Pr.* 325. The following fees are payable, in Chancery fee fund stamps, impressed on or affixed to the *præcipe*, on entering an appearance. If not more than three defendants, 7s.; if more than three, and not exceeding six defendants, 14s.; and

the same proportion for every like number of defendants. Regul. to Ord. Sched. 4. In this computation, husband and wife, when they appear jointly, are reckoned as one person. *Braithwaite's Pr.* 325. For forms of *præcipe*, see Vol. III.

⁴ Ord. X. 3; *Braithwaite's Pr.* 328; and see *Grünig v. Prioleau*, 10 Jur. N. S. 60; 12 W. R. 141, M. R. : 33 Beav. 221. For the practice as to entering an appearance after decree, see *ante*, p. 151; and *post*, p. 540.

⁵ For when a conditional appearance should be entered, see *ante*, pp. 453, 512, 537.

⁶ For form of motion paper, see Vol. III.

⁷ See *Price v. Webb*, 2 Har., 111.

⁸ For forms of order and entry, see *Seton*, 1249; and see *ante*, p. 512.

⁹ *Johnson v. Barnes*, 1 De G. & S. 129 131; 11 Jur. 261. The application to set aside the process is made by motion.

¹⁰ Ord. III. 9; *ante*, pp. 453, 454. For form of notice, see Vol. III.

other day : otherwise, the service will stand for Monday in the one case, and in the other for the next day.¹¹

Where a husband and wife are defendants, the husband should,
*538 * under ordinary circumstances, appear for both ; and he will be liable to process of contempt for the non-appearance of his wife, as well as his own.¹ The wife may, however, in all cases, without any special order, enter an appearance for herself,² and, as we have seen, the plaintiff is entitled, in some cases, to treat her as a *feme sole* in this respect.³

Appearances are entered on behalf of infants, and persons of unsound mind, in their own names, as in the case of ordinary defendants ; but they cannot put in their answers, or take any other step in the cause, until guardians *ad litem* have been appointed.⁴

A person intending to defend a suit *in formâ pauperis*, usually enters an appearance, and pays the fee, before he petitions for the order to defend *in formâ pauperis* ; but upon procuring an indorsement, by the proper officer, upon his petition, that the affidavit as to poverty has been filed, he may obtain the order before he enters his appearance : in which case, on production of the order, he may enter his appearance without payment of the fee.⁵

An appearance to a bill not original is subject to the same regulations as an appearance to an original bill.⁶

In the case of a supplemental statement,⁷ such proceedings by way of answer, evidence, and otherwise are to be taken upon it as if it were embodied in a supplemental bill ;⁸ and, therefore, an indorsement requiring appearance must be made on a supplemental statement, and an appearance entered thereto.⁹

No appearance is necessary, in the case of a party served with notice of a decree, under Rule 8 of the 15 & 16 Vic. c. 86, § 42.¹⁰

Where an order of Revivor or supplemental order has been obtained,¹¹ the practice is to require an appearance by the defendants brought

¹¹ Ord. XXXVII. 2; *ante*, p. 455.

¹ Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance, and put in a joint answer for both. *Leavitt v. Cruger*, 1 Paige, 421; see *ante*, 182, note, 524, note.

² *Braithwaite's Pr.* 321; *Rudge v. Weedon*, 7 W. R. 368 (n), V. C. K.

³ See *ante*, pp. 179, 181, 445, 476.

⁴ *Braithwaite's Pr.* 322; see *ante*, pp. 162, 177; and see Ord. VII. 3; Ord. X. 5; *Leese v. Knight*, 8 Jur. N. S. 1006; 10 W. R. 711, V. C. K. Infants can only appear and answer by their guardian appointed for that purpose. And it is erroneous to proceed against them till such appointment. *Irons v. Crist*, 3 A. K. Marsh. 143; *Bradwell v. Weeks*, 1 John. Ch. 325. It is irregular, after appointment of a guardian for an infant, to take the bill *pro confesso* against him, for want of an appearance or of answer. *Carnel v. Shreshley*, 1 A. K. Marsh. 471. [A decree

pro confesso cannot be taken against an infant. *Wells v. Smith*, 44 Miss. 296; *McIlvoy v. Alsop*, 45 Miss. 365. See Code of Tennessee, §§ 4371, 4372; *Kilcrease v. Blythe*, 6 Humph. 378, 390.]

A party who takes a copy of a bill filed against him as committee of a lunatic, and enters his appearance without his addition of committee, &c., cannot afterwards, after suffering the plaintiff to go on to a final decree, object that the *subpena* was against him individually, and not as committee, &c. *Brasher v. Cortlandt*, 2 John. Ch. 247.

⁵ 1 Turn. & Ven. 512; *Braithwaite's Pr.* 322, 563. For form of petition, see Vol. III.

⁶ *Braithwaite's Pr.* 329.

⁷ 15 & 16 Vic. c. 86, § 53.

⁸ Ord. XXXII. 2.

⁹ *Braithwaite's Pr.* 81, 331.

¹⁰ *Ib.* 323; *ante*, p. 437.

¹¹ Under 15 & 16 Vic. c. 86, § 52; see *post*, Chap. XXXIII. *Revivor, and Supplement*.

before the Court by such order; but not to require any new appearance by the original defendants.¹² This practice seems * scarcely consistent with the words of the Act; ¹ and its propriety has been doubted.² *539

Where the plaintiff amends his bill, he must, as we have seen, serve the defendants with a copy of the amended bill: but the defendants, if they have appeared to the original bill, need not enter any appearance to the amended bill: unless required so to do by the indorsement on the amended bill.³

Where a formal defendant is served with a copy of the bill under the General Order,⁴ he may appear in common form, at any time within twelve days from the service of the copy of the bill: ⁵ or he may, within the same time, enter a special appearance, for the purpose of being served with notice of all proceedings in the suit.⁶ After the expiration of the twelve days, neither the common nor special appearance can be entered, without an order for that purpose.⁷

A defendant may, if he has been informed of a bill being filed against him, enter an appearance, or cause an appearance to be entered for him, without waiting to be served with the copy of the bill. This is called appearing *gratis*, and is generally resorted to where the plaintiff has served some only of the defendants with the bill, and a defendant who is not served wishes to make an immediate application to the Court in the cause.⁸

In *Barkley v. Lord Reay*,⁹ Sir James Wigram V. C. decided that a defendant against whom it is prayed that, upon service of a copy of the bill, he may be bound by the proceedings in the cause, is entitled to appear gratis, either before or after service.

A defendant may, likewise, in certain cases, appear gratis at the hearing, and consent to be bound by the decree; ¹⁰ but where a person, not a party to the suit, who was interested in a question, appeared by counsel, and submitted to be bound by the decision, * the *540

¹² Braithwaite's Pr. 331, 559; Seton, 1171; Cross v. Thomas, 16 Beav. 592; 17 Jur. 336; Forster v. Menzies, 17 Jur. 657; 10 Hare Ap. 36; 16 Beav. 568; Ward v. Cartwright, 10 Hare Ap. 73; 17 Jur. 781.

¹ See 15 & 16 Vic. c. 86, § 25; but see Hanbury v. Ward, 18 Jur. 222, V. C. S.; Hall v. Radcliffe, 2 J. & H. 765.

² See 1 Smith's Pr. 805.

³ Cheesborough v. Wright, 28 Beav. 173; Barry v. Crosskey (No. 2), 2 J. & H. 130; 8 Jur. N. S. 114; Braithwaite's Pr. 328; Braithwaite's Manual, 159; and see *ante*, pp. 446, 533. Where defendants have not answered the original bill, but are called upon by an amended bill simultaneously to answer both, it is not necessary to issue a new *subpoena*. Fitzhugh v. McPherson, 9 Gill & J. 1. See Cunningham v. Pell, 6 Paige, 655; Longworth v. Taylor, 1 McLean, 514.

⁴ Ord. X. 11.

⁵ Ord. X. 14, 16, *ante*, p. 432.

⁶ Ord. X. 15; *ante*, p. 432.

⁷ Ord. X. 15, 16; and see *ante*, pp. 432, 433, for the practice as to entering a common or special appearance, and obtaining an order for leave so to do.

⁸ Fell v. Christ's College, 2 Bro. C. C. 279; Hume v. Babington, 1 Hogan, 8. So where the *subpoena* is irregularly served, as where it is served out of the State, the defendant may voluntarily appear. Dunn v. Dunn, 4 Paige, 425; see Seebor v. Hess, 5 Paige, 85. Where a plaintiff neglects to serve a *subpoena* on a defendant in a bill against whom an injunction has been granted affecting his rights, such defendant may appear voluntarily, and apply to dissolve the injunction, without waiting for the service of the *subpoena*. Wattle v. Vanderheyden, 8 Paige, 45; see Howe v. Willard, 40 Vt. 654. [Or demur. Jones v. Fulghum, 3 Tenn. Ch. 193.]

⁹ 2 Hare, 309.

¹⁰ Capel v. Butler, 2 S. & S. 457, 462; Sapte v. Ward, 1 Coll. 24; see form of order, *ib.* 25 (n.); Seton, 3.

Court held, that he could not be heard without the consent of the other defendants.¹

After decree, an appearance cannot be entered by a defendant except by leave of the Court, on an application by him for liberty to enter such appearance, and attend the proceedings: the defendant submitting to be bound by the decree and proceedings already had. The application may be made by petition of course, if the plaintiff will consent; and if he will not, by motion or summons, as before explained.²

If an appearance has been entered in the name of a defendant by mistake, and no proceeding has been subsequently taken, such appearance may be withdrawn, at the request of the party who entered it, and with the consent of the plaintiff; but if any proceeding has been taken, a special order, which may be obtained either on motion, with notice, or on summons at Chambers, is necessary. If it is only desired to alter the name of the solicitor who has entered the appearance, the common order to change solicitors is sufficient.³

If the defendant does not enter an appearance by himself or his solicitor within the time limited for that purpose, the plaintiff may enter an appearance for him;⁴ and as an attachment to compel appearance cannot now be issued without a special order of the Court, and no order will be made for a messenger or Sergeant-at-arms to take the body of a defendant for the purpose of compelling his appearance,⁵ it has, as we have seen,⁶ become the usual practice for the plaintiff to enter an appearance for the defendant, in default of such appearance being entered by the defendant.

An appearance which has, by mistake, been entered by the plaintiff, as if concerned for a defendant, may be withdrawn with the consent of the defendant, on the request of the plaintiff's solicitor, if the application is made before the expiration of three weeks from the service of the copy of the bill; but if the defendant will not consent, or the application is made after such three weeks, an order, which may be obtained on motion with notice, or on summons at Chambers, is necessary.⁷

*541 * We have before seen, that a defendant, notwithstanding an appearance has been entered for him, may afterwards appear for himself in the ordinary way: but that such appearance is not to affect

¹ *Bozon v. Bolland*, 1 R. & M. 69; *Attorney-General v. Pearson*, 7 Sim. 290; *Dyson v. Morris*, 1 Hare, 413; 6 Jur. 297; *Lewis v. Clewes*, 10 Hare Ap. 62; see also *ante*, p. 153.

² *Braithwaite's Pr.* 323; *ante*, p. 153. In *Morgan v. Day*, V. C. S. in Chamb. 3 Feb., 1865, a person not a party to the suit, but claiming to be interested under the will of the testator, was, by consent, permitted to enter an appearance, and defend the suit, on consenting to be bound by the decree, and the proceedings had thereunder, as if she had originally been made a defendant. For forms of peti-

tion, notice of motion, and summons, see Vol. III.

³ *Braithwaite's Pr.* 323, 324; *Martin v. Patching*, *ib.* 338. For forms of request, consent, notice of motion, and summons, see Vol. III.

⁴ Ord. X. 3, 4, *ante*, pp. 460-462.

⁵ Ord. X. 10; *Hackwood v. Lockerby*, 7 De G., M. & G. 238.

⁶ *Ante*, pp. 460-462.

⁷ *Braithwaite's Pr.* 337, 338; and *Martin v. Patching*, there cited. For forms of request, consent, notice of motion and summons, see Vol. III.

any proceeding duly taken, or any right acquired by the plaintiff under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first appearance; ¹ and it seems that, in practice, wherever an appearance for a defendant has been entered by the plaintiff, such defendant must, nevertheless, enter an appearance for himself, before he can be allowed to defend the suit. ²

¹ Ord. X. 9; *ante*, p. 479.

² *Ante*, p. 479. In *Groome v. Sporne*, M. R. 1863, G. No. 4, a motion by a defendant, who had not appeared to the bill, and against whom the bill had been taken *pro confesso*, to set aside the proceedings for irregularity,

was permitted to proceed, on his entering a conditional appearance with the Registrar, and undertaking, by his counsel, to enter an ordinary appearance; which was afterwards entered accordingly, upon the Registrar's minute, without any formal order.

DEMURRERS.

SECTION I. — *The general Nature of Demurrers.*

WHENEVER any ground of defence is apparent upon the bill itself, either from the matter contained in it, or from defect in its frame, or in the case made by it, the appropriate mode of defence is by demurrer.¹

Demurrers are now of much less frequent occurrence than formerly; the readiness with which the Court gives the plaintiff leave to amend his bill rendering it inexpedient to demur, in any case, where the defect in the bill can be cured by amendment;² but where the question raised by the bill can be properly determined on demurrer, a defendant, by neglecting to demur, injures his position with respect to the costs of the suit. Thus, bills dismissed at the hearing, have often been dismissed without costs, on the ground that they might have been demurred to;³ or the defendant has only been allowed the same costs as he would have received if he had demurred.⁴ The defendant is not justified in neglecting to demur to the bill, because it contains charges of fraud which he is desirous of answering.⁵

The Court sometimes declines to decide a doubtful question of title on demurrer: in which case, the demurrer will be overruled, without prejudice to any question.⁶ A demurrer may also be

*543 * overruled, with liberty to the defendant to insist upon the same

¹ Ld. Red. 107; see *Tappan v. Evans*, 11 N. H. 311; *Harris v. Thomas*, 1 Hen. & M. 18; *Alderson v. Biggars*, 4 Hen. & M. 472; *Mitchell v. Lenox*, 2 Paige, 280; *Brill v. Styles*, 35 Ill. 305; [*Barry v. Abbott*, 100 Mass. 398].

In Equity, a demurrer is only a mode of defence to a bill. It is never resorted to for the purpose of settling the validity of a plea or answer. *Travers v. Ross*, 1 M'Carter (N. J.), 254; *Raymond v. Simonson*, 7 Blackf. 79; *Thomas v. Brathear*, 4 Monroe, 65; *Cooper Eq. Pl.* 110; *Stone v. Moore*, 26 Ill. 165; [*Edwards v. Drake*, 15 Fla. 66. See *infra*, 692, n. 11. If, however, the parties have taken no exception to the mode of proceeding, the Court will dispose of the case on its merits. *Barry v. Abbott*, 100 Mass. 398.]

² As to the expediency of demurring, see *Wigram on Disc.* 158.

³ *Jones v. Davids*, 4 Russ. 277; *Hill v. Reardon*, 2 S. & S. 431, 439; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Webb v. England*, 29 Beav. 44; 7 Jur. N. S. 153; *Ernest v. Weiss*, 9 Jur. N. S. 145; 11 W. R. 206, V. C. K.; *Nesbitt v. Berridge*, 9 Jur. N. S. 1044; 11 W. R. 446, M. R.; but see *Morocco Company v. Fry*, 11 Jur. N. S. 76, 78; 13 W. R. 310, 312, V. C. S.

⁴ *Godfrey v. Tucker*, 9 Jur. N. S. 1188; 12 W. R. 33, M. R.; 33 Beav. 280.

⁵ *Nesbitt v. Berridge*, *ubi sup.*; but see *S. C.* before L. C. 10 Jur. N. S. 53; 12 W. R. 283.

⁶ *Brownsword v. Edwards*, 2 Ves. S. 243, 247; *Mortimer v. Hartley*, 3 De G. & S. 316; *Evans v. Evans*, 18 Jur. 666, L. J.J.; *Cochrane v. Willis*, 10 Jur. N. S. 162, L. J.J.; [4 De G., J. & S. 229; *Bloomstein v. Clees*, 3 Tenn. Ch. 438;] Ld. Red. 154, n. (p).

defence by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in.¹

A demurrer has been so termed, because the party demurring *demoratur*, or will go no further:² the other party not having shown sufficient matter against him; and it is in substance an allegation by a defendant, which, admitting the matters of fact stated by the bill to be true, shows that, as they are therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer; or that, for some reason apparent on the face of the bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the plaintiff ought not to be allowed to proceed. It, therefore, demands judgment of the Court, whether the defendant shall be compelled to make any further or other answer to the plaintiff's bill, or that particular part of it to which the demurrer applies.³

A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing;⁴ but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so;⁵ for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the Court to modify the relief or to grant no relief at all, the Court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer.⁶ Therefore, where a bill was filed for the specific performance of an agreement, and the case turned upon the point, whether the facts stated amounted to a perfect agreement, Lord Rosslyn thought that, although the circumstances, * as stated in the bill, amounted more to a treaty than a *544 complete agreement, the question whether it was an agreement

¹ Collingwood v. Russell, 13 W. R. 63, L. J.J.; 10 Jur. N. S. 1062; Loutour v. Attorney-General, 11 Jur. N. S. 48; 13 W. R. 305, L. J.J.; Baxendale v. Westminster R. W. Co., 8 Jur. N. S. 1163, L. C.

² 3 Bl. Com. 314; Tomlins' & Burrill's Law Dict. Tit. "Demurrer;" Story Eq. Pl. § 441. A demurrer is an answer in law to the bill, though not, in a technical sense, an answer according to the common language of practice. New Jersey v. New York, 6 Peters, 323. [And therefore, if, on setting aside an order *pro confesso*, leave be given to answer the defendant can neither plead nor demur without special permission. Allen v. Baugus, 1 Swan, 404.] The 32d Equity Rule of the United States Courts, declares, "The defendant may, at any time before the bill is taken for confessed, or afterwards, with the leave of the Court demur or plead to the whole bill or part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and expressly denying the

fraud and combination, and the facts on which the charge is founded." A similar rule has been adopted in Massachusetts. Rule 10, of the Rules for Practice in Chancery.

³ Ld. Red. 107.

⁴ Utterson v. Mair, 2 Ves. J. 95; 4 Bro. C. C. 270; Hovenden v. Lord Annesley, 2 Sch. & Lef. 607, 638.

⁵ Brooke v. Hewitt, 3 Ves. 253, 255; Morrison v. Morrison, 4 Drew. 315.

⁶ See Story Eq. Pl. §§ 446, 447, 478; Lubé, Eq. Pl. 338, 339, 340. A demurrer to a bill must be founded on some strong point of law, which goes to the absolute denial of the relief sought, and not on circumstances in which a minute variation may incline the Court either to grant, modify, or refuse the application. Verplanck v. Caines, 1 John. Ch. 58. [Vail v. Central R. Co., 8 C. E. Green, 466; Drummond v. Westervelt, 9 C. E. Green, 30. It should go to the merits and the facts on which the relief is prayed. Roberdeau v. Rous, 1 Atk. 544; Averill v. Taylor, 5 How. Pr. 478; Beale v. Hayes, 5 Sandf. 640; Brien v. Butterff, 2 Tenn. Ch. 523; Payne v. Berry, 3 Tenn. Ch. 154.]

or not depended very much upon the effect of the evidence, and therefore overruled the demurrer.¹

As a demurrer proceeds upon the ground that, admitting the facts stated in the bill to be true, the plaintiff is not entitled to the relief he seeks, it is held that, at least for the purpose of argument, all the matters of fact which are stated in the bill are admitted by the demurrer,² and cannot be disputed in arguing the question whether the defence thereby made be good or not; and such admission extends to the whole manner and form in which it is there stated. Upon this ground, where a bill misstated a deed, by alleging it to contain a proviso which it did not, Lord Cottenham, upon the argument of a demurrer to the bill, refused to allow the defendant's counsel to refer to the deed itself, for the purpose of showing the incorrectness of the manner in which it was set out: although the bill contained a reference "for greater certainty as to its contents, &c.," to the deed, as being in the custody of the defendants. His Lordship said, that to hold otherwise would be to give the defendants an advantage, depending upon the accident of their having the custody of the document which the bill purported to set out, and would in effect be to decide the question raised by the demurrer, upon matter which was *dehors* the record.³ In this case, the object of referring to the deed was to contradict a statement in the bill: and where the object is to support, and not contradict, the plaintiff's case, it appears that the Court will still refuse to look into the document.⁴

It is also to be remarked, that where a bill professes to set out a deed inaccurately, and alleges, as a reason for so setting it out, that it is in the possession of the defendants, a demurrer to the bill cannot be sustained, although, according to the terms of the deed, as stated *545 by the plaintiff, he can take no title under it: because * the Court will not, under such circumstances, bind the plaintiff by the statement he has made, which he alleges to be inaccurate, and which the defendant, therefore, by his demurrer admits to be so. In a case of this description, if the defendant means that the Court should at once

¹ *Brooke v. Hewitt*, *ubi sup.*; *Heffield Waterworks v. Yeomans*, L. R. 2 Ch. Ap. 8; but see *Reeves v. Greenwich Tanning Company*, 2 H. & M. 54.

² *E. I. Company v. Henchman*, 1 Ves. J. 289; and see *Nesbitt v. Berridge*, 9 Jur. N. S. 1044; 11 W. R. 446, M. R.; *Story Eq. Pl.* § 452; *Mills v. Brown*, 2 Scam. 549; *Goble v. Andras*, 1 Green Ch. 66; *Niles v. Anderson*, 5 How. (Miss.) 365; *Green v. Robinson*, *ib.* 80; *Smith v. Allen*, 1 Saxton (N. J.), 43; *Wales v. Bank of Michigan*, *Harring. Ch.* 308. But it cannot supply defects in substance, or cure a defective statement of title. *Mills v. Brown*, and *Goble v. Andras*, *ubi supra*.

Where a cause is argued upon a demurrer, and plea in bar, the averments in the plea, for the purpose of considering their legal effect, must be taken to be true. *York Manuf.*

Co. v. Cutts, 18 Maine, 204. A demurrer is a denial in form and substance of the plaintiff's right to have his case considered in a Court of Equity, and an admission of all its allegations that are properly pleaded. *Griffing v. Gibb*, 2 Black, U. S. 519; [*Roby v. Cossitt*, 78 Ill. 638; *Croft v. Thompson*, 51 N. H. 536; *Swan v. Castleman*, 4 Baxt. 257.]

³ *Campbell v. Mackay*, 1 M. & C. 603, 613; *Cuddon v. Tite*, 1 Giff. 395. [And see where a date was left blank. *Watson v. Byrd*, 53 Mo. 480.]

⁴ *Harmer v. Gooding*, 3 De G. & S. 407, 410, 411; 13 Jur. 400, 402; see, however, *Weld v. Bonham*, 2 S. & S. 91; and as to Acts of Parliament, see *Wilson v. Stanhope*, 2 Coll. 629; 10 Jur. 421; *Apperley v. Page*, 1 Phil. 779, 785; 11 Jur. 271; *Bailey v. Birkenhead Junction Railway*, 12 Beav. 433, 443; 14 Jur. 119, 122.

be called upon to determine the true construction of the deed, he must plead it.¹

On a demurrer, ambiguous statements are construed adversely to the pleader; but a defendant is not entitled to press the principle so far, as to draw any inference of facts he pleases which may happen to be not inconsistent with the averments of the bill.²

But although a demurrer confesses the matters stated in the bill to be true, such confession is confined to those matters which are well pleaded; *i. e.*, matters of fact.³ It does not, therefore, admit any matters of law which are suggested in the bill, or inferred from the facts stated; ⁴ for, strictly speaking, arguments, or inferences, or matters of law, ought not to be stated in pleading,⁵ although there is sometimes occasion to make mention of them for the convenience or intelligibility of the matter of fact. Thus, in the case of *Campbell v. Mackay*, above referred to, if the bill had gone on, after stating the alleged words of the proviso, to aver a legal inference from them which such words did not authorize, the demurrer, although it was held to confess the existence in the deed of a proviso, in the words stated, as a matter of fact, would not have been considered as admitting the inference of law alleged to have arisen from it. An inference of this nature is called a *Repugnancy*; and it is a rule in pleading that a demurrer will not admit matters, either of law or of fact, which are repugnant to each other. Thus, where a bill was filed for a discovery, and for an account and delivery up of the possession of land, on the ground that the plaintiff could not describe the land so as to proceed at law, by reason of the defendants having got possession of the title-deeds and mixed the boundaries, Lord Rosslyn allowed a demurrer, because the bill was a mere ejectment bill; but he intimated that, even if the bill had been for a discovery only, it could not have been sustained: because the averment, that the plaintiff could not ascertain the lands, was contrary to the facts disclosed in the bill, in which the lands were sufficiently described.⁶ And * so, *546 where a record is pleaded, it has been held, that a demurrer is never a confession of a thing stated in the bill, repugnant to the record.¹

¹ *Wright v. Plumtree*, 3 Mad. 481, 490.

² *Simpson v. Fogo*, 1 J. & H. 18.

³ *Ford v. Peering*, 1 Ves. J. 72, 78; *Commercial Bank of Manchester v. Buckner*, 20 How. U. S. 108; *Paterson's H. R. R. Co. v. Jersey City*, 1 Stockt. 434; *Mills v. Brown*, 2 Scam. 549; *Goble v. Andras*, 1 Green Ch. 66; *Niles v. Anderson*, 5 How. (Miss.) 365; *Baker v. Booker*, 6 Price, 381; *Redmond v. Dickerson*, 1 Stockt. 507; *Lea v. Robeson*, 12 Gray, 280. [An averment in a bill that the purchase-money of real estate sold by executors was not paid to, or received by them "as executors," and that they "as executors" received no consideration for the conveyance, is not equivalent to an averment that no consideration was in fact paid. *Barnes v. Trenton Gas Light Co.*, 12 C. E. Green, 33, referring to the text.]

⁴ *Lea v. Robeson*, 12 Gray, 280; *Bryan v.*

Spruill, 4 Jones Eq. 27; *Dike v. Greene*, 4 R. I. 285. [Averments as to the meaning of a contract set out by the bill, or exhibited with it, are not admitted by demurrer. *Dillon v. Barnard*, 21 Wall. 430; *Bonnell v. Griswold*, 68 N. Y. 294. So averments which admit of being construed as conclusions of law only, and allegations of parol agreements incompatible with, and incompetent to vary written instruments set up, do not stand admitted. *Dillon v. Barnard*, 1 Holmes, 386.]

⁵ *Merrill v. Plainfield*, 45 N. H. 126; *Murch v. Concord Railroad*, 29 N. H. 33; *Wooten v. Burch*, 2 Md. Ch. 190.

⁶ *Loker v. Rolle*, 3 Ves. 4, 7.

¹ *Arundel v. Arundel*, Cro. Jac. 12; *Com. Dig. Pleader*, Q. 6; *Green v. Dodge*, 6 Hare, 80; *Mortimer v. Fraser*, 30 Jan., 1837, reported upon another point, 2 M. & C. 173.

It may be noticed here, that there are some facts of which the Court is said to take *judicial notice*: thus, it recognizes foreign States; and when facts are averred in a bill which are contrary to any fact of which the Court takes judicial notice, the Court will not pay any attention to the averment. Thus, where, in order to prevent a demurrer, it was falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent State, Sir Lancelot Shadwell V. C., upon the argument of a demurrer to the bill, held, that the fact averred was one which the Court was bound to take notice of as being false, and that he must, therefore, take it just as if there had been no such averment on the record.² It is to be observed, that besides the recognition of foreign States, the Court will also take judicial or official notice of a war in which this country is engaged; but not of a war between foreign countries.³ The Court is also bound to notice the time of the Queen's accession, her proclamations, and privileges; time and place of holding Parliaments, the time of sessions and prorogation, and the usual course of proceedings; the Ecclesiastical, Civil, and Maritime Laws; the customary course of descent, in Gavelkind and Borough English tenures;⁴ the course of the Almanac;⁵ the division of England into counties, provinces, and dioceses;⁶ the meaning of English words⁷ and terms of art, even when only local in their use; legal weights and measures, and the ordinary measurement of time; the existence and course of proceeding of the Superior Courts at Westminster, and the other Courts of General Jurisdiction:⁸ such as the Courts of the counties palatine, &c.; and the privileges of its own officers.⁹ It follows, therefore, from the principle before laid down, that where a bill avers any fact in opposition to what the Court is so officially bound to notice, such averment will, in arguing a demurrer to the bill, be considered as a nullity.¹⁰

² Taylor v. Barclay, 2 Sim. 213, 220, *ante*, pp. 18, 19.

³ Dolder v. Lord Huntingfield, 11 Ves. 292, *ante*, p. 54.

⁴ Crosby v. Hetherington, 4 Man. & Gr. 946.

⁵ Mayor of Guildford v. Clark, 2 Vent. 247.

⁶ Courts *ex officio* take notice of the civil divisions of the State created by public laws, as counties and towns, and of its great geographical features, as its large lakes, rivers, and mountains. The Winnipiseogee Lake Co. v. Young, 40 N. H. 420. But not the local situation, and the distance of different places in a county from each other. Deybel's case, 4 B. & Ald. 243. [See Cooke, App. 1. bottom page 385.]

⁷ Commonwealth v. Kneeland, 20 Pick. 239.

⁸ Newell v. Newton, 10 Pick. 470; Hawkes v. Kennebeck, 7 Mass. 461; Ripley v. Warren, 2 Pick. 592; Despau v. Swindler, 3 Martin (N. S.), 705; Jones v. Gale, 4 Martin, 635; Woods v. Fitz, 10 Martin, 196.

⁹ Taylor on Evid. Chap. II.; Stephen on Pl. 269; and see 1 Chitty on Pl. 236 *et seq.*, where further information on the subject is to be found; see also 1 Greenl. Evidence, §§ 4, 6; Story Eq. Pl. § 24.

¹⁰ Courts will not, *ex officio*, take notice of foreign laws, and consequently they must, when material, be stated in pleading. Campion v. Kille, 1 McCarter (N. J.), 229.

* SECTION II. — *The different Grounds of Demurrer.*

*547

A demurrer may be either to the relief prayed, or, if discovery is sought, to the discovery only, or to both. If the demurrer is good to the relief, it will be so to the discovery; ¹ if, therefore, a plaintiff is entitled to the discovery alone, and goes on to pray relief, a general demurrer to the whole bill will be good; ² and, for the purposes of a demurrer, a prayer for general relief renders the bill a bill for relief. ³ A prayer will not, however, convert a * bill into one for relief, if it *548 merely prays for the equitable assistance of the Court, consequential upon the prayer for discovery: ¹ such as, a writ of injunction, or a

¹ *Ld. Red.* 183; *Loker v. Rolle*, 3 Ves. 4, 7; *Ryves v. Ryves*, *ib.* 343, 347; *Muckleston v. Brown*, 6 Ves. 63; *Barker v. Dacie*, *ib.* 686; *Hodgkin v. Longden*, 8 Ves. 3; *Williams v. Steward*, 3 Mer. 502; *Gordon v. Simpkinson*, 11 Ves. 509; *Speer v. Crawter*, 17 Ves. 216; *Evan v. Corporation of Avon*, 29 Beav. 144.

² *Price v. James*, 2 Bro. C. C. 319; *Collis v. Swayne*, 4 Bro. C. C. 480; *Albrectht v. Sussman*, 2 V. & B. 328; see *Miller v. Ford*, 1 Saxton (N. J.), 360; *Coombs v. Warren*, 17 Maine, 404; *Sauza v. Belcher*, 3 Edw. Ch. 117. It is said by Mr. Justice Story, in note to *Story Eq. Pl.* § 412, remarking on the rule in the text, that "the rule formerly adopted in England was different. It was, that if a bill was for discovery and relief, and it was good for discovery only, a general demurrer to the whole bill was bad; for though the party was not entitled to relief, he was not to be prejudiced for having asked too much." To this he cites, *Brandon v. Sands*, 2 Ves. J. 514; *Salter v. Scarborough*, 9 Ves. 75; *Attorney-General v. Brown*, 1 Swanst. 294; *Mitford Eq. Pl.* by Jereny, 183, 184. "In New York," the same learned author adds, "the old English rule is adhered to; and indeed it has much to commend it." See *Laight v. Morgan*, 1 John. Cases, 429; *S. C.* 2 Caines's Ca. in Error, 344; *Le Roy v. Veeder*, 1 John. Cases, 423; *Le Roy v. Servis*, 1 Caines's Ca. in Error, 1; *S. C.* 2 Caines's Ca. in Error, 175; *Kimberly v. Sells*, 4 John. Ch. 467; *Livingston v. Livingston*, 4 John. Ch. 496; *Higginbotham v. Burnet*, 5 John. Ch. 184. The proper course is held, in New York, to be, to demur to the relief and to answer to the discovery. *Higginbotham v. Burnet*, 5 John. Ch. 184. The same doctrine was affirmed in the Supreme Court of the United States in *Livingston v. Story*, 9 Peters, 632, 658, where Mr. Justice Thompson said, "And if any part of the bill is good, and entitles the plaintiff either to relief or to discovery, a demurrer to the whole bill cannot be sustained. It is an established and universal rule of pleading in Chancery, that a defendant may meet the plaintiff's bill by several modes of defence. He may demur, answer, and plead to different parts of the bill; so that if a bill for discovery and re-

lief contains proper matter for the one and not for the other, the defendant should answer the proper, and demur to the improper, matter. But if he demurs to the whole bill, the demurrer must be overruled;" see *post*, 584. So in *Wright v. Dame*, 1 Met. 241, Mr. Justice Putnam, delivering the opinion of the Court, said, "We adopt the old rule of pleading in Equity, that on a general demurrer to the whole bill, if there is any part, either as to the relief or discovery, to which the defendant ought to put in an answer, the demurrer, being entire, ought to be overruled." And he cites, 1 Harrison Ch. Pr. (7th ed.) 414; see *Higginbotham v. Burnet*, 5 John. Ch. 186; *Conant v. Warren*, 6 Gray, 562; *Brockway v. Copp*, 3 Paige, 539; *Sikes v. Truitt*, 4 Jones Eq. (N. C.) 361; *Atwill v. Ferrett*, 2 Blatch. C. C. 39; *Metler v. Metler*, 3 C. E. Green (N. J.), 270; *Metler v. Metler*, 4 C. E. Green (N. J.), 457; *Banta v. Moore*, 2 McCarter (N. J.), 97; *Miller v. Ford*, Saxton (N. J.), 365; *Holmes v. Holmes*, 36 Vt. 525, 537. "The defendant should answer as to the discovery, and demur as to the relief." *Laight v. Morgan*, 1 John. Cases, 434. But where a bill seeks general and special relief, and also discovery, and relief is the principal object, and discovery is sought merely as incidental to the relief, if the plaintiff shows no title to the relief sought, a demurrer lies to the whole bill. *Poole v. Lloyd*, 5 Met. 525; see *Mitchell v. Green*, 10 Met. 101; *Walker v. Locke*, 5 Cush. 90, 93; but see *Holmes v. Holmes*, 36 Vt. 525, 537. A defendant cannot plead or answer, and demur both, to the whole bill or to the same part of a bill. *Clark v. Phelps*, 6 John. Ch. 214; *Beauchamp v. Gibbs*, 1 Bibb, 481; *Robertson v. Bingly*, 1 Mc'CORD Ch. 352; see *post*, 589, n. 8.

³ *Angell v. Westcombe*, 6 Sim. 30; *Ambury v. Jones*, Younge, 199; *James v. Horriott*, 6 Sim. 428; *Rose v. Gannell*, 3 Atk. 439; *Baker v. Bramah*, 7 Sim. 17; *South-eastern Railway Company v. Submarine Telegraph Company*, 18 Beav. 420; 17 Jur. 1044; and see *post*, Chap. XXXIV. § 2. *Bills of Discovery*.

¹ A mere bill of discovery cannot properly pray for relief. Where upon the facts stated, the relief prayed for by the bill is

commission to examine witnesses abroad,² or that the testimony of witnesses may be perpetuated,³ or that defendant may set forth a list of deeds.⁴

Notwithstanding the general rule, that if the relief prayed is unnecessary or improper, the defendant may cover himself by a general demurrer, yet this will not preclude the defendant, in cases where, if the bill had been for a discovery only, there would have been a right to such discovery, from demurring to the relief only, and answering as to the discovery, or, in other words, giving the discovery required.⁵

The converse of this proposition, however, will not equally hold: for it has been determined, that where a bill prays relief as well as discovery, the defendant cannot demur to the discovery and answer to the relief: for then he does not demur to the thing required, but to the means by which it is to be obtained.⁶

There are, however, some exceptions to the last-mentioned rule: as where the discovery sought would subject the defendant to punishment, or to a penalty, or forfeiture; or is immaterial to the relief prayed; or is of matters which have been communicated under the seal of *549 professional confidence; or which relate entirely * to the defendant's title, and not to that of the plaintiff. In cases of this nature, the Court will allow a defendant to protect himself by demurrer from the particular discovery sought: though it will not protect him

proper, the bill is something more than a mere bill of discovery. Where the bill is for discovery merely, as distinguished from a bill of discovery and relief, an injunction to stay proceedings in a suit at Law for which the discovery is sought, must, according to the practice in New Jersey, be dissolved, the Court of Chancery in that State never having adopted the principle, that because its jurisdiction has once rightfully attached, it will retain the cause, as a matter of right, for the purposes of complete relief. *Little v. Cooper*, 2 Stockt. (N. J.) 273; *Brown v. Edsall*, 1 Stockt. (N. J.) 256; see *Pool v. Lloyd*, 5 Met. 525.

[And in a bill for relief and discovery, where the subject-matter of the relief prayed is not one which appropriately belongs to equity jurisdiction, the prayer for discovery in aid of that suit will not give jurisdiction to a Court of Equity. *United R. R. Co. v. Hoppock*, 1 Stew. Eq. 261.]

But in *Holmes v. Holmes*, 36 Vt. 525, 537, *Poland C. J.* said, "The rule, as we understand it, is, that when a bill is brought seeking both discovery and relief, and material discovery is elicited, the Court will proceed to grant the proper relief, and will not turn the plaintiff around to seek relief at Law, even if the relief were such as a Court of Law might grant. It may not be universally true that obtaining discovery will give a Court of Equity jurisdiction to grant relief, but this is the general rule." And in many cases it has been held, that where a party has a just title to come into Equity for

a discovery, and obtains it, the Court will go on and give him the proper relief; and not turn him round to the expenses and inconveniences of a doubtful suit at Law. [See to same effect, *Johnson v. Cooper*, 2 Yerg. 524; *Almony v. Hicks*, 3 Head, 39.] See a full discussion of this subject, and a citation of the authorities, 1 Story Eq. Jur. § 64 *k*, *et seq.*

² *Brandon v. Sands*, 2 Ves. J. 514; *Noble v. Garland*, 19 Ves. 376; *Lousada v. Templer*, 2 Russ. 561; *King v. Allen*, 4 Mad. 247; see also *Duke of Dorset v. Girdler*, Prec. in Ch. 532.

³ *Hall v. Hoddesdon*, 2 P. Wms. 162; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316; *Rose v. Gannell*, 3 Atk. 439.

⁴ *Crow v. Tyrell*, 2 Mad. 397, 408.
⁵ *Hodgkin v. Longden*, 8 Ves. 2; *Todd v. Gee*, 17 Ves. 273; see Story Eq. Pl. § 312 and cases in note; *Brownell v. Curtis*, 10 Paige, 214.

⁶ *Morgan v. Harris*, 2 Bro. C. C. 121, 124; Story Eq. Pl. § 312, in note, §§ 441, 446; *Brownell v. Curtis*, 10 Paige, 214; *ante*, 547, note. It has been suggested that this rule may possibly, in some cases, be affected by Order XIV. 8; that "no demurrer or plea shall be held bad, and overruled upon argument, only because such demurrer or plea does not cover so much of the bill as it might by Law have extended to." But see *Dell v. Hale*, 2 Y. & C. C. 1; 6 Jur. 986; and *post*, p. 584. This rule has been adopted by the Supreme Court of the United States. Equity Rule 38, Story Eq. Pl. § 443.

from the relief prayed, if the plaintiff's title to it can be established by other means than the discovery of the defendant himself. Thus, in a bill to inquire into the reality of deeds, on a suggestion of forgery, the Court has entertained jurisdiction of the cause, though it does not oblige the party to a discovery, and has directed an issue to try whether the deeds were forged or not.¹

It is proposed now to consider: first, the grounds of demurrer to the relief; and then those of demurrer to the discovery only.

Demurrers to the relief may be either: To the jurisdiction; the person; or the matter of the bill, either in its substance or form.

Demurrers to the jurisdiction are either on the ground: I. That the case made by the bill does not come within the description of cases in which a Court of Equity assumes the power of decision; or, II. That the subject-matter is within the jurisdiction of some other Court.²

I. It would be a task far exceeding the limits of this work, and not strictly within its object, to attempt to point out the cases in which a demurrer will hold to a bill, on the ground that the case made by it does not come within the ordinary cases for relief in a Court of Equity. It is sufficient to direct the reader's attention to the admirable statement of the general objects of the jurisdiction of a Court of Equity, which is to be found in Lord Redesdale's Treatise upon Pleading;³ and to observe, that if the case made by the bill appears to be one on which the jurisdiction of the Court does not arise, a demurrer will hold.⁴ And it is to be observed, that a demurrer will hold equally, where the defect arises from the omission of matter which ought to be attendant thereon for the * purpose of bringing the case properly *550 within the jurisdiction; as where it appears that the case is such

¹ *Per* Lord Hardwicke in *Brownsword v. Edwards*, 2 Ves. S. 246; *Attorney-General v. Sudell*, *Prec. in Ch.* 214.

² A demurrer for want of equity, includes a demurrer for want of jurisdiction. *Thompson v. University of London*, 33 L. J. Ch. 625; 10 Jur. N. S. 669. V. C. K.; see also *Barber v. Barber*, 4 Drew. 666; 5 Jur. N. S. 1197; *Cookney v. Anderson*, 31 Beav. 452; 8 Jur. N. S. 1220; 1 De G., J. & S. 365; 9 Jur. N. S. 736. As to the form of demurrer for want of jurisdiction, see *Barber v. Barber*, *ubi sup.*

³ And see *Fonb. on Eq.; Coop. Eq. Pl.; Story Eq. Jur.; Story Eq. Pl.*

⁴ *Stephenson v. Davis*, 56 Maine, 73, 74, 75; *Story Eq. Pl.* §§ 466, 467; *Mitford Eq. Pl. by Jeremy*, 110 *et seq.*; *Blount v. Garen*, 3 Hayw. 88; *Livingston v. Livingston*, 4 John. Ch. 287. Where a bill in Equity sets forth various claims, and the defendant files a general demurrer, the demurrer will be overruled if *any* of the claims be proper for the jurisdiction of the Court of Equity. *Castleman v. Veitch*, 3 Rand. 598; *Kimberly v. Sells*, 3 John. Ch. 467; *Graves v. Downey*, 3 Monroe, 356; *Blount v. Garen*, 3 Hayw. 88;

Mortone v. Grenada Academies, 8 Sm. & M. 773. A demurrer to the whole of a bill containing some matters relieviable and others not, is bad, unless the bill is multifarious. *Dimmock v. Bixby*, 20 Pick. 368. In order to sustain a demurrer for want of jurisdiction to the whole of a bill, it must appear that no substantial and essential part of the complaint is within the jurisdiction of the Court. *Boston Water Power Co. v. Boston & Worcester R.R.*, 16 Pick. 512. [The presumption, upon demurrer, is against the pleader, because he is presumed to state his case in the most favorable way for himself, and, therefore, if he has left any thing material in doubt, it is assumed to be in favor of the other party. *Columbine v. Chichester*, 2 Phil. 28; *Foss v. Harbottle*, 2 Hare, 502; *Durham v. Hyde Park*, 75 Ill. 371. The rule is otherwise in Tennessee. *Lincoln v. Purcell*, 2 Head, 154; *Gray v. Hays*, 7 Humph. 590; and now by statute, *Hobbs v. Memphis R. Co.*, 9 Heisk. 873. But not where the complainant's demand is obviously stale. *French v. Dickey*, 3 Tenn. Ch. 302; *Smiley v. Jones*, 3 Tenn. Ch. 317.]

as, under no circumstance, can be brought within the ordinary scope of a Court of Equity.¹ Thus, where it appears on the face of the bill that the defendants were, at the time of the institution of the suit, resident in a foreign country, and that the suit does not relate to any of the subjects in respect of which the Court is warranted in exercising jurisdiction against persons so resident, a demurrer for want of equity will be allowed.²

II. A demurrer, because the subject-matter of the suit is within the cognizance of some other Court, may be on the ground that it is within the jurisdiction either: 1. Of a Court of Common Law; 2. Of the Courts of Probate or Divorce; 3. Of the Court of Admiralty or Commissioners of Prize; 4. Of the Court of Bankruptcy; 5. Of some statutory jurisdiction; or, 6. Of some other Court of Equity.

1. If it appears by the bill, that the plaintiff can have as effectual and complete a remedy in a Court of Law as in a Court of Equity, and that such remedy is clear and certain, the defendant may demur.³

*551 Thus, where a bill was brought by the executrix of an *attorney,

¹ Ld. Red. 108; see *Columbine v. Chichester*, 2 Phil. 27; 1 C. P. Coop. t. Cott. 295. For forms of demurrer for want of equity, see *post*, Vol. III.

² *Cookney v. Anderson*, *ubi sup.*; and see *Foley v. Maillardet*, 1 De G., J. & S. 389; *Samuel v. Rogers*, 1 De G., J. & S. 396; and *ante*, pp. 449-451.

³ [*Kemp v. Tucker*, L. R. 8 Ch. App. 369;] Ld. Red. 123; Coop. Eq. Pl. 124; *Lynch v. Willard*, 6 John. Ch. 342; *May v. Goodwin*, 27 Geo. 352; *Reed v. Bank of Newbury*, 1 Paige, 215; *Bosley v. M'Kim*, 7 Har. & J. 160; *Reed v. Clarke*, 4 Monroe, 19; *N. London Bank v. Lee*, 11 Conn. 112; *Coombs v. Warren*, 17 Maine, 404; *Caldwell v. Knott*, 10 Yerger, 209; *Hoare v. Contencin*, 1 Bro. C. C. 27, 29, note (a); *Hammond v. Messenger*, 9 Sim. 327; *Bottorf v. Conner*, 1 Blackf. 287; *Pierpont v. Fowle*, 2 Wood. & M. 23; *Smith v. Morehead*, 6 Jones Eq. (N. C.) 360. In *First Cong. Society in Raynham v. Trustees of the Fund, &c.*, in Raynham, 23 Pick. 148, it was held, that, if a defendant in a suit in Equity, answers and submits to the jurisdiction of the Court, it is too late for him to object, that the plaintiff has a plain and adequate remedy at Law. This objection should be taken at the earliest opportunity. [And will come too late at the hearing. *Cutting v. Dana*, 10 C. E. Green, 265; *Marsh v. Haywood*, 6 Humph. 210; *Lishey v. Smith*, 7 Humph. 299. *Inf.* 555, n. 6.] The above rule must be taken with the qualification that it is competent for the Court to grant the relief sought, and that it has jurisdiction of the subject-matter. *Clark v. Flint*, 22 Pick. 231; *Russell v. Loring*, 3 Allen, 125, 126; [*Dearth v. Hide and Leather Natl. Bk.*, 100 Mass. 540;] see also *Ludlow v. Simond*, 2 Caines's Cas. 40, 56; *Underhill v. Van Cortlandt*, 2 John. Ch. 369; *McDonald v. Crockett*, 2 M'Cord Ch. 135; *Grandin v. Leroy*, 2 Paige, 509; *Kobbie v. Underhill*, 3

Sandf. Ch. 277; *Sperry v. Miller*, 2 Barb. Ch. 632; *Ohling v. Luitjens*, 32 Ill. 23. The above objection may and should undoubtedly be taken by demurrer, when it appears on the face of the bill; but when a disclosure is sought, "the Court should in no case," said Mr. Justice Woodbury, "send the matter to Law till after the answer and disclosure are completed in Equity." *Foster v. Swasey*, 2 Wood. & M. 221 & 222; see *Warner v. Daniels*, 1 *id.* 110, 111. In *Parker v. Winnipiseogee, &c., Co.*, 2 Black U. S. 715, it was held that where the plaintiff has a clear remedy at Law, his bill may be dismissed by the Judges of the United States Courts, *suâ sponte*, though its defects are not noticed either in the pleadings or arguments.

But in New York, under the Code, there is no longer any distinction between suits at Law and in Equity, as arising from the form of the pleadings or the jurisdiction of the Court. *General Mutual Insurance Co. v. Benson*, 5 Duer (N. Y.), 168.

And hence, if the sufficiency of a complaint, as not stating facts constituting a cause of action, is now denied, the only question is, whether, if the facts stated are admitted, the plaintiff is entitled to the relief he claims, without reference to its nature as legal or equitable. *Ibid.*; see also *Foster v. Watson*, 16 B. Mon. 377. [In Tennessee, by statute, objections to the jurisdiction must be taken *in limine*, but this has been held to mean that the defendant thereby waives objection, and the Court will take jurisdiction in all cases not unfit for the investigation of Equity. *Stockley v. Rowley*, 2 Head, 493; *Starnes v. Newsom*, 1 Tenn. Ch. 245, affirmed on appeal.]

In *Frey v. Demarest*, 1 C. E. Green (N. J.), 236, 238, Chancellor Green said, "The Court of Chancery is not deprived of its original jurisdiction in any case, either by the operation of a statute conferring similar

for money due from the defendant for business done as an attorney, the Court allowed a demurrer to the relief: because the remedy was at Law, and an Act of Parliament had pointed out a summary method of obtaining it.¹ And where the plaintiff had contrived to purchase goods for export to America, and, after the ship had sailed with them, it was discovered that there had been fraud used in the quantity and quality of the goods, but the plaintiff, being threatened with an action, paid the original price under a protest that he would seek relief in Equity, a demurrer was allowed to a bill, when it was afterwards brought for a discovery and account: though it is quite clear that, if the plaintiff had not paid the money, the Court would have granted him relief, by injunction, against the threatened action for the price.² Upon the same principle, if a bill is filed for an account, where the subject is matter of set-off, and capable of proof at Law, it may be demurred to.³ And so, if a bill is filed for the possession of land, or an

jurisdiction upon the common-law Courts, or by the adoption in those Courts of the principles or practice of Courts of Equity." [And see to same effect, *Hoggat v. McCrory*, 1 Tenn. 8.]

¹ *Parry v. Owen*, 3 Atk. 740; *Amb. 109*. For form of the demurrer, see *ibid.*; *Beames on Costs*, 376; also *Maw v. Pearson*, 28 Beav. 196.

² *Kemp v. Pryor*, 7 Ves. 237, 251.

³ *Dinwiddie v. Bailey*, 6 Ves. 136, 141. It is a difficult question to determine, when there is an account between two persons, consisting of items cognizable at Law, under what circumstances a concurrent jurisdiction in Equity exists; for cases on the subject, see *Foley v. Hill*, 1 Phil. 399, 403; *North Eastern Railway Company v. Martin*, 2 Phil. 758, 763; *South Eastern Railway Company v. Brogden*, 3 M.N. & G. 8, 16, 28; *Phillips v. Phillips*, 9 Hare, 471; *Navulshaw v. Brownrigg*, 2 De G., M. & G. 441; *Padwick v. Hurst*, 18 Beav. 575; *Fluker v. Taylor*, 3 Drew. 183; *Croskey v. European and American Shipping Company*, 1 J. & H. 108; *Barry v. Stevens*, 31 Beav. 258; *Shepard v. Brown*, 4 Giff. 208; 9 Jur. N. S. 195; *Smith v. Leveaux*, 2 De G., J. & S. 1; *Hemings v. Pugh*, 4 Giff. 456; *Makepeace v. Rogers*, 13 W. R. 450, V. C. S.; 11 Jur. N. S. 215, affirmed by L. J.J.; [4 De G., J. & S. 649;] *Kernot v. Potter*, 3 De G., F. & J. 447; *Edwards-Wood v. Baldwin*, 4 Giff. 613; *Dabbs v. Nugent*, 11 Jur. N. S. 943; 14 W. R. 94, V. C. S.; *Flockton v. Peake*, 10 L. T. N. S. 173, L. J.J.; *Hunter v. Belcher*, 2 De G., J. & S. 194; [Watford, &c. R. Co. v. London, &c. R. Co., L. R. 8 Eq. 231; *Southampton Co. v. Southampton Board*, L. R. 11 Eq. 254; *Moxar v. Bright*, L. R. 4 Ch. App. 292; *Burdick v. Garrick*, L. R. 5 Ch. App. 233.] It has been held that the Court of Chancery exercises a concurrent jurisdiction with Courts of Law in all matters of account. *Duncan v. Lyon*, 3 John. Ch. 351, 361; *Ludlow v. Simond*, 2 Caines's Ca. 1, 38, 52; *Post v. Kimberly*, 9 John. 470, 493; *Hawley v. Cramer*, 4 Cowen, 717; *Martin v. Spiers*, 1 Hayw. 371; *Sto-*

thart v. Burnet, Cooke, 420; *Breckenridge v. Brooks*, 2 A. K. Marsh. 338; *Fowle v. Lawrason*, 5 Peters. 455; *Cummings v. White*, 4 Blackf. 356; *Power v. Reeder*, 9 Dana, 10; *King v. Baldwin*, 17 John. 384. In Massachusetts, the jurisdiction in Equity over accounts is limited to those accounts of which the nature is such that they cannot be conveniently and properly adjusted and settled in an action at Law. Genl. Sts. c. 113, § 2; see *Locke v. Bennett*, 7 Cush. 445, 449; *Bartlett v. Parks*, 1 Cush. 82. [But a bill will lie for an account by a person interested in the profits, though not a partner. *Hallett v. Cumpston*, 110 Mass. 32.] But to sustain a bill for an account, there must be mutual demands, or a series of transactions on one side, and of payments on the other. *Porter v. Spencer*, 2 John. Ch. 171. Where all the items of account are on one side, the bill cannot be sustained; *Pearl v. Corp. of Nashville*, 10 Yerger, 179; unless a discovery is sought and obtained in aid of the account. See *Pleasant v. Glascock*, 1 Sm. & M. 17. [In *Taylor v. Tomkins*, 2 Heisk. 89, it was held that a bill would lie against the executrix of an agent for an account of goods sold on commission, if complicated, or if there were embarrassments in making proof, though the items were all on one side. But in *Haywood v. Hutchins*, 65 N. C. 574, the Court refused to take jurisdiction where there were independent items on both sides.]

In New Jersey, the concurrent jurisdiction of the Court of Equity with the Prerogative Courts over the administration of the estates of deceased persons, extends to the accounts of executors and administrators, and to the claims of creditors, legatees, and next of kin. *Frey v. Demarest*, 1 C. E. Green, 236, 233, 239. [But jurisdiction in matters of account is exercised only where some special cause is alleged, as where the accounts are intricate, or discovery is prayed, or some other ground peculiar to Equity exists. *Jewett v. Bowman*, 2 Stew. Eq. 174, compare *Seymour v. Long Dock Co.*, 5 C. E. Green, 396.]

*552 *Ejectment* * Bill, as it is called, it may be demurred to, even though the bill charges the defendants to have got the title-deeds, and to have mixed the boundaries, and prays a discovery, possession, and account: for the plaintiff, though he is entitled to a discovery, has, by praying such relief, rendered his whole bill liable to demurrer.¹

It is to be recollected that, in many cases, Courts of Equity have assumed a concurrent jurisdiction with Courts of Law, as in cases of account, partition, and assignment of dower;² and that, where an instrument on which a title is founded is lost, or fraudulently suppressed or withheld from the party claiming under it, a Court of Equity will interfere to supply the defect occasioned by the accident or suppression, and will give the same remedy which a Court of Common Law would have given, if the instrument had been forthcoming.³ In all such cases, therefore, a demurrer, because the subject-matter of the suit is within the jurisdiction of a Court of Law, will not hold.⁴

Amongst other cases in which Courts of Equity and Courts of Law entertain a concurrent jurisdiction, are those arising upon frauds; therefore, where fraud is made the ground for the interference of this Court, a demurrer will not hold.⁵ There is, however, one case in which fraud cannot be relieved against in Equity, though a discovery may be sought: namely, fraud in obtaining a will, which, if of real estate, must be investigated in a Court of Common Law or the Court of Probate;⁶ and if of personal estate, in the last-mentioned Court.⁷

Although the extension of the jurisdiction of the Courts of Common Law has prevented the necessity of resorting to the Courts of Chan-

¹ *Loker v. Rolle*, 3 Ves. 4, 7; *Ryves v. Ryves*, *ib.* 343; *Vice v. Thomas*, 4 Y. & C. Ex. 538; *Coop. Eq. Pl.* 125; *Russell v. Clark*, 7 Cranch, 69, 89. [The Court will not try the legal title to realty at the instance of a person out of possession. *Pryse v. Pryse*, L. R. 15 Eq. 86. Nor take jurisdiction of a bill to remove a cloud from the title in favor of a person out of possession. *Orton v. Smith*, 18 How. 263; *Campbell v. Allen*, 61 Mo. 581; *Elridge v. Smith*, 34 Vt. 484; *Peck v. Sexton*, 41 Iowa, 566; *Wing v. Sherrer*, 77 Ill. 200. But if there are other grounds of relief, Equity will take jurisdiction, although the defendant be in possession. *Moore v. Munn*, 69 Ill. 591; *Sale v. McLean*, 29 Ark. 612. And, in Tennessee, it is enough that there is a cloud upon the title to give Equity jurisdiction, although the defendant be in possession. *Almony v. Hicks*, 3 Head, 39. It is the duty of the Court, where a bill is filed to recover possession of land, *sui sponte*, to refuse jurisdiction, although the objection be not made by demurrer, plea, or answer. *Lewis v. Cocks*, 23 Wall. 466. There is an exception in favor of an infant, who may treat the intruder as a guardian or trustee, and come into Equity. *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. 378.]

² Ld. Red. 120, 123.

³ Ld. Red. 113; *Bromley v. Holland*, 7 Sumner's Ves. 3, and note (d).

⁴ *Anderson v. Lewis*, 1 Freeman, 206.

⁵ [But Equity will not in all cases take jurisdiction where there has been fraud, if the remedy at Law is plain and adequate. *Miller v. Scammon*, 52 N. H. 609.]

⁶ See 20 & 21 Vic. c. 77, §§ 61-63.

⁷ *Kerrick v. Bransby*, 7 Bro. P. C. ed. Toml. 437; *Webb v. Claverden*, 2 Atk. 424; *Bennet v. Vade*, *ib.* 324; *Anon.*, 3 Atk. 17; *Allen v. Macpherson*, 1 Phil. 133, 143; 7 Jur. 49; *Affid.* 11 Jur. 785, H. L.; *Gingell v. Horne*, 9 Sim. 539, 548; *Jones v. Gregory*, 4 Giff. 468; 9 Jur. N. S. 1171; 2 De G., J. & S. 83; *Affid.* 10 Jur. N. S. 59; 12 W. R. 193, L. J.J.; and see *Boyse v. Rosborough, Kay*, 71; 3 De G., M. & G. 817; 18 Jur. 205; 6 H. L. Ca. 1; 3 Jur. N. S. 373; *Gaines v. Chew*, 2 How. U. S. 619; *Tarver v. Tarver*, 9 Peters, 180.

[A Court of Equity has no jurisdiction to avoid a will, or set aside the probate on the ground of fraud, mistake, or forgery; or to give relief by charging an executor, a legatee, or devisee with a trust in favor of a person alleged to be defrauded. *Broderick's Will*, 21 Wall. 504; *Archer v. Meadows*, 31 Wis. 167. See *Gaines v. Fuentes*, 92 U. S. 10; *Burrow v. Ragland*, 6 Humph. 481; *State v. Allen*, 1 Tenn. Ch. 42.]

cery, in many cases in which it was formerly necessary to do so, yet the jurisdiction of the Court of Chancery is not thereby destroyed.*

* 2. That the objection, on account of the jurisdiction, is not confined to cases cognizable in Courts of Law, is evident from the case already put of proceedings instituted to set aside a will of personal estate on the ground of fraud, which can only be done in the Court of Probate: that Court having exclusive jurisdiction, in all cases relating to wills and intestacies of persons dying possessed of personal property. The Court of Divorce has exclusive jurisdiction of the rights and duties arising from the state of marriage; but it seems that the Court of Chancery will, at the suit of the wife and her trustees, restrain the husband from breaking the covenants of a separation deed.¹

Formerly it was held, that a bill of discovery could not be filed in the Court of Chancery, in aid of proceedings in the Ecclesiastical Court;² but it seems that the Court of Probate does not possess the same powers to obtain discovery as the Ecclesiastical Court did; and that such a bill may be filed in aid of proceedings in the Probate Court.³

3. If the Court of Admiralty, or Court of Prize, is competent to decide upon the subject-matter of the suit, a demurrer will also hold. Upon this principle, the Court of Chancery refused to interfere, by granting a prohibition against a monition to bring in property which had been received as a consignment to a merchant: Lord Eldon holding, that the Prize Jurisdiction extends to the question, whether a person who received and sold the property, received it as consignee for a valuable consideration, or as a prize agent.⁴

4. The Court of Bankruptcy exercises a special jurisdiction defined by statute;⁵ and any bill is liable to demurrer, the subject-matter of which is within the jurisdiction of that Court.⁶

5. Where a new mode of proceeding is provided by statute, and the

¹ *Kemp v. Pryor*, 7 Ves. 237, 249; *British Empire Shipping Company v. Somes*, 3 K. & J. 433; *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294, 299; *Oriental Bank v. Nicholson*, 3 Jur. N. S. 857, V. C. S.; *Croskey v. European and American Steam Shipping Company*, 1 J. & H. 108; *Shepard v. Brown*, 4 Giff. 208; *Frey v. Demarest*, 1 C. E. Green (N. J.), 236, 238; [*Hoggat v. McCrory*, 1 Tenn. 8.]. But where a party has, under the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125, §§ 83-86), pleaded equitable matter in the action at Law, he will not be permitted to apply subsequently to the Court of Chancery on the same grounds. *Terrill v. Higgs*, 1 De G. & J. 388; *Walker v. Micklethwaite*, 1 Dr. & Sm. 49; and see *Evans v. Bremridge*, 2 K. & J. 174, 181; 8 De G., M. & G. 100, 103; *Stewart v. Great Western Railway Co.*, 2 Dr. & Sm. 438; affirmed 2 De G., J. & S. 319; *Waterlow v. Bacon*, L. R. 2 Eq. 514.

² *Hunt v. Hunt*, [4 De G., F. & J. 221; *Williams v. Bailey*, L. R. 2 Eq. 731; *Brown*

v. Brown, L. R. 7 Eq. 185;] see also *Wilson v. Wilson*, 1 H. L. Ca. 538; 5 H. L. Ca. 40; *Evans v. Carrington*, 1 J. & H. 598; 2 De G., F. & J. 481.

³ *Dunn v. Coates*, 1 Atk. 288; *Anon.*, 2 Ves. S. 451.

⁴ *Fuller v. Ingram*, 5 Jur. N. S. 510; 7 W. R. 302, V. C. W. [But it seems by a later decision that the Court of Probate possesses as extensive power to compel discovery as the Court of Chancery. L. R. 1 P. & D. 476.]

⁵ *Case of the Danish ship Noysonhed*, 7 Ves. 593; see also *Castelli v. Cook*, 7 Hare, 89; *Jarvis v. Chandler*, T. & R. 319; and see 24 & 25 Vic. c. 10, Admiralty Court Act, 1861; 27 & 28 Vic. c. 25, Naval Prize Act, 1864.

⁶ 12 & 13 Vic. c. 106; 17 & 18 Vic. c. 119; 24 & 25 Vic. c. 134.

⁷ *Saxton v. Davis*, 18 Ves. 72, 82; *Preston v. Wilson*, 5 Hare, 185, 193; *Tarlton v. Hornby*, 1 Y. & C. Ex. 172, 183; see *ante*, p. 61 *et seq.*

ordinary mode of proceeding by bill is, either expressly or impliedly, taken away, a demurrer will lie.⁷ Thus, a demurrer will lie to a bill to set aside an award made under 9 & 10 Will. III. c. 15: that *554 statute having excluded any jurisdiction, to interfere with * the enforcement of the award, but that which is specially provided by the statute.¹

6. With respect to the objection, that some other Court of Equity has the proper jurisdiction,² it is to be observed that the establishment of Courts of Equity has obtained throughout the whole system of our judicial polity, and that most of the inferior branches of that system have their peculiar Courts of Equity: the Court of Chancery assuming a general jurisdiction, in cases not within the bounds, or beyond the powers, of inferior jurisdictions.³ The principal of the inferior jurisdictions in England which have cognizance of equitable cases, are those of the counties palatine of Lancaster and Durham,⁴ the Courts of the two Universities of Oxford and Cambridge,⁵ the Courts of the City of London,⁶ and the Stannary Courts of Devon and Cornwall,⁷ and wherever it appears, on the face of the bill, that any of these Courts has the proper jurisdiction, either immediately or by way of appeal, the defendant may demur to the jurisdiction of the Court of Chancery.⁸ Thus, to a bill of appeal and review of a decree in the county palatine of Lancaster, the defendant demurred, because on the face of the bill, it was apparent that the Court of Chancery had no jurisdiction, and the demurrer was allowed.⁹ Demurrers of this kind, however, are very

⁷ See *Parry v. Owen*, 3 Atk. 740; *ante*, p. 506; *Frey v. Demarest*, 1 C. E. Green (N. J.), 236.

¹ *Heming v. Swinnerton*, 2 Phil. 79; 1 C. P. Coop. t. Cott. 386; 10 Jur. 907; *Nicholls v. Roe*, 3 M. & K. 431, 442, overruling S. C. 5 Sim. 156; *Londonderry and Enniskillen Railway Company v. Leishman*, 12 Beav. 423, 429. As to awards, see now 17 & 18 Vic. c. 125, §§ 3, 5-17; and as to the present jurisdiction of the Court of Chancery over awards, see *Harding v. Wickham*, 2 J. & H. 676; *Smith v. Whitmore*, 10 Jur. N. S. 65; 12 W. R. 244, V. C. W.; 10 Jur. N. S. 1190; 13 W. R. 2, L. J.J.; 2 De G. J. & S. 297; *Wakefield v. Llanelly Railway and Dock Co.*, 3 De G., J. & S. 11; 11 Jur. N. S. 456; and see *Russell on Arbitration*; and *post*, Chap. XV. § 2, *Different Grounds of Pleas*; Ch. XLV. *Statutory Jurisdiction*.

² See *Story Eq. Pl.* § 490; *Ld. Red.* 125, 126; *Mead v. Merritt*, 2 Paige, 402.

³ *Ld. Red.* 151. For a Tabular View of all the Courts of Equity in England and Wales, and of the Courts of Appeal therefrom, see *Trower on Debtor and Creditor*, 474-485, 498.

⁴ As to the Court of Chancery of Lancaster, see 13 & 14 Vic. c. 43; 17 & 18 Vic. c. 82. By the 6 & 7 Will. IV. c. 19, *ante*, p. 6, the palatine jurisdiction of the county of Durham has been separated from the bishopric, and transferred to the Crown; but the jurisdiction of the Courts still remains. See *Cox's Insti-*

tutes, 584; *Trower*, 480; and see 21 & 22 Vic. c. 45.

⁵ See 3 Bla. Com. 83; *Geldart's Civil Law*, 153; and the Oxford University Acts, 17 & 18 Vic. c. 81; 18 & 19 Vic. c. 36; 19 & 20 Vic. c. 31; 20 & 21 Vic. c. 25; 23 & 24 Vic. c. 23; 25 & 26 Vic. c. 26; and Cambridge University Act, 22 & 23 Vic. c. 34, and Acts cited.

⁶ See *Pulling's Customs of London*, Chap. 13. Formerly the county palatine of Chester, the principality of Wales, and the Cinque Ports had Courts of equitable jurisdiction. *Ld. Red.* 151; see *ante*, p. 7; 11 Geo. IV. & 1 Will. IV. c. 70, § 14; 18 & 19 Vic. c. 48; 20 & 21 Vic. c. 1.

⁷ It was formerly held, that the Stannary Courts were only Courts of Law, and not Courts both of Law and Equity. *Trelawney v. Williams*, 2 Vern. 483; but see now 6 & 7 Will. IV. c. 106; 2 & 3 Vic. c. 58; 18 & 19 Vic. c. 32; *Procedure in the Stannaries, Introductory Notice*; *Trower*, 482; *Cox's Institutes*, 585.

⁸ The County Courts have now an equitable jurisdiction.

⁹ *Jennet v. Bishopp*, 1 Vern. 184. By 17 & 18 Vic. c. 82, the Lords Justices and the Chancellor of the Duchy are created the Court of Appeal in Chancery for the county palatine; and see 13 & 14 Vic. c. 43; *Trower*, 480; *Winstanley's Pra.* Chap. 1.

rare; for the want of jurisdiction can hardly be apparent upon the face of the bill, at least so conclusively as to deprive the Court of Chancery of cognizance of the suit: it being * a rule that, where *555 a Court is a Superior Court of general jurisdiction, the presumption will be that nothing shall be intended to be out of its jurisdiction that is not shown and alleged to be so.¹

The general way of objecting to the jurisdiction of the Court is by plea;² and in *Roberdeau v. Rous*,³ in which a bill was filed for delivery of possession of lands in St. Christopher's, Lord Hardwicke held, that the objection that the Court had no jurisdiction over land in that island, although right in principle, was irregularly and informally taken by demurrer, and should have been pleaded. Lord Redesdale, however, appears to have been of opinion, that the rule, that an objection to the jurisdiction should be pleaded, and not be taken by demurrer, can only be considered as referring to cases where circumstances may give the Chancery jurisdiction, and not to cases where no circumstance can have that effect; and that, where all the circumstances which would be requisite in a plea to show that the Court has no jurisdiction are shown in the bill a demurrer will lie.⁴ What those circumstances are, will be stated when we come to treat of pleas to the jurisdiction.⁵ In the mean time, it may be observed, that if the objection on the ground of jurisdiction is not taken in proper time, namely, either by demurrer or plea, before the defendant enters into his defence at large, the Court having the general jurisdiction will exercise it,⁶ unless in cases where no circumstances whatever can give the Court jurisdiction, as in the case before put, of a bill of appeal and review from a decree in a county

¹ *Per* Lord Hardwicke, in *Earl of Derby v. Duke of Athol*, 1 Ves. S. 204. [Kilcrease v. Blythe, 6 Humph. 378.]

² *Ld. Red.* 152; *Bank of Bellows Falls v. Rut. & Bur. R.R. Co.*, 28 Vt. 470; *Fremont v. Merced Mining Co.*, 1 McAll. C. C. (Cal.) 267.

³ 1 Atk. 543.

⁴ *Ld. Red.* 152, 153. In the case of *Henderson v. Henderson*, 3 Hare, 100, 110, 118, a demurrer was allowed on the ground that the whole of the matters were in question between the parties, and might have been the subject of adjudication in a suit before the Supreme Court of Newfoundland.

⁵ *Post*, Chap. XV. § 2.

⁶ *Livingston v. Livingston*, 4 John. Ch. 257; *Underhill v. Van Cortlandt*, 2 John. Ch. 369; *White v. Carpenter*, 2 Paige, 217; *Bank of Bellows Falls v. Rut. & Bur. R.R. Co.*, 28 Vt. 470. Generally, an objection to the jurisdiction cannot be taken at the hearing. [*Cutting v. Dana*, 10 C. E. Green, 265; *Marsh v. Haywood*, 6 Humph. 110; *Jones v. Keen*, 115 Mass. 170; *Wood v. Currey*, 49 Cal. 359; *Crecly v. Bay State Brick Co.*, 103 Mass. 514; *Massachusetts General Hospital v. State Mut. Life Ins. Co.*, 4 Gray, 227. But see where there was equity in the bill but abandoned at trial term. *Rose v. West*,

50 Ga. 474. And where the case is of controverted legal title. *Deery v. McClintock*, 31 Wis. 195.] Where the want of jurisdiction appears on the face of the bill, advantage should be taken of it by demurrer. *Nicholson v. Pim*, 5 Ohio (N. S.), 25; *Kendrick v. Whitfield*, 20 Geo. 579.

In Massachusetts, there is no jurisdiction in Equity to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and no certified copy of which has been filed in the Probate Court there; and the objection is properly taken by demurrer. *Campbell v. Wallace*, 10 Gray, 162; *Campbell v. Sheldon*, 13 Pick. 8; *May v. Parker*, 12 Pick. 34. So in any case where there is no sufficient ground shown for the interference of a Court of Equity. *Foster v. Swasey*, 2 Wood. & M. 217; *Pierpont v. Fowle*, 2 Wood. & M. 23; *Baker v. Biddle*, 1 Bald. C. 411, 412.

In Maine, it is said, that, as the Court has not general but limited jurisdiction in Equity, it is necessary that the bill should show upon its face, that the Court has jurisdiction of the subject-matter complained of. This may be inquired into under a special or general demurrer. *Stephenson v. Davis*, 55 Maine, 74.

palatine; in which case the Court cannot entertain the suit, even though the defendant does not object to its deciding on the subject.⁷

*556 *The objections arising from the personal disability of the plaintiff, have been already discussed.¹ All, therefore, that need now be said upon the subject is, that if any of these incapacities appear upon the face of the bill, the defendant may demur. So, also, he may, if the incapacity is such only as prevents the party from suing alone, as in the case of an infant or a married woman, an idiot or a lunatic: in which cases, if no next friend or committee be named in the bill, a demurrer will lie.²

This objection extends to the whole bill;³ and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief: for the defendant, in a bill for discovery, being always entitled to costs, after a full answer, as a matter of course, would be materially injured by being compelled to answer a bill by persons whose property is not at their own disposal, and who are, therefore, incapable of paying the costs.⁴

We come now to the consideration of demurrers arising upon objections applying more specifically to the matter of the bill: these may be either: I. To the substance; or, II. To the form in which it is stated.

I. Demurrers to the substance are: 1. That the plaintiff has no interest in the subject; 2. That although the plaintiff has an interest yet the defendant is not answerable to him, but to some other person; 3. That the defendant has no interest; 4. That the plaintiff is not entitled to the relief which he has prayed; 5. That the value of the subject-matter is beneath the dignity of the Court; 6. That the bill does not embrace the whole matter; 7. That there is a want of proper parties; 8. That the bill is multifarious, and improperly confounds together distinct demands; 9. That the plaintiff's remedy is barred by length of time; 10. The statute of frauds; 11. That it appears by the bill, that there is another suit depending for the same matter.⁵

⁷ 1d. Red. 153. [See *Starnes v. Newsom*, 1 Tenn. Ch. 239, affirmed on appeal.] In all bills in Equity in the Courts of the United States, the citizenship should appear on the face of the bill to entitle the Court to take jurisdiction, otherwise the cause will be dismissed. *Dodge v. Perkins*, 4 Mason, 435. The want of such an averment may be taken advantage of by demurrer; *Story Eq. Pl. § 492*; and where the want of jurisdiction is apparent on the face of the proceedings, from a defective statement of the citizenship of the different parties, it is fatal at all times, and may be insisted on by way of motion or otherwise, in any stage of the cause, and even upon appeal. *Dodge v. Perkins*, 4 Mason, 437; *Bingham v. Cabot*, 3 Dall, 382; *Jackson v. Ashton*, 8 Peters, 148; *Hughes v. Jones*, 2 Md. Ch. Dec. 173; *Niles v. Williams*, 24 Conn. 279; *Ketchum v. Driggs*, 6 McLean, 13. [In the United States Courts, if it appear on the hearing that there is no

case of equitable cognizance, it is the duty of the Court, *sua sponte*, to recognize the fact and give it effect, although the objection be not made by demurrer, plea, or answer. *Lewis v. Cocks*, 23 Wall. 466; *Hipp v. Babin*, 19 How. 278. So in Connecticut, *Hine v. New Haven*, 40 Conn. 478.]

¹ *Ante*, Chap. III.

² *Ante*, Chap. III. §§ 6, 7, 8. A married woman may, however, under certain circumstances, sue without a next friend, and an idiot or lunatic by his next friend, without a committee; see *ante*, pp. 82, 86, 111. A lunatic must be made a party, though his committee is so, or a demurrer lies. *Harrison v. Rowan*, 4 Wash. C. C. 202. But on a demurrer for his omission, leave will be granted to amend. *Berry v. Rogers*, 2 B. Mon. 308.

³ *Gilbert v. Lewis*, 1 De G., J. & S. 38.

⁴ See *post*, Chap. XXXIV. § 2.

⁵ See *Davis v. Hall*, 4 Jones Eq. 403.

1. In a former section, in which the matter of a bill has been discussed, the reader's attention has been directed to the necessity of showing that the plaintiff has a claim to the thing demanded, * or *557 such an interest in the subject as gives him a right to institute a suit concerning it.¹

2, 3. The same section also exhibits the nature of the privity which it is necessary the bill should aver to be existing between the plaintiff and defendant, and the application of the rule which requires that the bill should show that the defendant has an interest in the subject-matter of the suit. It also points out the exceptions to the rule, in certain cases in which persons, who have no interest in the subject-matter, may be made parties for the purpose of eliciting discovery from them, and in which they are prevented from availing themselves of a demurrer, to avoid answering the bill.²

4. It has been before stated³ as one of the requisites to a bill, that it should pray proper relief: to which may be added, that if for any reason founded upon the substance of the case, as stated in the bill, the plaintiff is not entitled to the relief he prays, the defendant may demur. Many of the grounds of demurrer, already mentioned, may perhaps be referred to this head; and in every instance, if the case stated is such that, admitting the whole bill to be true, the Court ought not to give the plaintiff the relief or assistance he requires, either in the whole or in part, the defect thus appearing on the face of the bill is a sufficient ground of demurrer.⁴

It is to be observed, in this place, that the question upon a demurrer of this nature is, frequently, not whether, upon the case made by the bill, the plaintiff is entitled to all the relief prayed, but whether he may, under the prayer for general relief, be entitled to some relief.⁵ The question, how far the defects in the relief prayed in the prayer for

¹ *Ante*, p. 314; *Atwill v. Ferrett*, 2 Blatch. C. C. 39; *Haskell v. Hilton*, 30 Maine, 419; *Ld. Red.* 154, 158. If, of several plaintiffs, some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *King of Spain v. Machado*, 4 Russ. 224; and see *Cuff v. Platett*, *ib.* 242; *Clarkson v. De Peyster*, 3 Paige, 339; *Dias v. Bouchaud*, 10 Paige, 445.

² *Ante*, p. 322.

³ *Ante*, pp. 325, 377, 378.

⁴ See *Rollins v. Forbes*, 10 Cal. 299. A demurrer for want of equity cannot be sustained unless the Court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations in the bill, can make the subject-matter of the suit a proper case for equitable cognizance. *Bleeker v. Bingham*, 3 Paige, 246; *Morton v. Grenada Academies*, 8 Sm. & M. 773; *Clark v. Davis*, *Harring*, Ch. 227; *Dike v. Greene*, 4 R. L. 285; *Sprague v. Rhodes*, 4 *ib.* 301.

[By the practice in Alabama, where a de-

fendant in his answer has demurred to the bill for want of equity, he has a right to make a motion to dismiss on that ground, at least before the final hearing. *Calhoun v. Powell*, 42 Ala. 645. And see as to a demurrer in answer by statute. *Harding v. Egin*, 2 Tenn. Ch. 39. On a motion to dismiss a bill for want of equity, all amendable defects of form are considered as amended. *Cahala v. Monroe*, 56 Ala. 303. Such a motion is allowed in Tennessee by statute. Code, § 4388; *Quinn v. Leake*, 1 Tenn. Ch. 67.]

⁵ *Ante*, p. 378; *Hartley v. Russell*, 2 S. & S. 244, 253. A demurrer to the whole bill does not lie merely because the prayer for relief is too broad. *Whitbeck v. Edgar*, 2 Barb. Ch. 106. [Nor does a demurrer lie to a prayer for incidental relief. *Miller v. Jamison*, 9 C. E. Green, 41; *Payne v. Berry*, 3 Tenn. Ch. 154. Nor is it a ground for demurrer that the plaintiff does not ask for the proper relief, or asks for inconsistent relief. *Connor v. Board of Education*, 10 Mich. 439.]

special relief may be supplied under the prayer for general relief, which forms part of every bill, has been before discussed; ⁶ it is only necessary now to remind the reader, that such relief must be consistent with the special prayer, as well as with the case made by the bill.

*558 *5. It has been before observed, that every bill must be for a matter of sufficient value: otherwise, it will not be consistent with the dignity of the Court to entertain it.¹ The usual method of taking advantage of an objection of this nature is, as we have seen,² by motion to take the bill off the file. There is no doubt, however, that if the objection appears upon the face of the bill, a demurrer, upon the ground of inadequacy of value, will be held good.³

6. A bill must not only be for matter of a sufficient value, but it must be for the whole matter. It is not, however, necessary to discuss here the principle and application of this rule, the reader's attention having been already fully called to it.⁴ All that need be said is, that if it appears by the bill that the object of the suit does not embrace all the relief which the plaintiff is entitled to have against the defendant, under the same representation of facts, it will be liable to demurrer, unless it comes within any of the exceptions before pointed out.⁵

7. The question: who are the proper parties to be brought before the Court, for the purpose of enabling a Court of Equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation, has been before so fully discussed,⁶ that nothing remains to be said upon it here, further than to remind the reader, that wherever a want of parties appears on the face of a bill, it is a cause of demurrer:⁷ unless a sufficient reason for not bringing

⁶ *Ante*, p. 378.

¹ *Ante*, p. 328.

² *Ante*, p. 329.

³ *Carr v. Inglehart*, 3 Ohio (N. S.), 457. If it appear on the face of the bill, that the matter in dispute, *exclusive of costs*, does not exceed the amount to which the jurisdiction of the Court is limited, the defendant may either demur, or move to have the bill dismissed with costs; or, if it does not appear on the face of the bill, it may be pleaded in bar of the suit. *Smets v. Williams*, 4 Paige, 364; *McElwain v. Willis*, 3 Paige, 505; *S. C.* on Appeal, 9 Wendell, 548; *Schreppel v. Redfield*, 5 Paige, 245; *Bradt v. Kirkpatrick*, 7 Paige, 62. By "exclusive of costs" is meant the costs of the suit in Chancery. *Van Tyne v. Bunce*, 1 Edw. Ch. 583; see further, *Moore v. Lytle*, 4 John. Ch. 183; *Fullerton v. Jackson*, 5 *ib.* 276; *Douw v. Sheldon*, 2 Paige, 303; *Vredenburg v. Johnson*, 1 Hopk. 112; *Mitchell v. Tighe*, 1 Hopk. 119.

⁴ *Ante*, p. 330.

⁵ *Ante*, p. 330.

⁶ *Ante*, Chap. V.; *Ld. Red.* 164 *et seq.*

⁷ *Ld. Red.* 180; *Story Eq. Pl.* § 541; *Farn-*

ham v. Clements, 51 Maine, 426, 429; *Elmendorf v. Taylor*, 10 Wheat. 152; *Crane v. Deming*, 7 Conn. 387; *Mitchell v. Lenox*, 2 Paige, 280; *Robinson v. Smith*, 3 *ib.* 222. A demurrer for want of parties must show who are the proper parties; not indeed by name, for that might be impossible; but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties. *Ld. Red.* 180, 181; *Attorney-General v. Poole*, 4 M. & C. 17; *Story Eq. Pl.* § 543; *ante*, 238; *Robinson v. Smith*, 3 Paige, 222.

It has, however, been held, that upon a demurrer to a bill for want of equity, the objection that the bill is defective for want of parties, may well be taken. *Vernon v. Vernon*, in Chancery (England), Feb., 1837, cited *Story Eq. Pl.* § 543 (3d ed.), note (4). [*Aliter*, in Georgia, the non-joinder of parties not being a ground for a general demurrer. *Hund v. Dexter*, 41 Ga. 451.] So the objection may be taken in the same way, if persons are improperly made plaintiffs. *Gething v. Vigurs*, before the Vice-Chancellor of England, Nov., 1836, cited *Story Eq. Pl. ubi supra*.

them before the Court is suggested, or unless the bill seeks a discovery of the persons interested * in the matter in question, *559 for the purpose of making them parties;¹ but it is no answer to a demurrer that the addition of the party would render the bill multifarious.² In consequence of the alterations in the rules of the Court as to parties, before pointed out, demurrers for want of parties are now of comparatively rare occurrence.³

8. The subject of multifariousness has been already discussed;⁴ and it need only be added, that a bill is demurrable on this ground; and that a demurrer for multifariousness goes to the whole bill, and it is not necessary to specify the particular parts of the bill which are multifarious.⁵

9. In determining whether the length of time which has elapsed since the plaintiff's claim arose is a bar to the relief which he asks, Courts of Equity have considered themselves bound by the Statute of Limitations, 21 Jac. I. c. 16, as to all legal titles and demands: although suits in Equity are not within the words of that statute;⁶ and as to all equitable titles and demands, they act in analogy to the statute.⁷ The modern Statutes of Limitations,⁸ apply, for most purposes, to suits in Equity, as well as actions at Law. The objection of lapse of time was formerly considered a proper ground for a plea, and not for a demurrer;⁹ and in *Gregor v. Molesworth*,¹⁰ * Lord Hardwicke refused to allow *560

¹ Ld. Red. 180; *ante*, p. 288.

² *Lumsden v. Fraser*, 1 M. & C. 589, 602; and as to amending in such cases, see S. C.; *Attorney-General v. The Merchant Tailors' Company*, 1 M. & K. 189, 191, and *ante*, p. 289.

³ For forms of demurrers for want of parties, see 2 Van Hey. 81; and *post*, Vol. III. In *Way v. Bragaw*, 1 C. E. Green (N. J.), 213, one ground of demurrer was that the bill should have been for the benefit of all the creditors of the defendant jointly with the plaintiff. The Chancellor said, "The same objection was raised, under similar circumstances, in *Edgell v. Haywood*, 3 Atk. 357. But Lord Hardwicke said, 'The person who first sues has an advantage by his legal diligence in all cases. The plaintiff, by his judgment and execution at law, and by his diligence in this Court, has obtained a position which entitles him to priority over the other creditors of the debtor. He does not stand in the attitude of a plaintiff in an ordinary creditor's bill. It does not appear that there is any creditor of equal degree with the plaintiff.'" *Clarkson v. De Peyster*, 3 Paige, 320; *Parmelee v. Egan*, 7 Paige, 610; *Grosvenor v. Allen*, 9 Paige, 74; *Farnham v. Campbell*, 10 Paige, 598.

⁴ *Ante*, p. 333 *et seq.*; see *Story Eq. Pl. §§ 530-540*; *Graves v. Fresh*, 9 Gill & J. 280; *Bryan v. Blythe*, 4 Blackf. 331; *Coe v. Turner*, 5 Conn. 86; *Mulock v. Mulock*, 1 Edw. 14; *Thurman v. Shelton*, 10 Yerger, 383; *Emans v. Emans*, 1 McCarter (N. J.), 114. A demurrer to a bill for multifariousness should be taken before the case comes

to the Appellate Court. *Wellborn v. Tiller*, 10 Ala. 305.

⁵ *East India Company v. Coles*, 3 Swanst. 142, n.; see *Dimmock v. Bixby*, 20 Pick. 368; *Gibbs v. Claggett*, 2 Gill & J. 14; *Boyd v. Hoyt*, 5 Paige, 65; *White v. White*, 5 Gill, 359. For forms of demurrers for multifariousness, see 2 Van Hey. 79, 80; and *post*, Vol. III.

⁶ *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630, 631; *Hony v. Hony*, 1 S. & S. 568, 580.

⁷ See *Bond v. Hopkins*, 1 Sch. & Lef. 428; *Hovenden v. Lord Annesley*, *ubi sup.*; *Stackhouse v. Barnston*, 10 Ves. 466; *Ex parte Dewdney*, 15 Ves. 496; *Beckford v. Wade*, 17 Ves. 96; *Lord Cholmondeley v. Lord Clinton*, 2 J. & W. 1, 161, 192.

⁸ 3 & 4 Will. IV. cc. 27, 42; 7 Will. IV. & 1 Vic. c. 23; 19 & 20 Vic. c. 97, §§ 9, 10, 11; 23 & 24 Vic. c. 38, § 13; see, as to these Acts, *Sugd. R. P. Stat. Chap. I.*

⁹ If the lapse of the period of limitation appears with certainty on the face of the bill, the objection may be taken by demurrer. *Deloraine v. Browne*, 3 Bro. C. C. (Perkins's ed.) 633, Mr. Belt's note (1) 436, Mr. Eden's note (7), and cases cited; *Wisner v. Barnett*, 4 Wash. C. C. 631; *Dunlap v. Gibbs*, 4 Yerger, 94; *Foster v. Hodgson*, 19 Ves. 180; *Hoare v. Peck*, 6 Sim. 51; *Hardy v. Reeves*, 4 Sumner's Ves. 466, note *ib.*; *Frankie v. Cranfelt*, 3 M. & C. 439; *Tyson v. Pole*, 3 Y.

¹⁰ 2 Ves. S. 109; see also *Aggas v. Pickercell*, 3 Atk. 225; *Deloraine v. Browne*, 3 Bro. C. C. 633, 646.

a demurrer of this nature, alleging as his reason, that several exceptions might take it out of the length of time, as infancy, or coverture, which the party should have the advantage of showing, but which cannot be done if demurred to. This, however, can hardly be a sufficient reason for the distinction in this case between a plea and a demurrer, as the plaintiff, if he has any reason to allege to take his case out of the bar, arising from the length of time, should show it by his bill; and it is now clearly the rule of the Court, that the Statute of Limitations, or objections in analogy to it, upon the ground of laches, may be taken advantage of by way of demurrer, as well as by plea.¹

Where there is no positive limitation of time, the question whether the Court will interfere or not depends upon whether from the facts of the case, the Court will infer acquiescence, or confirmation, or a release.

Such inference is an inference of fact, and not an inference of law, and cannot be raised on demurrer:² * because a defendant

has no right to avail himself, by demurrer, of an inference of fact upon matters on which a jury, in a Court of Law, would collect

& C. 266; *Humbert v. Rector, &c.*, *Trinity Church*, 7 Paige, 195; *Van Hook v. Whitlock*, 7 Paige, 373; *S. C.* 24 Wend. 587; *Coster v. Murray*, 5 John. Ch. 521; *Waller v. Demint*, 1 Dana, 92; see *M'Dowl v. Charles*, 6 John. Ch. 132.

¹ *Ld. Red.* 212, n.; *Saunders v. Hord*, 1 Ch. Rep. 184; *Jenner v. Tracey*, 3 P. Wms. 287, n.; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 637; *Foster v. Hodgson*, 19 Ves. 180; *Hoare v. Peck*, 6 Sim. 51; *Bampton v. Birchall*, 5 Beav. 67, 76; *Prance v. Sympson*, Kay, 678, 680; *Smith v. Fox*, 6 Hare, 386, 391; *Rolle v. Gregory*, 8 Jur. N. S. 606; 10 W. R. 711, V. C. K.; see *Marsh v. Oliver*, 1 McCarter (N. J.), 259; *Acherley v. Roe*, 5 Sumner's Ves. 565, Perkins's note (b), and cases cited, 573, note (a), and cases cited; *Stockhouse v. Barnston*, 10 Sumner's Ves. 453, Perkins's notes (c) and (d), and cases cited; *Hardy v. Reeves*, 4 Sumner's Ves. 465, notes (a) and (b); *Pierson v. David*, 1 Clarke (Iowa), 23; *Sublette v. Tinney*, 9 Cal. 428; *Bangs v. Hall*, 2 Pick. (2d ed.) 372, note (1), and cases cited; *Harris v. Mills*, 28 Ill. 44; [*Henry County v. Winnebago Draining Co.*, 52 Ill. 454; *McClung v. Sneed*, 3 Head, 219; *Stout v. Seabrook*, 3 Stew. Eq. 187. Even in cases of partnership account, if the statute has run since the dissolution. *Noyes v. Crawley*, 10 Ch. Div. 31; *Dawkins v. Lord Penrhyn*, 6 Ch. Div. 318; *Knox v. Gye*, L. R. 5 H. L. 656.]. In Massachusetts, the Statute of Limitations operates, in cases where it applies, *ex proprio vigore*, in Equity as well as at Law. *Farnam v. Brooks*, 9 Pick. 243; *Johnson v. Ames*, 11 Pick. 182; *Bowman v. Wathen*, 1 How. U. S. 189. [So in Pennsylvania. *Bickel's Appeal*, 86 Pa. St. 204.] In Kentucky, the Statute of Limitations is a bar in Equity. *M'Dowell v. Heath*, 3 A. K. Marsh. 223; *Beckenridge v. Churchill*, 3 J.

J. Marsh. 15. It seems, however, that it does not apply in *totidem verbis*, but has been adopted as reasonable and consistent. *Crain v. Prather*, 4 J. J. Marsh. 77. The principles of the Statute of Limitations, as applied to suits in Equity, are recognized by the Revised Statutes of New York. Before such recognition, they received the same application. *Kane v. Bloodgood*, 7 John. Ch. 90; *Stafford v. Bryan*, 1 Paige, 239; *Bertine v. Varian*, 1 Edw. Ch. 343; see 2 Rev. Stat. N. Y. 301; and *Van Hook v. Whitlock*, 3 Paige, 409. In New York, aside from the Revised Statutes, the bar would seem to operate by the discretion of the Court. *Murray v. Coster*, 2 John. 583; *Arden v. Arden*, 1 John. Ch. 316. See the same doctrine held by *Elmendorf v. Taylor*, 10 Wheat. 152; *Coulson v. Walton*, 9 Peters, 82. In Connecticut, where a delay has been such as to be a bar at Law, it will be so in Equity. *Banks v. Judah*, 8 Conn. 145. The same principle exists in the Courts of the United States. *Miller v. M'Intyre*, 6 Peters, 61. In Maine, the Statute of Limitations operates on suits in Equity as well as on actions at Law. *Denny v. Gilman*, 26 Maine, 149, 154; *Chapman v. Butler*, 22 Maine, 191. Whether this can apply to cases purely of equitable jurisdiction, see *Robinson v. Hook*, 4 Mason, 150; *Kane v. Bloodgood*, 7 John. Ch. 90; *Bigelow v. Bigelow*, 6 Ohio, 97. In case of a direct trust, no length of time bars the claim between the trustee and *cestui que trust*. *Cook v. Williams*, 1 Green Ch. 209; *Baker v. Whiting*, 3 Sumner, 476; *Armstrong v. Campbell*, 3 Yerger, 201; *Overstreet v. Bate*, 1 J. J. Marsh. 370; *Trecothick v. Austin*, 4 Mason, 16, and other cases cited in Perkins's note (b) to *Acherley v. Roe*, 5 Sumner's Ves. 573.

² *Cuthbert v. Creasy*, 6 Mad. 189.

matter of fact to decide their verdict, if submitted to them, or a Court would proceed in the same manner in Equity.¹

10. The non-compliance with the requirements of the Statute of Frauds may also be a ground of demurrer; for there can be no doubt but that a bill may contain such statements as to entitle a defendant, by general demurrer, to take advantage of the want of signature to an agreement: because it might appear clear that the plaintiff was not entitled to the relief he asked.² It is, however, more usual to plead this statute, as it is seldom that the bill discloses every thing necessary for the defence.³

11. If it appears, by the bill, that another suit is pending relating to the same matter, a defendant may demur. Such a demurrer, however, will not hold, unless it appears, by the bill, that the suit already depending will afford to the plaintiff the same relief as he would have been entitled to under the bill which is the subject of the demurrer.⁴

¹ Ld. Red. 213. A demurrer would undoubtedly lie to a bill for the redemption of a mortgage, after a great length of time had elapsed, if the bill was so framed as to present the objection without any attendant circumstances to obviate it. Story Eq. Pl. § 503, and cases in note. As to the length of time, which will bar a redemption of a mortgage, see *Acherley v. Roe*, 5 Ves. 573, Perkins's note (a), and cases cited; *Hardy v. Reeves*, 4 Ves. 466, note (a); *Trash v. White*, 3 Bro. C. C. (Perkins's ed.) 291; note (a), and cases cited; *Phillips v. Sinclair*, 20 Maine, 269.

In reference to the length of time which will bar a bill for an account, see *Acherley v. Roe*, 5 Ves. 565, Perkins's note (b), and cases cited; *Stackhouse v. Barnston*, 10 *ib.* 453, note (d), and cases cited.

[Laches and neglect are always discounted in Equity, and will constitute a bar to relief even where there has been fraud. *Brown v. County of Buena Vista*, 95 U. S. 157, citing *Smith v. Clay*, Amb. 645. And to let in the defence it is not necessary that a foundation should be laid by averment in the answer. *Sullivan v. Portland &c. R. Co.*, 94 U. S. 806. Where the lapse of time is sufficient to raise the presumption of the payment of a judgment on which the bill is based, a demurrer will lie. *Bird v. Inslee*, 8 C. E. Green, 363; *Harris v. Vaughn*, 2 Tenn. Ch. 487. And although the defence of the Statute of Limitations may be made by demurrer, plea, or answer, it must be somewhere set up in the pleadings, or it will not avail. *Ruckman v. Decker*, 8 C. E. Green, 283; *Graham v. Nelson*, 5 Humph. 605; *Merriman v. Cannovan*, 1 Leg. Rep. 94. But if made by demurrer which is overruled, it may be again set up by answer, and the Court will sustain it on the final hearing, if of opinion that the defence should have been allowed on demurrer. *Bolton v. Dickens*, 2 Cent. L. J. 477, a decision of Chancellor Morgan of Memphis. And the defendant may avail himself of the Statute of Limitations by demurrer, as well where the remedy alone is barred, leaving the right intact, as where the

right is itself extinguished by lapse of time. *Wyatt v. Luton*, 10 Heisk. 458.]

² Per Lord Langdale in *Field v. Hutchinson*, 1 Beav. 600; 3 Jur. 792; see also *Howard v. Okeover*, 3 Swanst. 421, n.; *Barkworth v. Young*, 4 Drew. 1; *Wood v. Midgley*, 5 De G., M. & G. 41; *Middlebrook v. Bromley*, 9 Jur. N. S. 614; 11 W. R. 712, V. C. K.; *Davies v. Otty*, 33 Beav. 540; 2 De G., J. & S. 238; [*Heard v. Pilley*, L. R. 4 Ch. App. 548; *Dolling v. Evans*, 15 W. R. 394. It has been intimated that a defence founded on the Statute of Frauds cannot now, under the Rules of Court of 1875, Order 19, Rule 23, be raised by demurrer. *Catlin v. King*, 5 Ch. Div. 660;] *Meach v. Stone*, 1 D. Chip. 182. In a suit for specific performance of a contract in relation to land, if the agreement appears in the bill to be oral, and no facts are alleged to take the case out of the Statute of Frauds, the defendant may demur to the bill. *Cozine v. Graham*, 2 Paige, 177; *Walker v. Locke*, 5 Cush. 90, 93; [*Slack v. Black*, 109 Mass. 496; *Ahrend v. Odiorne*, 118 Mass. 268; *Macey v. Childress*, 2 Tenn. Ch. 438.] But if the agreement does not appear in the bill to be oral, the proper course to take advantage of the Statute of Frauds is by plea or answer. *Cranston v. Smith*, 6 R. I. 231; *Dudley v. Bachelder*, 53 Maine, 403, 406. If it is stated generally in a bill that an agreement or contract was made, the Court will presume it was a legal contract until the contrary appears; and the defendant must either plead the fact, that it was not in writing, or insist upon that defence in his answer. *Dudley v. Bachelder*, 53 Maine, 403, 406; *Farnham v. Clements*, 51 Maine, 426. [*Ante*, 365, n. 3; *infra*, 655, n. 9.]

³ For form of demurrer see Vol. III.

⁴ *Law v. Rigby*, 4 Bro. C. C. 60, 63; see also *Peareth v. Peareth*, John. 58; *Singleton v. Selwyn*, 9 Jur. N. S. 1149; 12 W. R. 98, V. C. W. As to demurrers on the ground of *res judicata*, see *Waine v. Crocker*, 10 W. R. 204, L. J.J.; 3 De G., F. & J. 421; [*Knight v. Atkisson*, 2 Tenn. Ch. 387.]

II. The grounds upon which a bill may be demurred to, by reason of a deficiency in matters of form, are, as we have seen, as follows.⁵

*562 1. Because the plaintiff's place of abode is not stated.⁶ * 2. Because the facts essential to the plaintiff's right, and within his own knowledge, are not alleged positively.¹ 3. Because the bill is deficient in certainty.² 4. Because the plaintiff does not, by his bill, offer to do equity where the rules of the Court require that he should do so;³ or to waive penalties or forfeitures, where the plaintiff is in a situation to make such waiver.⁴ To these may be added: 5. The want of counsel's signature to the bill;⁵ and 6. The absence of the proper affidavit, in those cases in which the rules of the Court require that the plaintiff's bill should be accompanied by one.⁶

The grounds of demurrer before pointed out apply to the relief prayed by the bill, and not to the discovery, further than as it is incidental to the relief.⁷ It has, however, been stated⁸ that there are cases in which a defendant may demur to the discovery sought by the bill: although such demurrer will not extend to preclude the plaintiff from having the relief prayed, provided he can establish his right to it by other means than a discovery from the defendant himself.

In consequence of the changes which have taken place in the practice of the Court of Chancery, demurrers to discovery are now of rare occurrence (the objection being almost always taken by answer);⁹ but in determining the question whether a party is bound to give the discovery sought by the other side, the Court is guided by the same rules as it formerly acted on in allowing or overruling demurrers to discovery. These rules (which we shall now proceed to consider), therefore, still remain of importance.

Demurrers to discovery may be arranged under the following heads: ¹⁰

I. That the discovery may subject the defendant to pains and penalties, or to some forfeiture, or something in the nature of forfeiture. II.

⁵ Story Eq. Pl. §§ 528, 529, and notes; Ld. Red. 206. A demurrer will not hold to an irregularity of practice in regard to the bringing or filing of a bill, suggesting matters of fact which do not otherwise appear by the bill. Tallmadge v. Lovett, 3 Edw. Ch. 563.

⁶ *Ante*, p. 357; The Winnipiseogee Lake Co. v. Young, 40 N. H. 42; see Howe v. Harvey, 8 Paige, 73. It is not a ground of demurrer that the plaintiff omits to state his occupation, or addition. Gove v. Pettis, 4 Sandf. Ch. 403.

¹ *Ante*, p. 360; on this head, see Smith v. Kay, 7 H. L. Ca. 750, which decided that the point must be raised on demurrer.

² *Ante*, pp. 368, 371, 372.

³ *Ante*, p. 385.

⁴ *Ante*, pp. 386, 387.

⁵ *Ante*, p. 312; see Graham v. Elmore, Harring. Ch. 255. But in Gove v. Pettis, 4 Sandf. Ch. 403, it was held, that a demurrer could not be taken for an omission of the signature of the solicitor or counsel to the bill,

but that it is a fit subject for a motion to take the bill from the files of the Court.

⁶ *Ib.* p. 360; Gove v. Pettis, 4 Sandf. Ch. 403. The defendant is not bound to look beyond the copy of the bill, which is served on his solicitor; and if that does not contain the requisite affidavit or verification to give the Court jurisdiction of the case, he may demur to the bill on that ground. Lansing v. Pine, 4 Paige, 364.

⁷ A demurrer will be allowed to a bill of discovery in aid of the defence to a suit in a foreign Court. Bent v. Young, 9 Sim. 189; but see *contra*, Mitchell v. Smith, 1 Paige, 287; see *post*, Bills of Discovery.

⁸ *Ante*, p. 548; see Metter v. Metter, 3 C. E. Green (N. J.), 270; S. C. 4 C. E. Green (N. J.), 457.

⁹ Ord. XV. 4; see *post*, Chap. XVII., Answers, and see 15 & 16 Vic. c. 86, §§ 10, 12.

¹⁰ For form of demurrer to discovery, see Vol. III.

That, in conscience, the defendant's right is equal to the plaintiff's. III. That the discovery sought is immaterial *to the *563 relief prayed. IV. That the discovery would be a breach of professional confidence. V. That the discovery relates only to the defendant's case. VI. That a third party has an interest in the discovery, and ought not to be prejudiced. VII. That the discovery might be injurious to public interests.

I. We have before seen, that in cases where the plaintiff is the person who is entitled to the advantage of the penalty, or of the forfeiture, to which the defendant would render himself liable by making the discovery sought, he may obviate a demurrer by expressly waiving his right to the penalty or forfeiture in his bill: ¹ the effect of which waiver is, to enable the defendant, in case the plaintiff should sue him for the penalty, or endeavor to take advantage of the forfeiture, to apply to the Court for an injunction to restrain him from proceeding.² But where the forfeiture or penalty is not of such a nature that the plaintiff can, by waiver, relieve the defendant from the consequence of his discovery, a demurrer will hold,³ for it is a general rule, that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of that punishment: whether it arises by the Ecclesiastical Law, or by the law of the land.⁴ This rule is not confined to cases in which the discovery must necessarily subject the defendant to pains and penalties, but it extends to cases where it may do so.⁵ If, therefore, a bill alleges any thing which, if confessed by the answer, may subject the defendant to a criminal prosecution,⁶ or to any particular penalties, as maintenance,⁷ champerty,⁸ simony,⁹ or subornation of perjury,¹⁰ the defendant may

¹ *Ante*, pp. 386, 387, and note.

² *Ante*, p. 387.

³ Story Eq. Pl. § 575; *March v. Davison*, 9 Paige, 580; Ld. Red. 194, 195; 2 Story Eq. Jur. § 1494.

⁴ *Brownsword v. Edwards*, 2 Ves. S. 243, 245; *Harrison v. Southcote*, 1 Atk. 523, 539; see also *Parkhurst v. Lowten*, 2 Swanst. 214; *Hare on Discovery*, 131, 132, where the cases are classed; *Brownell v. Curtis*, 10 Paige, 213; *Livingston v. Harris*, 3 Paige, 528; *Patterson v. Patterson*, 1 Hayw. 167; *Wolf v. Wolf*, 2 Har. & G. 382; *Lambert v. People*, 9 Cowen, 578; *Northup v. Hatch*, 6 Conn. 361; *Leggett v. Postley*, 2 Paige, 599; *United States v. Twenty-Eight Packages, &c.*, Gilpin, 306; *Butler v. Catlin*, 1 Root, 310; *Leigh v. Everhart*, 4 Monroe, 381; *Ocean Ins. Co. v. Field*, 2 Story, 59; *Adams v. Porter*, 1 Cush. 170.

But a party is bound to make discovery, although his answer may subject him to the loss of legal interest. *Taylor v. Mitchell*, 1 How. (Miss.) 596.

⁵ *Harrison v. Southcote*, 1 Atk. 539.

⁶ *East India Company v. Campbell*, 1 Ves. S. 246; *Chetwynd v. Lindon*, 2 Ves. S. 450; *Cartwright v. Green*, 8 Ves. 405; *Claridge v. Hoare*, 14 Ves. 59, 65; *Maccallum v. Turton*,

2 Y. & J. 183; *Waters v. Earl of Shaftesbury*, 12 Jur. N. S. 3; 14 W. R. 259, V. C. S.

⁷ *Penrice & Parker*, Rept. C. Finch. 75; *Sharp v. Carter*, 3 P. Wms. 375; *Wallis v. Duke of Portland*, 3 Ves. 494; affirmed by H. L. *ib.* 761; *Mayor of London v. Ainsley*, 1 Aust. 158; *Scott v. Miller, Johns*, 229, 328; 5 Jur. N. S. 858.

⁸ *Hartley v. Russell*, 2 S. & S. 244, 252.

[An agreement to defray the expenses of a suit in which he has no interest is champertous. *Hayney v. Coyne*, 10 Heisk. 339. But an attorney's engagement to render services in the prosecution of a suit, in consideration of receiving a share of the property recovered, is not. *Duke v. Harper*, 2 Mo. App. 1; S. C. on appeal, 66 Mo. 51. And see, for recent rulings on champerty, *Coughlin v. N. Y. Cent., &c. R. Co.*, 71 N. Y. 445; *Adye v. Hanna*, 47 Iowa, 364; *Schomp v. Schenk*, 40 N. J. Law, 195; *Kennedy v. Brown*, 13 C. B. N. S. 677; *McPherson v. Cox*, 96 U. S. 494; *Coombes v. Mookerjee*, 2 App. Cas. 186.

⁹ *Attorney-General v. Sudel*, Free. Ch. 214; *Parkhurst v. Lowten*, 1 Mer. 394, 401.

¹⁰ *Selby v. Crow*, 2 Aust. 594; *Baker v. Pritchard*, 2 Atk. 389; as to discovering returns made to Income Tax Commissioners, see *Mitchell v. Koecker*, 11 Beav. 380.

*564 object to the discovery.¹¹ In the application * of this principle it has been held, that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony.¹

It is not necessary to the validity of an objection of this nature, that the facts inquired after should have an immediate tendency to criminate the defendant; he may equally object to answering the circumstances, though they have not such an immediate tendency.² This was very clearly laid down by Lord Eldon, in *Paxton v. Douglas*,³ in which his Lordship said, "In no stage of the proceedings in this Court can a party be compelled to answer any question, accusing himself, or any one in a series of questions that has a tendency to that effect: the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer containing nothing to affect him, except as it is one link in a chain of proof that is to affect him."

It results from the principle above laid down, that a defendant is not bound to make any discovery which may tend to show himself to have been guilty of any moral turpitude, which may expose him to ecclesiastical censure; thus, it has been held, that a defendant is not bound to discover whether a child was born out of lawful wedlock;⁴ nor is an unmarried woman bound to discover whether she and the plaintiff

*565 cohabited together.⁵ It has been * held, however, that a woman

¹¹ In *Livingston v. Tompkins*, 3 John. Ch. 452, it is said that "there are numerous cases establishing the rule that no one is bound to answer so as to subject himself, either directly or eventually, to a forfeiture or penalty, or any thing in the nature of a forfeiture or penalty." See the cases there cited; *Story Eq. Pl. § 583*; *Northup v. Hatch*, 6 Conn. 361; *Skinner v. Judson*, 8 Conn. 523; *Wolf v. Wolf*, 2 Harr. & G. 382; *Livingston v. Harris*, 3 Paige, 523; *United States v. Twenty-Eight Packages*, Gilpin, 306. The objection by the defendants, who were officers of a corporation, that a discovery of the matters stated in the bill may subject the corporation to a forfeiture of its charter, is not sufficient to support a general demurrer to the relief as well as to the discovery sought by the bill. *Robinson v. Smith*, 3 Paige, 222.

¹ *Cartwright v. Green*, 8 Ves. 405, 410; *ante*, p. 184, *Story Eq. Pl. § 519*.

² *East India Company v. Campbell, ubi sup.*; see also *Lee v. Read*, 5 Beav. 381, 386. A defendant will not be compelled to discover that, which, if answered, would tend to subject him to a penalty or punishment, or which might lead to a criminal accusation, or to ecclesiastical censure. *Thorpe v. Macauley*, 5 Mad. 229; *Maccallum v. Turton*, 2 Y. & J. 138; *Leggett v. Postlev*, 2 Paige, 599; *Patterson v. Patterson*, 1 Hayw. 168; *Wolf v. Wolf*, 2 Harr. & G. 382; *M'Intyre v. Mancius*, 15 John. 592; *Sloan v. Kelley*, 3 Y.

& C. 573; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Bishop of London v. Fythehe*, 1 Bro. C. C. (Perkins's ed.) 96, and notes; *Adams v. Porter*, 1 Cush. 170; *Marsh v. Marsh*, 1 C. E. Green (N. J.), 391, 397.

In case of witnesses, it is said that "many links frequently compose that chain of testimony, which is necessary to convict an individual of a crime, but no witness is compellable to furnish any one of them against himself." *Marshall C. J.*, 1 Burr's Trial, 244; *The People v. Mather*, 4 Wend. 229; *Southard v. Rexford*, 6 Cowen, 254; *Bellenger v. The People*, 8 Wend. 595; *Story Eq. Pl. § 553*; see *post*, p. 579, n. 5.

³ 19 Ves. 225, 227; and see *Maccallum v. Turton*, and *Claridge v. Hoare, ubi sup.*; *Thorpe v. Macauley*, 5 Mad. 218, 229.

⁴ *Attorney-General v. Duplessis, Parker*, 163. As to proof of non-access and how far parents can bastardize their issue, see *Anon. v. Anon*, 22 Beav. 481; 23 Beav. 273; *Legge v. Edmonds*, 25 L. J. Ch. 125, V. C. W.; *Plowes v. Bossey*, 2 Dr. & Sm. 145; 8 Jur. N. S. 352; [*Re Rideout*, L. R. 10 Eq. 541; *Cannon v. Cannon*, 7 Humph. 410;] and other cases collected in *Taylor on Evid. § 868*.

⁵ *Franco v. Bolton*, 3 Ves. 368, 371, 372; see on this subject *Benyon v. Nettleford*, 3 M'N. & G. 94, and the cases collected in the note, *ib.* 100.

is bound to discover where her child was born, though it might tend to show the child to be an alien.¹ It has also been held, that though parties may demur to any thing which may expose them to ecclesiastical censure, a defendant cannot protect himself from discovery whether he has or has not a legitimate son;² and it is to be observed, that the objection to answering upon the ground that the answer might show a defendant to be guilty of moral turpitude, appears to be confined to those cases where the moral turpitude is of such a nature as would lay the party open to proceedings in the Ecclesiastical or other Courts. In other cases, a defendant is bound to answer fully, notwithstanding his answer may cast a very great degree of reflection on his moral character;³ or may render him liable for fraudulent dealings;⁴ therefore, where a defendant demurred to such part of the bill as sought a discovery from her, as to a conspiracy or attempt to set up a bastard child, which she pretended to have by a person who kept her, and was desirous to have a child by her, the demurrer was overruled:⁵ because the conspiracy, or attempt to set up the bastard, not being alleged to have been for the purpose of defeating the heir, was not of itself an offence.

Where the discovery might subject a defendant to penalties to which the plaintiff is not entitled, and which he consequently cannot waive, yet, if the defendant has expressly covenanted not to plead or demur to the discovery sought, he will be compelled to answer.⁶ And where a person, by his own agreement, subjects himself to a payment, in the nature of a penalty, if he does a particular act, a demurrer to a discovery of that act will not hold;⁷ thus, where a lessee covenanted not to dig loam, with a proviso that, if he did, he should pay to the lessor 20s. a cart load, and he afterwards dug great quantities: upon a bill being filed by the lessor for a discovery of the quantities, waiving any possible forfeiture, a demurrer by the lessee, because the discovery might subject him to a payment by way of penalty, was overruled.⁸ Upon the same principle, where servants to a company bind themselves to pay a specified sum, in case of a breach of the regulations of their service, they cannot protect themselves from *answering, *566 as to breaches, because they would be subject to a penalty.¹

Upon the principle that the Court will not allow a man to contradict what he has, either by his actions or express words, asserted, it has

¹ Attorney-General v. Duplessis, *ubi sup.*; see Story Eq. Pl. § 585 and note.

² Finch v. Finch, 2 Ves. S. 491, 493.

³ Per Lord Eldon, in Parkhurst v. Lowten, 1 Mer. 400. A party may be compelled to make discovery of any act of moral turpitude, which does not amount to a public offence or an indictable crime. Story Eq. Pl. §§ 595, 596; Hare Discov. 142; Macauley v. Shackwell, 1 Bligh, N. S. 121; S. C. 2 Russ. 550, note; Glynn v. Houston, 1 Keen, 229.

⁴ Gartside v. Outram, 3 Jur. N. S. 39, V. C. W.

⁵ Chetwynd v. Lindon, 2 Ves. S. 450.

⁶ South Sea Company v. Bumsted, 1 Eq. Ca. Ab. 77, pl. 16; East India Company v. Atkins, cited *ibid.*; 1 Stra. 168; Paxton v. Douglas, 16 Ves. 239.

⁷ Ld. Red. 195; Morse v. Backworth, 2 Vern. 443; East India Company v. Neave, 5 Ves. 173, 185.

⁸ Ld. Red. 195, 196.

¹ African Company v. Parish, 2 Vern. 244; East India Company v. Neave, *ubi sup.*

been held, that a person who represents himself to be a broker of the city of London, and is employed in that character, cannot afterwards protect himself from discovery on the ground that he was not licensed to act as broker, and that, by answering, he may expose himself to penalties.²

It would appear, that where a defendant is entitled to the protection of the Court against a discovery, tending to establish a criminal charge, he cannot deprive himself of the benefit of it by any agreement whatever.³

The rule that a defendant is not bound to answer, in cases which may subject him to punishment or penalties, appears to be liable to modification, in some cases, where the facts charged in the bill would amount to conspiracy; ⁴ and also, in certain cases where the defendants would appear to be guilty of fraud, or of publishing a libel which might be the subject of indictment,⁵ as in the cases mentioned by Lord Eldon, in *Macaulay v. Shackell*,⁶ as having frequently occurred in the Court of Exchequer, in which it was the practice of underwriters, where policies of insurance were found to be affected with gross frauds, to bring the parties into Court, and compel them to answer, by stating in their bills frauds which would have been indictable.

It may be mentioned here that the Legislature has, in some cases, expressly provided, that parties to transactions rendered illegal by statute, shall be compelled to answer bills in Equity for the discovery of such transactions; in such cases, of course, the defendant cannot protect himself from the discovery required, on the ground that it will render him liable to the penalties imposed by the statute itself.⁷ Thus,

*567 trustees and other persons who are * liable to a criminal prosecution for the fraudulent misapplication of moneys intrusted to them, are, nevertheless, bound to give discovery, in answer to a bill in Equity.¹ So, also a person infringing a trade-mark, though liable to prosecution, must give discovery in Equity.²

² *Green v. Weaver*, 1 Sim. 404, 432; *Robinson v. Kitchin*, 21 Beav. 365; 2 Jur. N. S. 57; *ib.* 294; 8 De G., M. & G. 88; see *Story Eq. Pl.* § 589.

³ *Lea v. Reed*, 5 Beav. 381, 385. This appears to be confined to criminal cases, see observation of Sir J. Romilly M. R. in *Robinson v. Kitchin*, 21 Beav. 355, 370.

⁴ *Dummer v. Corporation of Chippenham*, 14 Ves. 245, 251; see also Lord Eldon's observation in *Mayor of London v. Levy*, 8 Ves. 404; and *Hare on Disc.* 143.

⁵ See *Wilmot v. Macabee*, 4 Sim. 263; *Story Eq. Pl.* § 597. In *March v. Davidson*, 9 Paige, 580, Mr. Chancellor Walworth held, that in the case of a libel, the defendant could not be compelled in a bill of discovery to discover any thing which would make him liable to an indictment criminally; but he was compellable to discover other facts in support of the action, which would not subject him to a criminal prosecution, or to a penalty or forfeiture.

⁶ 1 Bligh, N. S. 96.

⁷ See *post*, p. 579, n. 5. The New York Revised Statutes, and a statute passed since, have provisions which compel a defendant to make a discovery in many cases where criminal prosecutions and penalties can take place and be executed. Thus the defendant must answer to a gaming transaction at the suit of the loser or any other person. 1 Rev. Stat. 664, § 19. As to money illegally received for brokerage, *ib.* 709, § 4. As to money and things taken usuriously, *ib.* 772, § 6. And also in all cases where the defendant is charged with being a party to a fraudulent conveyance. New York Laws of 1833, p. 17. In all these cases, however, the effect of the discovery is specially limited, by statute, to the object of the civil proceedings, in regard to which it is sought. *Graham on Jurisdiction*, 493.

¹ 24 & 25 Vic. c. 96, §§ 75-86.

² 25 & 26 Vic. c. 88, § 11.

If a party be liable to a penalty or forfeiture, provided he is sued within a limited time, and the suit is not commenced till after the limitation has expired, the defendant will be bound to answer fully, even though, by so doing, he may expose his character and conduct to reflection; ³ and it seems, that the plaintiff is entitled to an answer, if the liability ceases after the defence has been put in, and before it is heard, even though there was a liability at the time of putting in his defence. This has been decided upon a plea, ⁴ and upon exceptions to an answer; ⁵ and there is no doubt that the same decision would be come to upon demurrer.

It has been before stated, that if the executor or administrator of a parson, bring a bill for tithes, he need not offer to accept the single value: ⁶ the reason of which rule is, that the treble value is not given, by the statute, to the representatives: and there can be no doubt that the same reason will be valid against allowing a demurrer, in all cases where the penalty is personal, and does not survive to the representatives of the person entitled to sue for it. ⁷

A defendant cannot refuse to give discovery on the ground that it will expose him to penalties in a foreign country. ⁸

Some of the cases in which a demurrer will lie to a bill, on the ground that the discovery required will expose the defendant to a forfeiture, have been before referred to, ⁹ for the purpose of illustrating the principle, that where it is in the power of a plaintiff to waive such forfeiture, his omission to do so may be taken advantage of by demurrer. ¹⁰ The bill, however, will be equally liable to this species of objection, in cases where the plaintiff has no power to waive the effects of the discovery, as in those where he has such power, and omits to exercise it; therefore, where the discovery sought by an information would have subjected the *defendants to a *quo warranto*, a demurrer *568 was allowed. ¹ In like manner, where a legacy was given to a woman, on her marriage, with a condition, that if she married without the consent of the trustees under the will, the legacy was to be forfeited, and a bill was filed against the legatee for a discovery whether any marriage had taken place, in which it was alleged she had married without consent: Lord Hardwicke allowed the demurrer, as she could not answer to the marriage without showing, at the same time, that it was against consent. ² In a case of this nature, where the husband and wife

³ *Parkhurst v. Lowten*, 1 Mer. 400; *Story Eq. Pl.* § 598; *Skinner v. Judson*, 8 Conn. 528; but see *Northup v. Hatch*, 6 Conn. 361; *Lambert v. People*, 9 Cowen, 528.

⁴ *Corporation of Trinity House v. Burge*, 2 Sim. 411.

⁵ *Williams v. Farrington*, 3 Bro. C. C. 38.

⁶ *Ante*, p. 387.

⁷ See *Hare on Disc.* 148.

⁸ *King of the Two Sicilies v. Wilcox*, 1 Sim. N. S. 301; 15 Jur. 214; distinguished in *United States of America v. McRea*, L.

R. 4 Eq. 327; S. C. on appeal, L. R. 3 Ch. Ap. 79.

⁹ *Ante*, pp. 386, 387.

¹⁰ *Story Eq. Pl.* §§ 580, 581; *Lansing v. Pine*, 4 Paige, 369; *ante*, 387.

¹ *Attorney-General v. Reynolds*, 1 Eq. Ca. Ab. 131, pl. 10.

² *Chancey v. Fenhoulet*, 2 Ves. S. 265; S. C. *nom.* *Chauncey v. Tabouarden*, 2 Atk. 392; see also *Hambrook v. Smith*, 17 Sim. 209; 16 Jur. 144; *Cooke v. Turner*, 14 Sim. 218; 8 Jur. 703.

put in separate answers, under an order for that purpose, and the husband, by his answer, admitted the marriage without consent, but the wife omitted to do so, Lord Talbot, upon exceptions being taken to her answer, said, that he could not reconcile himself to compelling a wife to confess that by which she might forfeit all she had in the world, and held the answer to be sufficient.³

The principle, that a defendant is not bound to give discovery which will expose him to a forfeiture, applies equally, whether the forfeiture is enforceable in Equity or at Law.⁴

The rule applies only to cases where a forfeiture, or something in the nature of a forfeiture, may be incurred: where the discovery sought merely extends to the performance of a condition upon failure in which a limitation over is to take effect, the defendant cannot protect himself from the discovery. Thus, where a husband, by will, gave an estate to his wife, whilst she continued his widow, with a limitation over in case of her second marriage, and the remainder-man brought a bill against her, in which he sought a discovery of her second marriage: upon the defendant demurring to the discovery, as subjecting her to a forfeiture, Lord Talbot overruled the demurrer.⁵ A demurrer, also, will not prevail where the discovery is of a matter which shows the defendant disqualified from having any interest or title: as whether a person claiming a real estate, under a devise, be an alien, and consequently incapable of taking by purchase.⁶ A distinction, however, appears to exist, in this respect, between incapacities which are the result of general principles of Law, and those which are imposed by the Legislature, by way of penalty or forfeiture; thus, before the repeal of the statutes im-

*569 posing disabilities upon persons professing the Popish religion,¹ it was held, that a defendant was not obliged to discover whether he was a Papist or not.² Upon the same principle, it has been held, that where a bill sought a discovery, whether a clergyman had been presented to a second living which avoided the first, under the statute 21 Hen. VIII., a demurrer to the discovery of that fact would lie: because the incapacity of holding the first living, incurred by the acceptance of the second, was in the nature of a penalty imposed by the statute.³

A defendant, in order to protect himself from answering, on the ground that the discovery of the matters inquired after would expose, or tend to expose, him to penalties, must state upon oath, his belief that such would be the case: a submission of the question to the Court is not sufficient.⁴

² Wrottesley v. Bendish, 3 P. Wms. 236, 239: *ante*, p. 180.

⁴ Attorney-General v. Lucas, 2 Hare, 566.

⁵ Cited *Chamney v. Tahourden*, 2 Atk. 393; *Chancey v. Fenhoulet*, 2 Ves. S. 265; *Lucas v. Evans*, 3 Atk. 260; *Hambrook v. Smith*, *ubi sup.*; see, *contra*, *Monnins v. Monnins*, 2 Ch. Rep. 68; *Story Eq. Pl.* § 579, note.

⁶ *Attorney-General v. Duplessis*, Parker, 144.

¹ 11 & 12 Will. III. c. 4, § 4.

² *Smith v. Read*, 1 Atk. 526; *Harrison v. Southcote*, *ib.* 528; 2 Ves. S. 389, 395.

³ *Boteler v. Allington*, 3 Atk. 453, 458.

⁴ *Scott v. Miller* (No. 2), *Johns.* 328; 5 *Jur. N. S.* 858.

II. If a defendant has, in conscience, a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, a Court of Equity will not compel him to make any discovery which may hazard his title,⁵ and if the matter appear clearly on the face of the bill, a demurrer will hold.⁶ The most obvious case is that of a purchaser for a valuable consideration, without notice of the plaintiff's claim.⁷ *Upon the same ground, a jointress may, in *570 many cases, demur to a bill filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, her jointure, and the facts appear sufficiently upon the face of the bill: though, ordinarily, advantage is taken of this defence by plea.¹

III. A defendant is not compellable to discover any thing immaterial to the relief prayed by the bill.² Upon this ground, upon a bill filed by

⁵ Story Eq. Pl. §§ 603, 604 a; Howell v. Ashmore, 1 Stockt. (N. J.) 82.

⁶ Ld. Red. 199; see Glegg v. Legh, 4 Mad. 193, 207.

⁷ Ld. Red. 199; Jerrard v. Saunders, 2 Ves. J. 458; see Sweet v. Southcote, 2 Bro. C. C. 66. The protection which Equity throws around an innocent purchaser, applies not only to bills of relief, but also to bills of discovery. 2 Story Eq. Jur. § 1502. Equity will not take the least step against him, and will allow him to take every advantage which the law gives him; for there is nothing which can attach itself upon his conscience, in such a case, in favor of an adverse claim. *Ib.* § 1505; 1 *id.* § 410; Wood v. Mann, 1 Sumner, 507; McNeil v. Magee, 5 Mason, 269; Vattier v. Hinde, 7 Peters, 252; Fitzsimmons v. Ogden, 7 Cranch, 2; Boone v. Chiles, 10 Peters, 177; Payne v. Compton, 2 Y. & C. 457; Story Eq. Pl. § 603; Howell v. Ashmore, 1 Stockt. (N. J.) 82. And so a purchaser, with notice from an innocent purchaser without notice, is entitled to the like protection. For otherwise, it would happen that the title of such a *bonâ fide* purchaser would become unmarketable in his hands. 2 Story Eq. Pl. Jur. § 1503 a; 1 *id.* 410, and cases cited; Varick v. Briggs, 6 Paige, 323; Bennett v. Walker, 1 West, 130; Jackson v. McChesney, 7 Cowen, 360; Jackson v. Henry, 10 John. 185; Jackson v. Ewer, 8 John. 573; Demarest v. Wyncoop, 3 John. 147. But where a bill is brought for discovery and to set aside a mortgage, which the plaintiff alleges was taken by the defendant with intent to defraud the plaintiff, the defendant cannot by demurring to the bill, avoid answering and disclosing the time when his mortgage was executed, or whether he claims to hold the land by virtue of it; or from disclosing, and, if in his power, producing the note which his mortgage purports to secure; or from stating when, where, and in whose presence, and for what, the note was given; or from whom the consideration was received, and to whom paid. Burns v. Hobbs, 29 Maine, 273; see *post*, pp. 579, 580.

In Howell v. Ashmore, 1 Stockt. (N. J.) 82, it was held that when the defendant is charged with a fraud, and that he has procured a title fraudulently, and is fraudulently setting it up to defeat the plaintiff, the Court of Chancery may compel such fraud-doer to disclose the fact alleged as a fraud, and all the circumstances attending it, in order that the Court may determine whether those circumstances establish the fraud. And it is a proper object of a bill of discovery to ascertain, in a case where the defendant's title can prevail only upon the ground of his being a *bonâ fide* purchaser, without notice of the plaintiff's title, whether he had such notice, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point. Howell v. Ashmore, 1 Stockt. (N. J.) 82; see *post*, p. 531, note.

¹ Ld. Red. 199; Chamberlain v. Knapp, 1 Atk. 52; Senhouse v. Earl, 2 Ves. S. 450; see also Leech v. Trollop, *ib.* 662, from which it appears, that a widow is not bound to discover her jointure deed, by her answer (even where the bill offers to confirm it) till the confirmation has been effected; see *post*, Chap. XLII., *Production of Documents*.

² Ld. Red. 191. The plaintiff in a bill must show the materiality of the discovery sought. [It is the language of some of the reported cases, that a party seeking a discovery even in aid of a suit at Law must show affirmatively, in his bill, that the right which he seeks to enforce at Law cannot be established without the discovery sought. Whitesides v. Lafferty, 9 Humph. 27; Vaughan v. Central Pac. R. Co., 4 Sawy. 280. But the weight of authority is clearly otherwise, and limits the requirement to bills which seek to give jurisdiction to the Court to grant relief because of the discovery. March v. Davison, 9 Paige, 580; Metler v. Metler, 4 C. E. Green, 457; Peck v. Ashley, 12 Met. 478; Continental Ins. Co. v. Webb, 54 Ala. 697. And in the latter class of cases, where jurisdiction to give relief depends on discovery, it has been held that the bill will not lie against a corporation, which answers only under its corporate seal.

a mortgagor against a mortgagee to redeem, and seeking a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed: for, as there was no trust declared upon the mortgage deed, it was immaterial to the plaintiff whether there was any trust reposed in the defendant or not.³ So, where a bill was filed by the lord of a borough, praying a discovery whether a person applying to be admitted a tenant was a trustee or not, a demurrer was allowed:⁴ and where a bill was brought for real estate, and sought discovery of proceedings in the Ecclesiastical Court upon a grant of administration, the defendant demurred, successfully, to that discovery.⁵ In like manner, where a bill was filed to establish an agreement entered into before marriage, by which a separate estate was secured to the defendant's wife, and praying a discovery of several unkindnesses and hardships which the defendant, as it was pretended, had used towards his wife, to make her recede from the agreement, and the defendant demurred to the discovery, the demurrer was allowed.⁶ But in general, if it can be supposed

that the discovery may in any way be material to the plaintiff, *571 for * the purposes of the suit, the defendant will be compelled to make it;¹ thus, where a bill called for a discovery of cases laid before counsel, and their opinion, Lord Eldon held, that the plaintiff had no right to a discovery of the opinions of counsel, but only of the cases.² And now, the cases, if prepared subsequently to, or in contemplation of, the litigation, are also protected.³

IV. The last case brings us to the consideration of those causes of demurrer to discovery, which are the consequence of the privilege resulting from professional confidence.⁴ The privilege conferred by this species of confidence applies, though in a different degree, to both the adviser and the client.⁵ The application of the rule, with regard to professional confidence, to discovery required from the client, has been

Vaughan v. Central Pac. R. Co., 4 Sawy. 230. The contrary was held by Brown, U. S. Dist. J. in *Vaughan v. East Tenn. and Va. R. Co.*, 9 Chi. Leg. News, 255. The fact, in such cases, that the plaintiff is entitled to the discovery does not, necessarily, entitle him also to an account; but where the case is complicated, or where, from other circumstances, the remedy at Law will not give adequate relief, a Court of Equity will take jurisdiction. *Magic Ruffle Co. v. Elm City Co.*, 14 Blatchf. 109.] Where the bill seeks relief which the Court has no power to grant, and also seeks a discovery, the defendant may demur to the whole bill, if it do not aver that a suit at Law is pending, or is about to be brought, in which a discovery may be material. *Mitchell v. Green*, 10 Met. 101; *Pease v. Pease*, 8 Met. 395.

This objection of immateriality may be to the whole bill, or to a part of the bill, or to a part only of the interrogatories, or to a particular defendant only. *Story Eq. Pl.* § 558; *Hare on Discov.* 159-161. For form

of a demurrer for immateriality, see *Story Eq. Pl.* § 567; *Willis*, 475.

³ *Harvey v. Morris*, Rep. t. Finch, 214.

⁴ *Lord Montague v. Dudman*, 2 Ves. S. 396, 398.

⁵ *Baker v. Pritchard*, 2 Atk. 388.

⁶ *Hincks v. Nelthorpe*, 1 Vern. 204.

¹ *Ld. Red.* 193.

² *Richards v. Jackson*, 18 Ves. 472.

³ *Post*, p. 573.

⁴ *Story Eq. Pl.* §§ 599-602; 1 Greenl. Ev. § 235 *et seq.*; and cases in notes; *Gresley Eq. Ev.* 278-284; *Brown v. Payson*, 6 N. H. 443; *Foster v. Hall*, 12 Pick. 89; *Wright v. Mayo*, 6 Sumner's Ves. 280 a, and notes; *Aiken v. Kilburne*, 27 Maine, 251; *Brazier v. Fortune*, 10 Ala. 516; *Beeson v. Beeson*, 9 Barr, 279.

⁵ See also, on this subject, *post*, Chap. XLII., *Production of Documents*. And it is quite possible that the client may be compelled to disclose the facts when his professional adviser would be bound to withhold them. *Preston v. Carr*, 1 Y. & J. 175, 179; *Hare, Discov.* 174, 175; *Greenlaw v. King*, 1 Beav. 137.

exemplified in the case already referred to of *Richards v. Jackson*, in which Lord Eldon, as we have seen, held, that if the demurrer had been confined to the discovery of the opinions, it would have been good; and the rule has since been extended to exempt a defendant from the discovery of the case itself, and to all confidential communications which have passed in the progress of the cause itself, and with reference to it before it was instituted;⁶ and also to letters written by a defendant to his solicitor, after a dispute between him and the plaintiff had arisen, with the view to taking the opinion of counsel upon the matter in question, and which afterwards became the subject of the suit.⁷ The rule also extends to all observations, notes, and remarks made by counsel upon their briefs, but the briefs themselves, so far as they are copies of matter otherwise *publici juris*,⁸ and counsel's indorsement, or note of any order made by the Court,⁹ are not privileged.

The rule has been adopted out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, *every one would be thrown upon *572 his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.¹ Unless, however, the communication has a direct reference to the subject of the dispute, the party himself has no privilege: he is, in other respects, bound to disclose all he knows and believes and thinks respecting his own case; and he must disclose the cases he has laid before counsel for their opinion, unconnected with the suit itself.²

Sir James Wigram V. C. has stated the history of the law upon this subject, in the following terms: "The first point decided upon this subject was, that communications between solicitor and client pending litigation, and with reference to such litigation, were privileged; upon this there is not at this day any question. The next contest was upon communications made before litigation, but in contemplation of, and with reference to, litigation which was expected and afterwards arose; and it was held, that the privilege extended to these cases also. A third question then arose, with regard to communications after the dis-

⁶ *Garland v. Scott*, 3 Sim. 396; *Bolton v. Corporation of Liverpool*, *ib.* 467, 487; 1 M. & K. 88, 93; *Hughes v. Biddulph*, 4 Russ. 190; *Woods v. Woods*, 4 Hare, 83, 86; *Jenkins v. Bushby*, L. R. 2 Eq. 547; 12 Jur. N. S. 558, V. C. K.

⁷ *Vent v. Pacey*, 4 Russ. 193; *Greenough v. Gaskell*, 1 M. & K. 98, 101.

⁸ *Walsham v. Stainton*, 2 H. & M. 1.

⁹ *Nicholl v. Jones*, 13 W. R. 451, V. C. W.; 2 H. & M. 588. [The notes of a shorthand writer by one of the parties are not

privileged so far as they merely describe what took place in Court, but all notes or observations thereon, and all parts thereof which do not relate to the proceedings in Court, are privileged. *Nicholl v. Jones*, 2 H. & M. 588.]

¹ Per Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. 103. [The client as well as the attorney may refuse to testify to what was said between them in professional confidence. *State v. White*, 19 Kan. 445.]

² *ib.* 100, 101.

pute between the parties, followed by litigation, but not in contemplation of, or with reference to, that litigation; and these communications were also protected.³ A fourth point which appears to have called for decision, was the title of a defendant to protect from discovery in the suit of one party, cases or statements of fact made on his behalf by or for his solicitor or legal adviser, on the subject-matter in question, after litigation commenced or in contemplation of litigation, on the same subject, with other persons, with the view of asserting the same right. This was the case of *Combe v. The Corporation of London*.⁴ The question in that suit was the right of the corporation to certain metage dues, and the answer stated that other persons had disputed the right of the corporation to metage, and that they had in their possession cases which had been prepared with a view to the assertion of their rights against such other parties, in contemplation of litigation, or after it had actually commenced; Sir J. L. Knight Bruce held, that those cases, relating to the same question, but having reference to disputes with other persons, were within the privilege; and I perfectly concur with that decision."⁵

The case before Sir James Wigram was a bill for specific *573 performance * by a purchaser, and during the treaty for the sale and purchase of the estate, but before any dispute had arisen, the defendant, the vendor, from time to time consulted his solicitor on the subject, and written communications passed between them. A question arose, upon a motion for the production of documents, whether these communications were privileged, regard being had to the circumstance that they took place before any dispute arose, though with reference to the very subject in respect of which that dispute had since arisen; and his Honor decided, chiefly upon the authority of *Radcliffe v. Fursman*,¹ that such communications were privileged, so far only as they might be proved to contain legal advice or opinions, but not otherwise.²

This case of *Radcliffe v. Fursman* is commonly referred to as a leading case, upon the extent to which the privilege applies, in protecting cases laid before counsel for their opinion. The defendant, in that cause, demurred to so much of the bill as required him to discover an alleged case, the name of the counsel, and the opinion given upon it. The demurrer was overruled as to the first point, but allowed as to the second and third by Lord King, and the decision was affirmed in the House of Lords. This decision has been frequently mentioned with disapprobation; but having been made by the House of Lords, its

³ *Bolton v. Corporation of Liverpool*, 3 Sim. 467, 487; 1 M. & K. 88, 93; *Hughes v. Biddulph*, 4 Russ. 190; *Vent v. Pacey*, *ib.* 193; *Clagett v. Phillips*, 2 Y. & C. C. 82, 86; 7 Jur. 31; 1 Greenl. Ev. § 240; *Story Eq. Pl.* § 600; *Beltzhoover v. Blackstock*, 3 Watts, 20; *Foster v. Hall*, 12 Pick. 89, 92, 98, 99.

⁴ 1 Y. & C. C. 631, 650; see also

Holmes v. Baddeley, 1 Phil. 476, 480; 9 Jur. 289.

⁵ *Lord Walsingham v. Goodricke*, 3 Hare, 124.

¹ 2 Bro. P. C. ed. Toml. 514; and see *Mornington v. Mornington*, 2 J. & H. 697.

² See observations of V. C. Wood on *Lord Walsingham v. Goodricke*, in *Manser v. Dix*, 1 K. & J. 451, 453.

authority is recognized, though only to the extent to which it strictly applies. Lord Brougham, in commenting upon it, observed: "Even by the report, and certainly by the printed cases, which I have examined, together with my noble and learned predecessor, it appears plain, that the record did not show any suit to have been instituted, or even threatened, at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the Court had no right to know any thing which the record did not disclose." "So far this decision rules, that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel in reference to, or in contemplation of, or pending the suit or action, for the purposes of which the production is sought."³

The privilege arising from professional confidence, as it respects the legal advisers, is of a more extended nature: "As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation."⁴ If, touching *mat- *574 ters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, from a client, and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them; and will not be compelled to disclose the information, or produce the papers, in any Court of Law or Equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and, it may be, the most important, of all communications: those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued." "The protection would be insufficient if it only included communications more or less connected with judicial proceedings: for a person oftentimes requires the aid of professional advice, upon the subject of his rights and liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry.

³ *Bolton v. Corporation of Liverpool*, 1 M. & K. 95, 96; *C. P. Coop. t. Brough*, 24, 25; see *Nias v. Northern and Eastern Railway Company*, 3 M. & C. 355.

⁴ *Foster v. Hall*, 12 Pick. 89, 93 *et seq.*; *Wilson v. Troup*, 7 John. Ch. 25, 38, 39; *Beltzhoover v. Blackstock*, 3 Watts, 20; *March v. Ludlum*, 3 Sand. Ch. 35; *Moore v. Bray*, 10 Barr, 519; [*Conn. Mut. Life Ins. Co. v. Schaeffer*, 94 U. S. 457; *Bigler v. Reyher*, 43 Ind 112; *Carnes v. Platt*, 36 N. Y. Sup. Ct. 360; *Lockhard v. Brodie*, 1 Tenn. Ch. 384. So, as to confidential corre-

spondence between a party, or his predecessor in title and their respective solicitors. Minet v. Morgan, L. R. 8 Ch. App. 361. And a bill prepared by the attorney on his client's statements, sworn to but never filed, is privileged. *Barnham v. Roberts*, 70 Ill. 19. So the privilege extends to all that passes between client and attorney in the course and for the purpose of the business. *Lengsfeld v. Richardson*, 52 Miss. 443. But not to information in reference to a criminal act. *People v. Mahon*, 1 Utah, 205.]

It would be most mischievous, said the learned Judges in the Common Pleas,¹ if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw."² In *Herring v. Clobery*,³ in which a solicitor was examined as a witness, Lord Lyndhurst said: "Where an attorney is employed by a client professionally, to transact professional business, all the communications that pass between the client and the attorney in the cause, and for the purpose of that business, are privileged communications: and the privilege is the privilege of the client, and not of the attorney."

Communications to a solicitor made, not by his client, but by third parties, and information acquired by such solicitor from collateral sources, are not privileged from disclosure, even though such communications are made to, and information acquired by, him in his character of solicitor, and solely by reason of his filling that character.⁴

*575 Although the general rule is, as laid down in the above case, that a counsel or solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation: there is no doubt that the privilege will be excluded, where the communication is not made or received professionally, and in the usual course of business,¹ and during the existence of the professional relation. Thus, a communication made to an attorney or solicitor, in the character of steward, either before the attorney or solicitor was employed as such,² or after his employment has ceased, will not be protected from disclosure;³ and so, where an attorney had been consulted by a friend, because he was an attorney, yet refused to act as such,⁴ and was, therefore, applied to only as friend,⁵ or where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure.⁶ In all such cases, the matters to be disclosed cannot be said to be matters which

¹ *Cromack v. Heathcote*, 2 Brod. & Bing. 6.

² Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. 101, 102; C. P. Coop. t. Brough. 98; Story Eq. Pl. § 600, and note. The attorney is not bound to produce title-deeds, or other documents, left with him by his client for professional advice. [Dover v. Harrell, 58 Ga. 572.] Though he may be examined to the fact of their existence, in order to let in secondary evidence of their contents, which must be from some other source than himself. 1 Greenl. Ev. § 241; *Wright v. Mayer*, 6 Ves. 280, note (a); *Bank of Utica v. Mersereau*, 3 Barb. Ch 528.

³ 1 Phil. 91; 6 Jur. 202; see also *Carpmael v. Powis*, 1 Phil. 687, 692; and that it is the privilege of the client, see *Re Cameron's Coalbrook, &c., Railway Company*, 25 Beav. 1, 4.

⁴ *Ford v. Tennant*, 32 Beav. 162; and see *Gore v. Bowser*, 5 De G. & S. 30, 33; S. C. *nom. Gore v. Harris*, 15 Jur. 1168; [Rundle v.

Foster, 3 Tenn. Ch. 658; *Perkins v. Guy*, 55 Miss. 153; *Hebbard v. Haughian*, 70 N. Y. 54; *State v. Mewherter*, 46 Iowa, 88.]

¹ *Greenough v. Gaskell*, 1 M. & K. 98, 104; *Walker v. Wildman*, 6 Mad. 47; see also *Desborough v. Rawlins*, 3 M. & C. 515; 2 Jur. 125; [*Smith v. Daniell*, L. R. 18 Eq. 649; *Minet v. Morgan*, L. R. 8 Ch. App. 361.] And the privilege is destroyed if the information is subsequently communicated to the solicitor from another source. *Lewis v. Pennington*, 6 Jur. N. S. 478; 8 W. R. 465, M. R.

² *Cutts v. Pickering*, 1 Ventris, 197.

³ *Wilson v. Rastall*, 4 T. R. 753; Story Eq. Pl. § 602; 1 Greenl. Ev. § 244.

⁴ If a party has been requested to act as solicitor, and the communication has been made, under the impression that the request has been acceded to, it is privileged. *Smith v. Yell*, 2 Curtis. 667.

⁵ *Ibid.*

⁶ *Rex v. Watkinson*, 2 Stra. 1122.

the professional adviser has learnt by communication with his client, or on his client's behalf, or as matters which were committed to him in his capacity of attorney, or which, in that capacity alone, he came to know.⁷ And so, where an attorney is, as it were, a party to the original transaction, as if he be the attesting witness to a deed, he may be called upon to disclose facts relating to its execution, or as to an erasure made by himself in a deed or will;⁸ if, also, he was present when his client was sworn to an answer in Chancery, he may be called upon to disclose the fact;⁹ and if he has been employed as the agent of a party, and does not gain his knowledge of the facts, as to which the discovery is required, merely in his relation of attorney to his client, the rule will not apply: for, in such cases, there was no professional confidence, and he stands in the same situation as any other person.¹⁰

* The privilege will also be excluded, with regard to communi- *576
cations to members of other professions than the Law: it has, therefore, been held not to extend to clergymen;¹ nor to physicians or medical advisers;² nor will it extend to mere agents or stewards;³ it, however, applies to scriveners;⁴ and also to counsel.⁵ It has, however, been held that it does not extend to communications made to persons acting as conveyancers, who are neither counsel nor solicitors; thus, in the *South Sea Company v. Dolliffe*, referred to in *Vaillant v. Dodemead*,⁶ a Mr. Gambier, who had settled certain articles, is reported to have demurred to the discovery sought from him, as to the alterations

⁷ *Greenough v. Gaskell*, 1 M. & K. 98, 104.

⁸ *Sandford v. Remington*, 2 Ves. J. 189; Taylor on Evid. §§ 857, 858; 1 Phil. on Evid. 128.

⁹ *Doe v. Andrews*, 2 Cowp. 846.

¹⁰ *Morgan v. Shaw*, 4 Mad. 54, 56, 57; see also *Desborough v. Rawlins*, 3 M. & C. 515; [*Williams v. Young*, 4 Iowa, 140.]

The person, called as a witness, or made defendant to a bill, must have learned the matter in question only as counsel, or attorney, or solicitor, and not in any other way. If, therefore, he were a party to the transaction, and, especially, if he were a party to a fraud (and the case may be put of his becoming an informer, after being engaged in a conspiracy), that is, if he were acting for himself, although he might be employed for another, he would not be protected from the discovery; for in such case his knowledge would not be acquired solely by his being employed professionally. Story Eq. Pl. § 601.

An attorney may be compelled to disclose the name of the person by whom he was retained; the character in which his client employed him; the time when an instrument was executed, or put into his hands, but not its condition and appearance at that time; his client's handwriting; and various other matters, for an enumeration of which, see 1 Greenl. Ev. 245.

So if an attorney put his name to an instrument as a witness, his signature binds

him to disclose all that passed at the time, respecting the execution of the instrument. *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 2 Sugd. V. & P. (7th Am. ed.) 1063.

¹ Taylor on Evid. § 838; 1 Greenl. Ev. § 247; *Commonwealth v. Drake*, 15 Mass. 161.

² *Duchess of Kingston's case*, 11 Harg. St. Tr. 243; S. C. 20 How. St. Tr. 572; *Greenough v. Gaskell*, *ubi sup.*; 1 Greenl. § 248, note; *Hewitt v. Prime*, 21 Wend. 79.

³ *Vaillant v. Dodemead*, 2 Atk. 524; *Wilson v. Rastall*, 4 T. R. 753. As to bankers and clerks, see *Loyd v. Freshfield*, 2 Car. & P. 325.

⁴ *Harvey v. Clayton*, 2 Swanst. 221, n. (a).

⁵ *Rothwell v. King*, 2 Swanst. 221, n. (a); *Spencer v. Luttrell*, and *Stanhope v. Nott*, *ibid.*

The privilege of clients to have their communications to counsel kept secret, extends in New Hampshire, not only to communications made to professional men, but to those made to any other person employed to manage a cause as counsel. *Bean v. Quimby*, 5 N. H. 94.

An attorney, who, in his professional character, has received from the owner of property confidential communications on the subject of a transfer of it, which is subsequently made, cannot be examined, against the consent of the grantee, in relation to such communication. *Foster v. Hall*, 12 Pick. 89.

⁶ 2 Atk. 525.

in those articles, on the ground that he was counsel for the company; and it is stated that the demurrer was overruled: "for that what he knew was as the conveyancer only."⁷ It has also been held, that the privilege will not apply to one who has been consulted confidentially as an attorney, when in fact he was not one.⁸

A person who acts as an interpreter,⁹ or agent,¹⁰ between an attorney and his client, stands in the same situation as the attorney; and the rule has also been held to apply to the clerk of the counsel or solicitor consulted;¹¹ and the privilege extends to the representatives of *577 the party as against third persons, but not as *between different claimants under him.¹ The privilege extends to communications with an unprofessional agent, employed to collect evidence;² and also to communications with a Scotch solicitor and law agent resident in England.³

The privilege does not cease upon the solicitor afterwards becoming interested in the matters in question in the suit;⁴ nor upon his being struck off the rolls.⁵

The propriety of the distinction which has been made between the extent of the privilege, as it affects the client and as it affects the solicitor, has been doubted.⁶ Upon this point, Sir J. L. Knight Bruce V. C. said: "I confess myself at a loss to perceive any substantial reason, in point of difference, or principle, or convenience, between the liability of the client, and that of his counsel, or solicitor, to disclose the client's communications made in confidence professionally to either;"⁷ and upon the same point, Sir R. T. Kindersley V. C. observed: "If I could, upon authority, determine the abstract point which has been argued, *viz.*, whether the privilege of the client is as extensive as that of the solicitor, I should be glad to remove the anomaly by which it seems, that where the solicitor is interrogated, and

⁷ 2 Atk. 525; and see *Turquand v. Knight*, 2 M. & W. 100, as to certificated conveyancers.

⁸ *Fountain v. Young*, 6 Esp. 113; but see *Calvey v. Richards*, 19 Beav. 401, 404. [The privilege applies only to licensed attorneys. *McLaughlin v. Gilmore*, 1 Ill. App. 563.]

⁹ *Du Barré v. Livette, Peake*, N. P. C. 77, 78, explained 4 T. R. 756; see *Jackson v. French*, 3 Wend. 337; *Andrews v. Solomon*, 1 Peters C. C. 326; *Parker v. Carter*, 4 Munf. 278.

¹⁰ *Parkins v. Hawkshaw*, 2 Stark. N. P. 239; *Reid v. Langlois*, 1 M'N. & G. 627, 638; 14 Jur. 467, 470; *Russell v. Jackson*, 9 Hare, 387; 15 Jur. 1117; *Goodall v. Little*, 1 Sim. N. S. 155; 15 Jur. 309; *Hooper v. Gumm*, 2 J. & H. 602.

¹¹ *Taylor v. Foster*, 2 Car. & P. 195; *Foot v. Hayne*, 1 Car. & P. 545; 1 Ry. & M. 165; *Foster v. Hall*, 12 Pick. 93; *Jackson v. French*, 3 Wend. 337.

¹ *Wigram on Disc.* 82; see also *Parkhurst v. Lowten*, 1 Mer. 391, 402; *Russell v. Jackson, ubi sup.*; *Gresley v. Mousley*, 2 K. & J. 258; *Tugwell v. Hooper*, 10 Beav. 348, 350; see 1 Greenl. Ev. § 239.

² *Steele v. Stewart*, 1 Phil. 471, 475; 9 Jur. 121; *Lafone v. Falkland Island Company*, 4 K. & J. 34; *Walsham v. Stainton*, 2 H. & M. 1; see also *Kerr v. Gillespie*, 7 Beav. 572; *Simpson v. Brown*, 33 Beav. 482. And in the recent decision of *Ross v. Gibbs*, and *Gibbs v. Ross*, L. R. 8 Eq. 522, it was held generally that communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of, or defence to, a claim to the matter in dispute, are privileged.

³ *Lawrence v. Campbell*, 4 Drew. 485; see also *Bunbury v. Bunbury*, 2 Beav. 173, 176, where the question was as to an opinion by a Dutch counsel. [The privilege extends to all letters and communications between the solicitors and other persons written or made for the purposes of the suit. *Churton v. Frewen*, 2 Dr. & Sm. 390. But see *Page v. Page*, 17 W. R. 435.]

⁴ *Chant v. Brown*, 7 Hare, 79.

⁵ *Lord Cholmondeley v. Lord Clinton*, 19 Ves. 268.

⁶ *Ante*, 571, n. 5.

⁷ *Pearse v. Pearse*, 1 De G. & S. 12, 26.

objects, because it would be calling on him to divulge matters which passed in the relation of solicitor and client, then there is a privilege without more: whether such matters relate to an actual or contemplated litigation or not; and yet, if the same questions are put to the client, then when his privilege is in question, he is to be told that he has a less privilege than he would have through his solicitor, if the latter were questioned. So great an anomaly, so inconsistent and absurd a rule, I should be glad to take on myself to say is not the rule of this Court, and that there is no such distinction. When *Reid v. Langlois*,⁸ was cited to me, it did appear, at first sight, that it established the broad proposition contended for; and I should certainly have followed that case if it did so; but, on further examination, though that case does not establish the contrary, yet I think it was not the intention of Lord Cottenham to lay down the general proposition: that point he did not decide; nor do the cases of **Pearse v. Pearse*¹ and **578 Follett v. Jefferyes*² so lay it down as to enable me to say I can follow them. If that point is to be decided, it must be by a higher authority than mine.”³

The more recent cases upon the privilege, as it affects the client, are very numerous; and although it is difficult, if not impossible, to extract any clear rules from them as to the extent of the privilege, it may be said that their tendency is to make the rules the same, whether the discovery is sought from the solicitor or client;⁴ and in matters of title, this seems to have been decided.⁵

There does not seem to be any difference, in principle, between cases stated for opinion, and other communications of matters of fact between a client and his professional advisers.⁶

The privilege is, however, confined to legal advisers: for it has been held, that although a defendant in a suit cannot be compelled to discover or produce letters, between himself and his solicitor, subsequently to the institution of the suit, and in relation thereto, yet, where there are more defendants than one, they are bound to discover letters, and copies of letters, which have passed between them with reference to their defences.⁷

⁸ 1 M’N. & G. 627, 638.

¹ 1 De G. & S. 12; 11 Jur. 52.

² 1 Sim. N. S. 1; 15 Jur. 118.

³ *Thompson v. Falk*, 1 Drew. 21, 25.

⁴ The following are some of the more recent decisions: *Nias v. Northern and Eastern Railway Company*, 3 M. & C. 355, 357; 2 Jur. 295; *Bunbury v. Bunbury*, 2 Beav. 173; *Flight v. Robinson*, 8 Beav. 22, 33; 8 Jur. 888; *Maden v. Veevers*, 7 Beav. 489; *Woods v. Woods*, 4 Hare, 83; *Reece v. Trye*, 9 Beav. 316; *Pearse v. Pearse*, *ubi sup.*; *Tugwell v. Hooper*, 10 Beav. 348; *Penruddock v. Hammond*, 11 Beav. 59; *Beadon v. King*, 17 Sim. 34; *Reid v. Langlois*, and *Follett v. Jefferyes*, *ubi sup.*; *Warde v. Warde*, 3 M’N. & G. 365; 15 Jur. 759; *Balguy v. Broadhurst*, 1 Sim. N. S. 111; 14 Jur. 1105;

Hawkins v. Gathercole, 1 Sim. N. S. 150; 15 Jur. 186; *Goodall v. Little*, 1 Sim. N. S. 155; 15 Jur. 309; *Thompson v. Falk*, *ubi sup.*; *Black v. Galsworthy*, 2 Giff. 453; *Ford v. Tennant*, 32 Beav. 162; *ante*, pp. 570, 571, notes.

⁶ *Manser v. Dix*, 1 K. & J. 451; 1 Jur. N. S. 466; *Pearse v. Pearse*, *ubi sup.*

⁷ *Lord Walsingham v. Goodricke*, 3 Hare, 122, 129; [*Wilson v. Northampton, &c. R. Co.*, L. R. 14 Eq. 477; *McFarlan v. Rolt*, L. R. 14 Eq. 580].

⁸ *Whitbread v. Gurney, Younge*, 541; *Goodall v. Little*, *ubi sup.*; *Glyn v. Cadfield*, 3 M’N. & G. 463, 474; 15 Jur. 807; *Betts v. Menzies*, 3 Jur. N. S. 885; 5 W. R. 767; *V. C. W.*; see also *Reynolds v. Godlee*, 4 K. & J. 88.

Where a solicitor is party to a fraud, the privilege does not attach to the communications with him upon the subject: because the contriving of a fraud is not part of his duty as solicitor;⁸ and it seems, that it is the same where the communications are with a view to effecting any illegal purpose.⁹ In order, however, to prevent the privilege attaching, the bill must contain allegations specifically connecting the solicitor with the fraud or illegal act.¹⁰ Questions concerning privileged communications arise more frequently upon applications for the production of documents, than upon demurrers to discovery; and the subject is, therefore, more fully considered under that title.¹¹

*579 *V. The necessity that the bill should show, that a certain degree of privity exists between the plaintiff and defendant, in order to entitle him to maintain his suit, has been before pointed out;¹ and it has been stated, that the want of such privity will afford a ground for demurrer to the relief prayed. It may sometimes, however, happen that a plaintiff may, by his bill, show that, supposing the facts he states are true (and which, as we have seen, are admitted by every demurrer), he has a right to the relief he prays, and yet may not show such a privity as will entitle him to the discovery which he asks for: for it is a rule of the Court that, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims.² Thus, where a bill was filed by a person claiming to be lord of a manor, against another person also claiming to be lord of the same manor, and praying, amongst other things, a discovery how the defendant derived title to the manor, and the defendant demurred, because the plaintiff had shown no right to the discovery, the demurrer was allowed;³ and so, where a bill was filed by one claiming to be the heir, *ex parte maternâ*, against another claiming to be heir, *ex parte paternâ*, and the bill sought a discovery in what manner the claim *ex parte paternâ* was made out, and the particulars of the pedigree, a demurrer to that discovery was allowed.⁴

The principle upon which these cases proceed is: that the right of a plaintiff in Equity to the benefit of a defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established.⁵

⁸ *Follett v. Jefferyes*, 1 Sim. N. S. 1: 15 Jur. 118; *Russell v. Jackson*, 9 Hare, 387; 15 Jur. 1117; *Gilbert v. Lewis*, 1 De G., J. & S. 38, 49, 50; 9 Jur. N. S. 187; *Feaver v. Williams*, 11 Jur. N. S. 902, V. C. S.

⁹ *Russell v. Jackson*, *ubi sup.*

¹⁰ *Mornington v. Mornington*, 2 J. & H. 697; *Charlton v. Coombes*, 4 Giff. 372, 382; 9 Jur. N. S. 534.

¹¹ See *post*, Chap. XLII., *Production of Documents*.

¹ *Ante*, p. 322.

² *Ld. Red. 190*; *Stroud v. Deacon*, 1 Ves. S. 37; *Buden v. Dore*, 2 Ves. S. 445; *Samp-*

son v. Swettenham, 5 Mad. 16; *Tyler v. Drayton*, 2 S. & S. 309; see also *Stainton v. Chadwick*, 3 M'N. & G. 575, 582.

³ *Ld. Red. 190*.

⁴ *Ivy v. Kekewick*, 2 Ves. J. 679.

⁵ *Wigram on Disc.* 261; *Ingilby v. Shafto*, 33 Beav. 31; 9 Jur. N. S. 1141; *Daw v. Eley*, 2 H. & M. 725; *Hoffman v. Postill*, L. R. 4 Ch. Ap. 673. [So where the discovery is such as might be used prejudicially to the defendant irrespective of the suit. *Carver v. Leite*, L. R. 7 Ch. App. 90; *Moore v. Carver*, L. R. 7 Ch. App. 94 note.]

The rule of the English Courts of Equity,

This principle is recognized by Lord Brougham, in * *Bolton v. The Corporation of Liverpool*; ¹ and by Lord Abinger, in *Bellwood v. Wetherell*.² It is true that in those cases the question did not come before the Court upon demurrer, but the rule is the same in whatever way the question may be raised: on demurrer, on exceptions to the defendant's answer, or on application to produce documents in the defendant's possession.³

This rule will not extend to defeat the plaintiff of his right to discovery from the defendant, where he makes a case in his bill which, if admitted, would disprove the truth of, or otherwise invalidate the defence made, to the bill; in such cases, he is entitled to discovery from the defendant, of all which may enable him to impeach the defendant's case; for the plaintiff does not rest on a mere negative of the defendant's case, but insists upon some positive ground entitling him to the assistance of the Court, such as fraud, or other circumstances of equitable cognizance, to a discovery of which, no objection of this kind can be raised.⁴

If a plaintiff is entitled to a discovery of deeds or other documents for the purpose of establishing his own case, his right to such discov-

that the plaintiff in a bill of discovery "shall only have a discovery of what is necessary to his own title, and shall not pry into the title of the defendant" (Coop. Eq. Pl. 58), is held not to be applicable in Massachusetts. *Adams v. Porter*, 1 Cush. 170, 175, 176. "Our whole system of inquiry," says Mr. Justice Dewey in the above case, "by the instrumentality of a legal proceeding, has been that of full inquiry as to any and all facts, that may impeach the right of property in the party of whom the inquiry is made." Instances are adduced of interrogatories to supposed trustees in trustee processes; to persons charged with embezzling the property of deceased persons; and to persons charged with having fraudulently received the property of an insolvent debtor. But see *Wilson v. Webber*, 2 Gray, 558, in which the English rule is distinctly recognized; and the case of *Adams v. Porter* is not referred to; see also *Haskell v. Haskell*, 3 Cush. 540, 542, 543; *Bellows v. Stone*, 18 N. H. 465, 483, 484; *Story Eq. Pl. §§ 572-574 c*; *Shaftsbury v. Arrowsmith*, 4 Ves. 72, Mr. Hovenden's note (1); *Cullison v. Bossom*, 1 Md. Ch. 95; *Howell v. Ashmore*, 1 Stockt. (N. J.) 87, 88. The plaintiff must state the facts which he expects to establish by the defendant's answer, otherwise he cannot have a discovery, merely to enable him to judge whether he can prevail in a suit at Law. *Deas v. Harvie*, 2 Barb. Ch. 448.

¹ 1 M. & K. 88, 91; see also *Attorney-General v. Corporation of London*, 2 M'N. & G. 247, 256.

² 1 Y. & C. Ex. 211, 215.

³ For instances in which this rule has been acted upon where the objection has been taken by demurrer, see *Stroud v. Deacon*, 1 Ves. S. 37; *Ivy v. Kekewick*, 2 Ves. J. 679; *Glegg v. Legh*, 4 Mad. 193; *Compton v. Earl*

Grey, 1 Y. & J. 154; *Wilson v. Forster*, Younge, 280; *Tooth v. Dean and Chapter of Canterbury*, 3 Sim. 49, 61. On Application to Produce: *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 114, 121; *Micklethwait v. Moore*, 3 Mer. 292; *Bligh v. Benson*, 7 Pri. 205; *Tyler v. Drayton*, 2 S. & S. 309; *Sampson v. Swettenham*, 5 Mad. 16; 2 M. & K. 754, n. (b); *Firkins v. Low*, 13 Pri. 193; *Wilson v. Forster*, M'Le. & Y. 274; *Tomlinson v. Lymer*, 2 Sim. 489; *Shaftsbury v. Arrowsmith*, 4 Ves. 66, 70; *Aston v. Lord Exeter*, 6 Ves. 288; *Worsley v. Watson*, cited *ib.* 289; *Bolton v. The Corporation of Liverpool*, 1 M. & K. 88; *Wasney v. Tempest*, 9 Beav. 407; *Attorney-General v. Thompson*, 8 Hare, 106; *Manby v. Bewicke* (No. 3), 8 De G., M. & G. 476; *Rumbold v. Forteith*, No. 2, 3 K. & J. 748; *Hunt v. Elmes*, 27 Beav. 62; 5 Jur. N. S. 645; *Ferrier v. Atwool*, 12 Jur. N. S. 365; 14 W. R. 597, L. J.J.; *ib.* 582, V. C. W. On Exceptions to Answers: *Buden v. Dore*, 2 Ves. S. 445; *Stainton v. Chadwick*, 3 M'N. & G. 375; 15 Jur. 1139; *Ingilby v. Shafto, ubi sup.*; *Bethell v. Casson*, 1 H. & M. 806; *Bovill v. Smith*, L. R. 2 Eq. 459, V. C. W.

⁴ *Hare on Disc.* 201; *Bellows v. Stone*, 18 N. H. 465, 483-485; *Daw v. Eley*, 2 H. & M. 725. And in answering interrogatories filed by a defendant for the examination of the plaintiff, under the English practice, the general rule applies, that he who is bound to answer must answer fully. Such interrogatories are on a different footing from those for the examination of a defendant in this respect, that a plaintiff is not entitled to a discovery of the defendant's case, but a defendant may ask any questions tending to destroy the plaintiff's claim. *Hoffman v. Postell*, L. R. 4 Ch. Ap. 673.

ery will not be affected by the circumstance that the same documents are evidence of the defendant's case also ;⁵ and if a defendant, bound to keep distinct accounts for another party, improperly mixes them with his own, so that they cannot be separated, he must discover the whole.⁶

*581 *VI. The circumstance that a party not before the Court has an interest in a document which a defendant, so far as his own interest is concerned, is bound to produce, will, in some cases, deprive the plaintiff of his right to call for its production, at least in the absence of the third party, as in the instance of a person being a trustee only for others. Upon this principle, a mortgagee cannot be compelled to show the title of his mortgagor, unless such mortgagor is before the Court ;¹ in such cases, however, a demurrer, for want of proper parties, would be the proper form in which to raise the objection, where the bill is for relief as well as for discovery.²

VII. Communications which come within a certain class of official correspondence, are privileged, upon the ground, that they could not be made the subject of discovery in a Court of Justice without injury to the public interest.³ In *Smith v. The East India Company*,⁴ Lord Lyndhurst had to consider whether correspondence, between the Court of Directors of the East India Company and the Board of Control, came within the limits of his privilege ; and he decided that it could not be subject to be communicated, without infringing the policy of the Act of Parliament,⁵ and without injury to the public interests.

The above are the principal grounds upon which a defendant may demur to the discovery sought by a bill ; although the plaintiff may be entitled to the relief prayed, in case he could establish his right to it by other means than discovery from the defendant, on those points as to which the defendant is entitled to defend himself from making discovery. In all other cases, a plaintiff, if entitled to relief, is entitled to call upon the defendant to make a full discovery of all matters upon which his title to relief is founded. It does not, however, very often happen that these grounds affect the whole of the discovery sought ; in such cases, the defendant must, if interrogated, answer all those parts of the bill, the answer to which will not expose him, or have a tendency to expose him, to the inconveniences before enumerated. A demurrer, under such circumstances, should precisely distinguish each

⁵ *Burrell v. Nicholson*, 1 M. & K. 680 ; *Wigram on Disc* 244 ; *Smith v. The Duke of Beaufort*, 1 Hare. 507, 518 ; 1 Phil. 209, 218 ; 7 Jur. 1095 ; *Combe v. The Corporation of London*, 1 Y. & C. C. C. 631, 650 ; *Earp v. Lloyd*, 3 K. & J. 549.

⁶ *Freeman v. Fairlie*, 3 Mer. 43 ; *Earl of Salisbury v. Cecil*, 1 Cox, 277 ; *Wigram on Disc*. 244 ; *Hare on Disc*. 245 ; and see *post*, Chap. XLII., *Production of Documents*.

¹ *Lambert v. Rogers*, 2 Mer. 489 ; see, however, *Balls v. Margrave*, 3 Beav. 448 ; 4

Beav. 119 ; *Few v. Guppy*, 13 Beav. 457 ; *Gough v. Offley*, 5 De G. & S. 653 ; *Hercy v. Ferrers*, 4 Beav. 97 ; and *post*, Chap. XLII., *Production of Documents*.

² See *ante*, pp. 278, 558.

³ See 1 Greenl. Ev. §§ 250, 251 ; *Bellows v. Stone*, 18 N. H. 465, 485.

⁴ 1 Phil. 50, 55 ; 6 Jur. 1 ; see also *Waddeer v. East India Company*, 8 De G., M. & G. 182 ; 29 Beav. 300.

⁵ 3 & 4 Will. IV. c. 85.

part of the bill demurred to, and if it does not do so, it will be overruled.⁶

If a defendant objects to a particular part of the discovery, and *the grounds upon which he may demur appear clearly on *582 the face of the bill, and the defendant does not demur to the discovery, but, answering to the rest of the bill, declines answering to so much, the Court will not compel him to make the discovery; but, in general, unless it clearly appears by the bill that the plaintiff is not entitled to the discovery he requires, or that the defendant ought not to be compelled to make it, a demurrer to the discovery will not hold, and the defendant, unless he can protect himself by plea, must answer.¹

Any irregularity in the frame of a bill may be taken advantage of by demurrer.² Thus, if a bill is brought contrary to the usual course of the Court, a demurrer will hold;³ as where, after a decree directing incumbrances to be paid according to priority, a creditor obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him, by way of priority, over the demands of some of the defendants, a demurrer was allowed:⁴ it being, in effect, a bill to vary a decree, and yet neither a bill of review, nor a bill in the nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a decree, unless the decree has been obtained by fraud.⁵ Where, however, a supplemental bill was filed, in a case in which, according to the former practice of the Court, a supplemental bill was the proper course, but by more recent practice the same object had been accomplished by petition: Sir John Leach V. C. held, that the supplemental bill was not rendered irregular, although the circumstances would be taken into consideration upon the question of costs.⁶

If the plaintiff neglects to take advantage of the irregularity by demurrer, he will be held to have waived the objection,⁷ unless he has claimed the benefit of it by answer.⁸

An amended bill is liable to have the same objections taken to it, by demurrer, as an original bill; and even where a demurrer to the original bill has been overruled, a demurrer to an amended bill has been

⁶ Chetwynd v. Lindon, 2 Ves. S. 450; Devonsher v. Newenham, 2 Sch. & Lef. 199; Robinson v. Thompson, 2 V. & B. 118; Weatherhead v. Blackburn, *ib.* 121, 124. [*Infra*, 589, n. 8.]

¹ Ld. Red. 200; Ord. XV. 4; *post*, p. 583.

² Ld. Red. 206; Bainbrigge v. Baddeley, 9 Beav. 538; Ranger v. Great Western Railway Company, 13 Sim. 368; 7 Jur. 935; Henderson v. Cook, 4 Drew. 306.

³ Ld. Red. 206; Story Eq. Pl. § 643.

⁴ Wortley v. Birkhead, 3 Atk. 809.

⁵ Ld. Red. 206; Lady Granville v. Ramsden, Bunb. 56.

⁶ Davies v. Williams, 1 Sim. 5.

⁷ Archbishop of York v. Stapleton, 2 Atk. 136; Ranger v. Great Western Railway Com-

pany, *ubi sup.* [An irregularity in pleading is waived by going to issue upon the merits, as where, pending a suit for the infringement of a patent, the patent was surrendered and a new patent taken out, and the complainant filed a supplemental, instead of an original bill. Ready v. Scott, 23 Wall. 352, 365. So where the answer was filed as a cross-bill without any warrant of law. Hubbard v. Turner, 2 M'Lean, 539. So where the answer was filed as a cross-bill when an original bill was alone proper. Odom v. Owen, 2 Baxt. 446; Campbell v. Foster, 2 Fenn. Ch. 402. So, where a pre-requisite to the filing of an answer as a cross-bill is omitted. Hull v. Fowlkes, 9 Heisk. 753.]

⁸ Milligan v. Mitchell, 1 M. & C. 433, 442.

allowed;⁹ and the circumstance of the amendment being of the most trifling extent will not, it seems, make any difference; and, even where the bill was amended by the addition of a party only, the demurrer was held to be regular.¹⁰ Where the defence first put in is a plea, and

*583 the bill is afterwards amended, the amended * bill may still be demurred to.¹ A defendant, however, cannot, in general, after he has answered the original bill, put in a general demurrer to the amended bill: because the answer to the original bill, being still on the record, will, in fact, overrule the demurrer.² The defendant must, in such case, confine his demurrer to the matters introduced by amendment. But where a substantially new case is made by the amended bill, a general demurrer will lie.³

A defendant may demur to part only of the relief or discovery: in which case it is called a partial demurrer.⁴ Under the former practice, a defendant demurring to part of the bill, was bound to answer the rest; and when interrogatories have been served, a defendant may still answer such of the interrogatories as are not covered by the demurrer; but where no interrogatories have been served, he may file the partial demurrer without coupling any answer with it.⁵ It is not, however, necessary that the defendant should adopt the form of a partial demurrer, for the purpose of protecting himself from giving discovery to which the plaintiff is not entitled: for a defendant may decline answering any interrogatory, or part of one, from answering which he might have protected himself by demurrer, notwithstanding he answers other parts of such interrogatory or interrogatories from which he might have protected himself by demurrer, or other part of the bill as to which he was not interrogated.⁶ The effect of this rule will have to be considered again in the Chapter on Answers;⁷ and it may, therefore, be sufficient here to observe, that in cases in which it is still thought expedient to adopt the defence of a partial demurrer against discovery, this rule does not seem to affect the practice; but the rule which directs, that no demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant extends to some part of the same matter as is covered by such demurrer or plea,⁸ is important. And we have before seen, that now, no demurrer or plea will be held

⁹ *Bancroft v. Wardour*, 2 Bro. C. C. 66; 2 Dick. 672; 1 Hoff. Ch. Pr. 216, 217; *Moore v. Armstrong*, 9 Porter, 697. [A demurrer will lie where the title alleged in an amended bill is inconsistent with that presented by the original bill. *Winter v. Quarles*, 43 Ala. 692.]

¹⁰ *Bosanquet v. Marsham*, 4 Sim. 573; [*Horton v. Thompson*, 3 Tenn. Ch. 575. *Infra*, 601, n. 6.]

¹ *Robertson v. Lord Londonderry*, 5 Sim. 226.

² *Atkinson v. Hanway*, 1 Cox, 360; see *Ellice v. Goodson*, 3 M. & C. 653, 658; 2 Jur. 219; *Salkeld v. Phillips*, 2 Y. & C. Ex. 580; and see *ante*, p. 409.

³ *Cresy v. Bevan*, 13 Sim. 354; see also

Powell v. Cockerell, 4 Hare, 565, 569; *Wyllie v. Ellice*, 6 Hare, 505, 510; *Attorney-General v. Cooper*, 8 Hare, 166; *ante*, p. 409.

⁴ See *Emans v. Emans*, 1 McCarter (N. J.), 114.

⁵ *Burton v. Robertson*, 1 J. & H. 38; 6 Jur. N. S. 1014. The defendant must, however, wait till the expiration of the time for filing interrogatories. *Rowe v. Toukin*, L. R. 1 Eq. 9; 11 Jur. N. S. 849, M. R.

⁶ Ord. XV. 4.

⁷ *Post*, Chap. XVII. § 1.

⁸ Ord. XIV. 9; *Attorney-General v. Cooper*, *ubi sup.* This order has been adopted in the Equity Rules of the United States Courts, Rule 37.

bad, and overruled upon argument, only because such demurrer or plea does not cover so much of the bill as it might by law have extended to.⁹

A demurrer cannot be good in part and bad in part;¹⁰ so that, *if a demurrer is general to the whole bill, and there is any *584 part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled.¹

Instances are, certainly, mentioned by Lord Redesdale,² in which demurrers have been allowed in part; but whatever may have formerly been done, the practice appears to be now more strict: though sometimes the Court has, upon overruling a demurrer, given the defendant leave to put in a less extended demurrer, or to amend and narrow the demurrer already filed.³ In the latter case, however, the application to amend ought to be made before the judgment upon the demurrer, as it stands, has been pronounced: though, even where that has been omitted, the Court has, after the demurrer has been overruled, upon a proper case being shown, given the defendant leave, upon motion, to put in a less extended demurrer and answer.⁴

A defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes:⁵ for the same grounds of demurrer, frequently, will not apply to different parts of a bill, though the whole may be liable to demurrer; and in this

⁹ *Ante*, p. 546, n. 6, *post*, p. 617; Ord. XIV. 8.

¹⁰ In this respect, there is a difference between a plea and a demurrer. *Mayor, &c., of London v. Levy*, 8 Ves. 403; *Baker v. Mellish*, 11 Ves. 70.

¹ Per Lord Hardwicke in *Metcalfe v. Hervey*, 1 Ves. S. 248; *Earl of Suffolk v. Green*, 1 Atk. 450; *Todd v. Gee*, 17 Ves. 273, 277; *Attorney-General v. Brown*, 1 Swanst. 304. A demurrer bad in part is void *in toto*. *Verplanck v. Caines*, 1 John. Ch. 57; *Forbes v. Whitlock*, 3 Edw. Ch. 446; *Fay v. Jones*, 1 Head (Tenn.), 442; *Shed v. Gartfield*, 5 Vt. 39; *Castleman v. Weitch*, 3 Rand. 598; *Kimberley v. Sells*, 3 John. Ch. 467; *Graves v. Downey*, 3 Monroe, 356; *Chase's case*, 1 Bland, 217; *Blount v. Garen*, 3 Hayw. 88; *Treadwell v. Brown*, 44 N. H. 551; *Metler v. Metler*, 3 C. E. Green (N. J.), 273; *S. C. 4 C. E. Green (N. J.)*, 457; *Banta v. Moore*, 2 McCarter (N. J.), 97; *Mitchell v. Green*, 10 Met. 101; *ante*, 547, note; but see *Pope v. Stansbury*, 2 Bibb, 484, *contra*. It is a general rule that a demurrer cannot be good as to a part, which it covers, and bad as to the rest; and therefore it must stand or fall altogether. *Higginbotham v. Burnet*, 5 John. Ch. 184; *Burns v. Hobbs*, 29 Maine, 272, 277; *[Marye v. Dyche]*, 42 Miss. 347; *Reid v. Beall*, 42 Miss. 472.

But in Tennessee, which authorizes an appeal from the decree of the Chancellor on a demurrer, the Supreme Court has sometimes departed from this rule with a view to

narrow the subsequent litigation. *Fitzgerald v. Cummings*, 1 Lea, 232; *Riddle v. Mottley*, 1 Lea, 468.]

A demurrer to the whole of a bill, containing some matters relievable and others not, is bad, unless the bill is multifarious. *Dimmock v. Bixby*, 20 Pick. 368; *McLaren v. Steapp*, 1 Kelly, 376; *Beach v. Beach*, 11 Paige, 161; *Stuyvesant v. Mayor, &c., of New York*, 11 Paige, 414; *Robinson v. Guild*, 12 Met. 323. Where a demurrer to a bill is overruled, because it covers too much, the defendant may, on exception to his answer, raise the question of the materiality of the discovery. *Kuypers v. Ref. Dutch Church*, 6 Paige, 570. If the ground of demurrer assigned as to all of the plaintiffs be bad as to one, the demurrer must be overruled. *Gibson v. Jayne*, 37 Miss. 164. [If the demurrer be to the whole bill for want of proper parties, and there are sufficient parties to the proper part of the bill, which is independent of another part faulty for want of parties, the demurrer will be bad. *Laughton v. Harden*, 68 Me. 208.]

² *Ld. Red. 214*; *Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759, pl. 8; *Radelcliff v. Fursman*, 2 Bro. P. C. ed. Toml. 514.

³ *Baker v. Mellish*, 11 Ves. 68; *Glogg v. Legh*, 4 Mad. 193, 207; *Thorpe v. Macaulay*, 5 Mad. 218.

⁴ *Baker v. Mellish*, 11 Ves. 72, 76.

⁵ *North v. Earl of Strafford*, 3 P. Wms. 148; *Roberdeau v. Rous*, 1 Atk. 544.

case, one demurrer may be overruled upon argument and another allowed.⁶

Although a demurrer cannot be good in part and bad in part, it may be good as to one of the defendants demurring, and bad as to others.⁷

A demurrer must be entitled in the cause, and is headed "The demurrer of A. B. (or, of A. B. and C. D.), one, &c., of the above-named defendants, to the bill of complaint of the above-named plaintiff." If it be accompanied by a plea, or by an answer, it should be called in the title "the demurrer and plea," or "demurrer and answer." Where it is to an amended bill, it need not be expressed, in the title, to be a demurrer to the original and amended bill; but a demurrer to the amended bill will be sufficient.¹

As a demurrer confesses the matters of fact to be true, as stated by the opposite party, it is always preceded by a general protestation against the truth of the matters contained in the bill;² a practice borrowed from the Common Law, and probably intended to avoid conclusion in another suit,³ or in the suit in which the demurrer is put in, in case the demurrer should be overruled.

After the protestation, the demurrer, if it is a partial demurrer and not to the whole bill, must proceed distinctly to point out the parts of the bill to which it is intended to apply.⁴ The rule, as to this, is laid down by Lord Redesdale in *Devonsher v. Newenham*,⁵ "that where a defendant demurs to part, and answers to part of a bill, the Court is not to be put to the trouble of looking into the bill or answer, to see what is covered by the demurrer; but it ought to be expressed, in clear and precise terms, what it is the party refuses to answer;⁶ and I cannot agree that it is a proper way of demurring to say, that the defendant answers to such a particular fact, and demurs to all the rest of a bill: the defendant ought to demur to a particular part of the bill, specifying it precisely."⁷

⁶ *North v. Earl of Strafford*, *ubi sup.*; *Little v. Archer*, 1 Hogan, 55.

⁷ *Mayor, &c., of London v. Levy*, *ubi sup.*; *Barstow v. Smith*, Walk. Ch. 394; but not unless it is in form a "joint and several demurrer;" per Sir L. Shadwell V. C. in *Glascoth v. Copper Miners' Company*, 11 Sim. 305, 310; 5 Jur. 264. If too many persons are joined as defendants in a bill in Equity, there being no misjoinder of subjects, one, against whom a good cause of action is stated, cannot on this ground, demur. *N. Y. & N. H. R.R. Co. v. Schuyler*, 17 N. Y. 592.

¹ *Smith v. Bryon*, 3 Mad. 428; *Osborn v. Jullion*, 3 Drew 552; and see *Granville v. Betts*, 17 Sim. 58. For forms of demurrer, see 2 Van Hey. 74-92; and *post*, Vol. III.

² Story Eq. Pl. §§ 452, 457; 1 Smith Ch. Pr. (2d Am. ed.) 209. Protestations in demurrers are required, in New Hampshire, to be omitted by Rule 6 of the Rules of Chancery Practice, 38 N. H. 606.

³ *Ld. Red.* 212.

⁴ In New Hampshire, the form of a demurrer is required in substance to be,—“The defendant says the plaintiff is not entitled upon such bill to the relief [or discovery] prayed for, because,” &c. Rule 10 of the Rules for Chancery Practice, 38 N. H. 10.

⁵ 2 Sch. & Lef. 199, 205.

⁶ See *Atwill v. Ferrett*, 2 Blatch. C. C. 39.

⁷ *Chetwynd v. Lindon*, 2 Ves. S. 450; *Salkeld v. Science*, *ib.* 107; *Barnes v. Taylor*, 4 W. R. 577, V. C. K.; *Johnston v. John-*

Although a demurrer, in the form above stated, namely, "to all the rest of the bill which is not answered," would, for the reasons stated by Lord Redesdale, be a bad form of demurrer: a demurrer * to all the bill, except as to a particular specified part, would *586 not be open to the same objection; and where the exception applies to a very small part only of the bill, it has been held to be the proper way of demurring.¹ In framing such a demurrer, however, care must be taken that it should appear distinctly, by the demurrer itself, what part of the bill is to be included in the exception: otherwise, the demurrer will be bad.²

The above rule also applies to cases where there are two or more distinct demurrers to different portions of the bill: in such cases, the different portions of the bill to be covered by each demurrer must be distinctly pointed out. And where a demurrer is put in to such parts of an amended bill as have been introduced by the amendments, it will not be sufficient to say it is a demurrer to the amendments, but the parts must be specifically pointed out, and a demurrer to so much of the amended bill, as has not been answered by the answer to the original bill, will be bad.³

A demurrer will not be good if it merely says, generally, that the defendant demurs to the bill; ⁴ it must express some cause of demurrer, either general or specific.⁵ A defendant is said to demur generally, when he demurs to the jurisdiction, or to the substance of the bill: or specially, when he demurs on the ground of a defect in form. He may, however, in cases where he demurs either to the jurisdiction or to the substance, state specially the particular grounds upon which he founds his objection; and, indeed, some of the grounds of demurrer, which go to the substance of the bill, require rather a particular statement: thus, a demurrer for want of parties, must, as has been before stated, show who are the necessary parties, in such a manner as to point out to the plaintiff the objection to his bill, so as to enable him to amend by adding proper parties; ⁶ and in the case of a demurrer for multifariousness, a mere allegation, "that the bill is multifarious," will be informal; it should state, as the ground of demurrer, that the bill unites distinct matters upon one record, and show the inconvenience of so doing.⁷

Some objections, which appear to be merely upon matters of form,

ston, 2 Moll. 414; Story Eq. Pl. §§ 457, 458, and notes; Nash v. Smith, 6 Conn. 421; Clancy v. Craine, 2 Dev. Ch. 363.

¹ Hicks v. Raincock, 1 Cox, 40; Howe v. Duppa, 1 V. & B. 511.

² Robinson v. Thompson, 2 V. & B. 118; Weatherhead v. Blackburn, *ib.* 121; Burch v. Coney, 14 Jur. 1009, V. C. K. B.; Osborn v. Jullion, 3 Drew. 552; Barnes v. Taylor, 4 W. R. 577, V. C. K.; Story Eq. Pl. §§ 457, 458; and see Burton v. Robertson, 1 J. & H. 38; 6 Jur. N. S. 1014, for case where no answer had been required.

³ Mynd v. Francis, 1 Anst. 5.

⁴ Duffield v. Graves, Carey, 87; Offley v. Morgan, *ib.* 107; Peachie v. Twycrosse, *ib.* 113.

⁵ Nash v. Smith, 6 Conn. 422; see Johnston v. Johnston, 2 Moll. 414; Howland v. Kenosha County, 19 Wis. 247. A general demurrer, without any special cause assigned, has the effect only to turn the inquiry upon the equities of the bill. Wellborn v. Tiller, 10 Ala. 305.

⁶ *Ante*, p. 278.

⁷ Rayner v. Julian, 2 Dick. 677; 5 Mad. 144, n. (b); Barber v. Barber, 4 Drew. 666; 5 Jur. N. S. 1197.

may be taken advantage of under general demurrers, for *587 *want of equity;¹ thus, it has been before stated² that some bills may be demurred to on the ground that they are not accompanied by an affidavit; that objection, however, is in fact an objection to the equity, because the cases in which an affidavit is required are those in which the Court has no jurisdiction, unless upon the supposition that the fact stated in the affidavit is true; and the Court requires the annexation of the affidavit to the bill, for the purpose of verifying that fact. In these cases, the objection may be made either in the form of a special demurrer, or of general demurrer for want of equity: because the plaintiff, by his bill, does not bring his case within the description of cases over which the Court exercises jurisdiction. Upon the same principle, a defendant may take advantage by general demurrer, of the omission to offer to do equity, in cases where such an offer ought to be made.³ The objection for want of sufficient positiveness in the plaintiff's statement of facts within his own knowledge, may also be taken by general demurrer;⁴ but where a defendant to a bill praying relief, demurs to the discovery only, he cannot do so under a general demurrer for want of equity: he must make it the subject of special demurrer;⁵ and so, a general demurrer does not include a demurrer on the ground that the bill (being a bill of review) does not state on the face of it that it is by leave of the Court; but that ground may be taken *ore tenus*.⁶

Care must be taken, in framing a demurrer, that it is made to rely only upon the facts stated in the bill; otherwise it will be what is termed a speaking demurrer, and will be overruled.⁷ Thus, where a bill was filed to redeem a mortgage, alleging that the plaintiff's ancestor had died in 1770, and that, soon after, the defendant took possession, &c.; and the defendant demurred, and for cause of demurrer showed, that it appeared upon the face of the bill, that from the year 1770, which is upwards of twenty years before the filing of the bill, the defendant has been in possession, &c., Lord Rosslyn overruled the demurrer, because the language of the bill did not show that the defendant took possession in the year 1770, but, that he did so, could only be collected from the averment in the demurrer.⁸ But a demurrer,

¹ In *Marsh v. Marsh*, 1 C. E. Green (N. J.), 391, 397, it is said that, under a general demurrer for want of equity, no objection for want of form can properly be raised. [And this is repeated in *Miller v. Jamison*, 9 C. E. Green, 41. Such a demurrer is too general under the Ala. Rev. Code, § 3350. *Erwin v. Reese*, 54 Ala. 589.]

² *Ante*, p. 394. A demurrer for want of equity need not refer to the allegations of the bill. *Middlebrook v. Bromley*, 9 Jur. N. S. 614, 615; 11 W. R. 712, V. C. K.

³ *Ante*, p. 385; *Inman v. Wearing*, 3 De G. & S. 729.

⁴ *Ante*, pp. 360, 560.

⁵ *Whittingham v. Burgoyne*, 3 Anst. 990,

904; *Marsh v. Marsh*, 1 C. E. Green (N. J.), 391, 397. [And the demurrer may be to a particular interrogatory, as where, in a bill for divorce, the defendant is called upon to discover whether, since the marriage, she has committed adultery. *Black v. Black*, 11 C. E. Green, 431.]

⁶ *Henderson v. Cook*, 4 Drew. 306.

⁷ *Brownsword v. Edward*, 2 Ves. S. 245; *Henderson v. Cook*, 4 Drew. 306, 315.

⁸ *Edsell v. Buchanan*, 4 Bro. C. C. 254; 2 Ves. J. 83. It is said in *Brooks v. Gibbons*, 4 Paige, 375, that "the case of *Edsell v. Buchanan*, 2 Ves. J. 83, has been frequently misunderstood. The demurrer in that case was not overruled as a speaking demurrer,

for that it appeared * on the bill that the agreement, therein al- *588
leged to have been entered into, is not in writing signed by the
defendant, is not a speaking demurrer.¹ It is material to notice that,
in order to constitute a speaking demurrer, the fact or averment intro-
duced must be one which is necessary to support the demurrer, and is
not found in the bill:² the introduction of immaterial facts, or aver-
ments, or of arguments, is improper; but it is mere surplusage, and
will not vitiate the demurrer.³

A defendant is not limited to show one cause of demurrer only: he
may assign as many causes of demurrer as he pleases, either to the
whole bill, or to each part of the bill demurred to, but they must be
stated as distinct and separate causes of demurrer;⁴ and if any one of
the causes of demurrer assigned hold good, the demurrer will be al-
lowed.⁵ Where, however, two or more causes of demurrer are shown
to the whole bill, the Court will treat it as one demurrer; and if one of
the causes be considered sufficient, the order will be drawn up, as upon
a complete allowance of the demurrer.⁶ A defendant may also, at the
hearing of his demurrer, orally assign another cause of demurrer, differ-
ent or in addition to those assigned upon the record: which, if valid,
will support the demurrer, although the causes of demurrer stated in
the demurrer itself are held to be invalid. This oral statement of a
cause of demurrer, is called demurring "*ore tenus*."⁷ A defendant can-
not demur *ore tenus*, unless there is a demurrer on the record: and upon
this ground, where a defendant had pleaded, and, upon the plea being
overruled, offered to demur *ore tenus*, for want of parties, he was not
permitted to do so;⁸ neither can a defendant demur *ore tenus*
for the same cause that has been expressed in the * demurrer on *589

merely on account of a modest suggestion, that the time, stated by the complainant, 'about the year 1770,' was upwards of twenty years before the filing of the bill. But it was because that suggestion, from the manner in which it was introduced into the demurrer, was in the nature of an averment that the defendant had been in possession of the mortgaged premises for more than twenty years. And the fact of such possession was necessary to sustain the defence set up on the argument of the demurrer; which defence was, that the plaintiff's right to redeem was barred by the lapse of time. The precise time, at which the defendant's possession commenced, not appearing from the bill itself, the averment that the heir of the mortgagee had been in possession 'upwards of twenty years before the bill filed,' should have been brought forward by plea, or answer, and not by demurrer."

¹ Wood v. Midgley, 5 De G., M. & G. 41; see also Jones v. Charlemont, 12 Jur. 532; V. C. E.

² Brooks v. Gibbons, 4 Paige, 374; see Kuypers v. Ref. Dutch Church, 6 Paige, 570; M'Comb v. Armstrong, 2 Moll. 295; Story Eq. Pl. § 448; Pendlebury v. Walker, 4 Y. & C. 424; 1 Smith Ch. Pr. (2d Am. ed.) 206;

Tallmadge v. Lovett, 3 Edw. Ch. 554; Saxon v. Barksdale, 4 Desaus. 522.

³ Cawthorn v. Chalie, 2 S. & S. 127; Davies v. Williams, 1 Sim. 5, 8.

⁴ Barber v. Barber, 4 Drew. 666; 5 Jur. N. S. 1197.

⁵ Harrison v. Hogg, 2 Ves. J. 323; Jones v. Frost, 3 Mad. 1, 9; Jac. 466; Cooper v. Earl Powis, 3 De G. & S. 688.

⁶ Wellesley v. Wellesley, 4 M. & C. 554, 558; 4 Jur. 2; see also Watts v. Lord Eglington, 1 C. P. Coop. t. Cott. 25, 27.

⁷ Brinkerhoff v. Brown, 6 John. Ch. 149; Story Eq. Pl. § 464; Wright v. Dame, 1 Met. 237; M'Dermott v. Blois, R. M. Chanc. 281; Daly v. Kirwan, 1 Irish Eq. 157; see Garlick v. Strong, 3 Paige, 440; Chase v. Searle, 45 N. H. 512.

Under a general demurrer for want of equity, a demurrer for want of parties may be made *ore tenus*. Robinson v. Smith, 3 Paige, 231; Garlick v. Strong, 3 Paige, 452; Stillwell v. McNeely, 1 Green Ch. 305; see Pyle v. Price, 6 Sumner's Ves. 781; Mr. Hovenden's note (2); Ld. Red. 217.

⁸ Durdant v. Redman, 1 Vern. 78; Hook v. Dorman, 1 S. & S. 227, 231; Story Eq. Pl. § 464.

record, and overruled;¹ nor can he, after a demurrer to the whole bill, demur *ore tenus* as to part.² It seems, however, that after a demurrer to part of the bill has been overruled, the defendant may demur *ore tenus* to the same part.³

It is to be noticed that, although a defendant may, either upon the record, or *ore tenus*, assign as many causes of demurrer as he pleases, such causes of demurrer must be co-extensive with the demurrer upon the record; therefore, causes of demurrer, which apply to part of the bill only, cannot be joined with causes of demurrer which go to the whole bill:⁴ for, as we have seen before, a demurrer cannot be good in part and bad in part; which would be the case if a demurrer, professing to go to the whole bill, could be supported by the allegation of a ground of demurrer which applies to part only.

The consequence of demurring *ore tenus*, as regards costs, will be discussed in a future section.⁵

The demurrer, having assigned the cause or causes of demurrer, then proceeds to demand judgment of the Court, whether the defendant ought to be compelled to put in any further or other answer to the bill, or to such part thereof as is specified as being the subject of demurrer; and concludes with a prayer, that the defendant may be dismissed with his reasonable costs in that behalf sustained.⁶

If a demurrer is to part of the bill only, the answer (if any) to the remainder usually follows the statement of the causes of demurrer, and the submission to the judgment of the Court of the plaintiff's right to call upon the defendant to make further or other answer.⁷

It was formerly an invariable rule, that an answer to any part of a bill demurred to would overrule the demurrer,⁸ even though *590 * the part answered was immaterial.¹ And this rule was carried

¹ Bowman v. Lygon, 1 Anst. 1; but see Pratt v. Keith, 10 Jur. N. S. 305, V. C. K.; 12 W. R. 394, where a demurrer on the record, that there were not proper parties, having been overruled, a demurrer *ore tenus*, describing the necessary parties, was allowed.

² Shepherd v. Lloyd, 2 Y. & J. 490; Harr. Ch. 227; [Barrett v. Doughty, 10 C. E. Green, 380].

³ Crouch v. Hickin, 1 Keen, 385, 389; see *contra*, Shepherd v. Lloyd, *ubi sup*.

⁴ Pitts v. Short, 17 Ves. 213, 216; Metcalfe v. Brown, 5 Pri. 560; Rump v. Greenhill, 20 Beav. 512; 1 Jur. N. S. 123; Henderson v. Cook, 4 Drew. 306; Gilbert v. Lewis, 1 De G., J. & S. 38; Thompson v. University of London, 10 Jur. N. S. 669, 671; 33 L. J. Ch. 625, V. C. K.

⁵ See *post*, p. 549.

⁶ See form in Vol. III.

⁷ See *ante*, pp. 581, 584, 585.

⁸ Tidd v. Clare, 2 Dick. 712; Hester v. Weston, 1 Vern. 463; Roberts v. Clayton, 3 Anst. 715; see Varick v. Smith, 5 Paige, 137. A demurrer may be to the whole bill or to a part only of the bill; and the defendant may

therefore demur as to one part, plead as to another part, and answer to the rest of the bill. Story Eq. Pl. § 442; Newton v. Thayer, 17 Pick. 132, 133; Pierpont v. Fowle, 2 Wood. & M. 23. But a defendant cannot plead or answer, and demur both, to the whole bill or to the same part of a bill. Clark v. Phelps, 6 John. Ch. 214; Beauchamp v. Gibbs, 1 Bibb, 481; Robinson v. Bingley, 1 M'Cord Ch. 352. If the defendant demur to the whole bill, an answer to a part thereof is inconsistent; and the demurrer will be overruled. [Pieri v. Shieldsboro, 42 Miss. 493.] For the same reason, if there be a demurrer to a part of the bill, there cannot be a plea or answer to the same part, without overruling the demurrer. Clark v. Phelps, 6 John. Ch. 214; Souzer v. De Meyer, 2 Paige, 574; H. K. Chase's case, 1 Bland, 217; Leacraft v. Dempsey, 4 Paige, 124; Spofford v. Manning, 6 Paige, 383; Miller v. Fasse, 1 Bailey Eq. 187; Jarvis v. Palmer, 11 Paige, 650; Kuypers v. Reformed Dutch Church, 6 Paige, 570; Chase's case, 1 Bland,

¹ Ruspini v. Vickery, cited Ld. Red. 211; Savage v. Smalebroke, 1 Vern. 90.

so far, that where the demurrer did not in form extend to the part answered, yet, if the principle upon which the demurrer depended was such that it ought to have extended to the whole bill, then the answer to such part overruled the demurrer.² This is still the rule of the Court, but it has been modified to this extent: that the Court will not overrule a demurrer, merely on the ground that, by some slip or mistake, a small or immaterial part of the bill is covered by the answer or plea, as well as the demurrer.³

For information as to the nature of the answer (if any) to be put in to those parts of the bill to which the defendant does not demur, the reader is referred to the chapter on Answers.⁴ If the plaintiff conceives such answer to be insufficient, he may except to it, but he must not do so before the demurrer has been argued:⁵ otherwise, he will admit the demurrer to be good.⁶ It is said, however, that if the defendant demurs to the relief only, and answers the rest of the bill, the plaintiff may take exceptions to the answer before the demurrer is argued.⁷

A demurrer is prepared, and must be signed, by counsel;⁸ but it is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill;⁹ and it need not be signed by the defendant.

* A mere clerical error in a demurrer may be amended on an *ex parte* order, before the twelve days have expired,¹ or at the hearing.²

206; *Saxon v. Barksdale*, 4 Desaus. 522; *Bull v. Bell*, 4 Wis. 54; see *ante*, p. 547, n. 2.

In Massachusetts, "the defendant, instead of filing a formal plea or demurrer, may insist on any special matter in his answer, and have the same benefit therefrom as if he had pleaded the same or demurred to the bill." Rule 14 of the Rules of Practice in Chancery; see *Lovett v. Longmire*, 14 Ark. (1 Barb.) 339. The same rule exists in New Hampshire; Rule 10 of Chancery Practice. 38 N. H. 607.

By the rules in Chancery cases in Maine, defendants may severally demur and answer to the merits of the bill at the same time. Rule 6, 37 Maine, 582; *Hartshorn v. Eames*, 31 Maine, 97; *Smith v. Kelley*, 56 Maine, 64, 65. [So in Tennessee, Code, § 4319; *Harding v. Egin*, 2 Tenn. Ch. 39.]

² *Dawson v. Sadler*, 1 S. & S. 542; *Sherwood v. Clark*, 9 Pri. 259; *Hester v. Weston*, 1 Vern. 463.

³ Ord. XIV. 9; *ante*, p. 583; *Lowndes v. Garnett* and *Moseley Gold Mining Company*, 2 J. & H. 282; *Mansell v. Feeney*, *ib.* 313; *Gilbert v. Lewis*, 1 De G., J. & S. 38; 9 Jur. N. S. 187; see also *Jones v. Earl of Strafford*, 3 P. Wms. 81.

⁴ *Post*, Chap. XVII.

⁵ *London Assurance v. East India Company*, 3 P. Wms. 326.

⁶ *Ld. Red. 317*; *Boyd v. Mills*, 13 Ves. 85, 86. If necessary, the plaintiff may obtain

an extension of the time to file exceptions; see *post*, Chap. XVII. § 4.

⁷ *Ld. Red. 317*; 3 P. Wms. 327, n. (c).

⁸ Ord. VIII. 1; *Story Eq. Pl.* § 461. Where a solicitor has appeared in a cause, and a demurrer is filed, signed by solicitors who have not appeared, the demurrer may be treated as without signature, and as a nullity. *Graham v. Elmore*, *Harring. Ch.* 265. In *Ernest v. Partridge*, 11 W. R. 715, V. C. W., the costs of advising with counsel as to demurring were allowed, on a party and party taxation.

⁹ *Ld. Red. 208*. By the 31st Equity Rule of the United States Courts, no demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

In Massachusetts, "A demurrer shall be accompanied with a certificate that it is not intended for delay." *Genl. Sts. of Mass. c.* 113, § 5. But this provision does not apply to a statement in the nature of a demurrer for want of Equity, contained in an answer to a bill in Equity. *Mill River Loan Fund Ass. v. Claflin*, 9 Allen, 101. For forms of demurrer, see Vol. III.

¹ *Richardson v. Hastings*, 7 Beav. 58.

² *Osborn v. Jullion*, 3 Drew. 552, 553.

SECTION IV. — *Filing, Setting Down, and Hearing Demurrers.*

After the draft of the demurrer has been settled and signed, it is copied on paper of the same description and size as that on which bills are printed,³ and counsel's signature is copied at the foot; the demurrer is then filed at the Record and Writ Clerks' Office.⁴ The name and place of business of the plaintiff's solicitor, and of his agent, if any, or the name and place of residence of the plaintiff, where he acts in person, and, in either case, the address for service, if any, must be indorsed, as upon other pleadings.⁵

A separate demurrer, by a married woman, must have an order to warrant it; such a demurrer ought not, therefore, to be filed till an order to that effect has been procured.⁶ A demurrer cannot be filed on behalf of an infant, or a person of unsound mind not so found by inquiry, until a guardian *ad litem* has been appointed; and it is the same in the case of a lunatic, when his committee has an adverse interest. The order appointing the guardian must be produced when the demurrer is presented for filing.⁷

A defendant, demurring alone to any bill,⁸ may do so within twelve days after his appearance, but not afterwards;⁹ the day of his appearance does not count.¹⁰ When he does not demur alone, he has the same time as he has for answering.¹¹ Time for demurring runs in vacation.¹²

Where, after appearance to the original bill, a defendant is *592 * served with, but is not required to answer, an amended bill, a further appearance by him is unnecessary; and no time is fixed for his demurring alone by the General Orders; but it is customary, in such case, to file the demurrer within twelve days from the service of the copy of the amended bill.¹ It would seem, however, that he is entitled to demur within twelve days after the expiration of the time within

³ Ord. 6 March, 1860, r. 16; and Ord. IX. 3, *ante*, p. 361. A joint demurrer and answer must be printed in the same manner as an answer, see *post*, Chap. XVII. § 3, *Printing Answers*.

⁴ Ord. I. 35. No fee is payable on filing.

⁵ Ord. III. 2, 5; *ante*, pp. 453, 454.

⁶ *Barron v. Grillard*, 3 V. & B. 165; *Braithwaite's Pr.* 58; except, it is presumed, in those cases where a married woman is entitled to defend as a *feme sole*; see *ante*, pp. 178, 179.

⁷ *Braithwaite's Pr.* 58.

⁸ Whether original, amended, or supplemental. *Braithwaite's Manual*, 175.

⁹ Ord. XXXVII. 3; 15 & 16 Vic. c. 86, § 13. In the case of a defendant served abroad, this rule so far overrules Ord. X. 7 (2), as to limit its provisions to pleading, answering, or demurring, not demurring

alone. *Grüning v. Prioleau*, 10 Jur. N. S. 60; 12 W. R. 141, M. R.; 33 Beav. 221. Demurring to part of the bill, without answering or pleading to the rest, cannot be filed before expiration of the time for filing interrogatories. *Rowe v. Tonkin*, L. R. 1 Eq. 9; 11 Jur. N. S. 849, M. R.

¹⁰ Ord. XXXVII. 9.

¹¹ *Post*, Chap. XVII. § 3; Ord. XXXVII. 4, 5. As the time for demurring alone runs from appearance, and that for answering, pleading, or demurring, not demurring alone, from the service of the interrogatories, it seems that, by delaying appearance, the defendant may obtain a longer time for demurring alone than for answering, pleading or demurring, not demurring alone. See *Grüning v. Prioleau*, *ubi sup.*

¹² Ord. XXXVII. 13.

¹ *Braithwaite's Manual*, 175.

which he might have appeared, if required to do so: that is, within twenty days from the service of the amended bill.²

The Court, under the former practice, would, on a special case being made, have allowed a defendant to put in a demurrer to the whole bill, after the time for demurring alone had expired;³ and it is presumed that this would be allowed under the present practice,⁴ upon the delay being satisfactorily accounted for, and upon a special application being made.⁵

A demurrer will not be received at the Record and Writ Clerks' Office, after twelve days from the entry of the appearance,⁶ without a special order enlarging the time, or giving leave to file it; and if, by inadvertence, it should be received, it will, on the application of the plaintiff, be taken off the file.⁷

A demurrer, to which is annexed an answer to any material part of the bill, is considered an answer and demurrer, and may be filed within the time limited for pleading, answering, or demurring, not demurring alone.⁸

If an attachment for want of an answer has been issued against a defendant, a demurrer, even though coupled with an answer, will be irregular; and in such case, the proper course is to move that the demurrer and answer be taken off the file, and not that the demurrer be overruled; and taking an office copy does not waive the right.⁹ And so, where a traversing note has been filed and served, a defendant cannot demur without special leave.¹⁰

It is right here to advert to the distinction in practice between taking a demurrer and answer off the file, and simply overruling * the demurrer, thereby leaving the answer on the file. The *593 former course appears to be the one adopted, in all cases where there has been an irregularity in the formal parts or the filing of the demurrer, whether it be accompanied by an answer or not.¹ The latter course is adopted, wherever the demurrer has been properly filed, but

² *Cheesborough v. Wright*, 28 Beav. 173; *Braithwaite's Manual*, 175.

³ *Bruce v. Allen*, 1 Mad. 556; see also *Taylor v. Milner*, 10 Ves. 444; *Dolder v. Lord Huntingfield*, 11 Ves. 283, 293; see *Davenport v. Sniffen*, 1 Barb. Ch. 223; *Lakens v. Fielden*, 11 Paige, 644; *Bedell v. Bedell*, 2 Barb. Ch. 99; 1 Smith Ch. Pr. (2d Am. ed.) 207, 208; *Burrall v. Raineteaux*, 2 Paige, 331; 2 Madd. Ch. Pr. (4th Am. ed.) 264, 265; *Kenrick v. Clayton*, 2 Bro. C. C. (Perkins's ed.) 214, note (1), and cases cited.

⁴ Ord. XXXVII. 17; see, however, Ord. XXXVII. 3.

⁵ For forms of summons in such case, see Vol. III.

⁶ *Braithwaite's Pr.* 59.

⁷ *Dyson v. Benson*, G. Coop. 110; *Cust v. Boode*, 1 S. & S. 21; *Burrall v. Raineteaux*, 2 Paige, 331.

⁸ *Osborn v. Jullion*, 3 Drew. 552; see also *Ld. Red.* 208, 210; *Stephenton v. Gardiner*,

2 P. Wms. 286; *Tonkin v. Lethbridge*, 9 Ves. 178; *Taylor v. Milner*, 10 Ves. 444, 446; *Baker v. Mellish*, 11 Ves. 73; *White v. Howard*, 2 De G. & S. 223; *Read v. Barton*, 3 K. & J. 166.

⁹ *Mellor v. Hall*, 2 S. & S. 321; *Curzon v. Lord De La Zouch*, 1 Swanst. 185, 193; *Attorney-General v. Shield*, 11 Beav. 441; *Vigers v. Lord Audley*, 2 M. & C. 49, 52; *Braithwaite's Pr.* 59.

¹⁰ Ord. XIII. 7; see *ante*, p. 516.

¹ Leave to amend the title of a joint demurrer and answer has been given, on the hearing of a motion to take it off the file for irregularity. *Osborn v. Jullion*, 3 Drew. 552, 554.

[An objection to the time of filing a pleading must be taken by motion to strike from the files, and if not taken in that mode must be deemed waived. *Holley v. Young*, 27 Ala. 203; *Shaw v. Lindsey* (Sup. Ct. Ala.), 6 Rep. 327.]

the Court is of opinion that it is insufficient, or that it has been overruled by the answer.

Where a demurrer has been taken off the file for irregularity, it ceases to be a record of the Court, and the defendant may, therefore, put in a plea, or another demurrer (if his time for demurring has not expired), as if no demurrer had been filed; but the demurrer is not taken off the file by the mere pronouncing of the order: it must actually be withdrawn from the file.² To effect this, the order, when drawn up, should be carried to the Record and Writ Clerk: who will withdraw the demurrer, annexing the order to it.³

Notice of filing the demurrer must be served on the plaintiff, or his solicitor, on the day on which it is filed, before seven o'clock in the evening, or, if on a Saturday, before two o'clock in the afternoon.⁴ Neglect to do so will not, however, render the demurrer inoperative; but the time allowed to the opposite party for taking the next step in the cause will be extended, so as to give him the benefit of the time he would otherwise lose by the delay in the service.⁵

Upon the demurrer being filed, the plaintiff should take an office copy;⁶ and if he apprehends that the demurrer will hold good, he should either obtain an order to dismiss his bill with costs,⁷ or, if he thinks the defect can be remedied by amendment, he may obtain an order of course, on motion or petition, to amend his bill, in the usual way, upon payment of 20s. costs.⁸ This, however, can only be done before the demurrer has been set down: afterwards, the plaintiff must pay the defendant's taxed costs of amending, and of the demurrer;⁹ and must make a special application, by summons, for leave to *594 amend.¹⁰ The 20s. cover *all the costs of the demurrer; but when the demurrer has been prepared, though not actually on the file, before the amendment, the costs will be costs in the cause.¹

It was formerly necessary, after filing a demurrer, to enter it with the Registrar. This need not now be done; but upon the filing thereof by the defendant, either party may set the demurrer down for argument immediately.²

Where a demurrer to the whole bill is not set down for argument within twelve days after the filing thereof, and where a demurrer to part of a bill is not set down within three weeks after the filing thereof, and the plaintiff does not within such twelve days or three weeks, as the

² *Cust v. Boode*, 1 S. & S. 21.

³ *Ibid.*

⁴ Ord. III. 9; Ord. XXXVII. 2; *ante*, pp. 454, 455. For form of notice, see Vol. III.

⁵ *Wright v. Angle*, 6 Hare, 107; *Lowe v. Williams*, 12 Beav. 482; *Jones v. Jones*, 1 Jur. N. S. 863, V. C. S.; *Lloyd v. Solicitors and General Life Assurance Company*, 3 W. R. 640; 24 L. J. Ch. 704, V. C. W.; see however, *Matthews v. Chichester*, 5 Hare, 207, overruled on appeal, *ib.* 210.

⁶ *Braithwaite's Pr.* 491.

⁷ See *post*, Chap. XIX. § 1.

⁸ See *ante*, p. 411. For forms of motion paper and petition, see Vol. III.

⁹ *Warburton v. London and Blackwall Railway Company*, 2 Beav. 253; *Hearn v. Way*, 6 Beav. 368; *Hoffick v. Reynolds*, 9 W. R. 398, V. C. K. If he neglects to amend within the proper time, the bill is gone. *ib.* 431.

¹⁰ *Hoffick v. Reynolds*, *ubi sup.* For form of summons, see Vol. III.

¹ *Bainbridge v. Moss*, 3 K. & J. 62; 3 Jur. N. S. 107.

² Ord. XIV. 11.

case may be, serve an order for leave to amend the bill, the demurrer will be held sufficient to the same extent, and for the same purposes, and the plaintiff is to pay to the demurring party the same costs, as in the case of a demurrer to the whole, or part of a bill, as the case may be, allowed upon argument.³

In order to entitle a plaintiff to be relieved against the consequences of not setting down the demurrer, or obtaining an order to amend, within the periods fixed by the General Orders, he must make out a clear case of accident, mistake, or surprise.⁴

The order for payment of the costs of a demurrer, neglected to be set down, is an order of course, and may be obtained on petition at the Rolls, or on motion.⁵

The times of vacation are not reckoned in the computation of time for setting down demurrers.⁶

As, in the event of a demurrer not being set down for argument within the limited period, the defendant derives the same benefit as by its allowance, the duty is cast upon the plaintiff, if he is desirous that it should be submitted to the judgment of the Court, of having it set down.⁷

The party wishing to set down a demurrer for argument must obtain an order for that purpose. Unless specially directed by an order of the Lord Chancellor or Lords Justices, the demurrer must be set down to be heard before the Judge to whose Court the cause * is *595 attached.¹ If the cause is attached to the Court of one of the Vice-Chancellors, this order is obtained on a petition of course, to the Lord Chancellor, being left at the order of course seat in the Registrars' Office, and is dated the day the petition is left; and the demurrer is set down by the order of course Clerk the same day. If the cause is attached to the Rolls Court, the order is obtained on a petition of course to the Master of the Rolls being left with his under-secretary; the order is then taken by the solicitor to the order of course seat in the Registrars' Office, and the demurrer will be set down by the order of course Clerk on the day the order is left.²

The petition must state to what Court the cause is attached,³ the day

³ Ord. XIV. 14, 15; *Matthews v. Chichester*, 5 Hare, 207; on appeal, *ib.* 210; 11 Jur. 48; Reg. Regul. 15 March, 1860, r. 4.

⁴ *Knight v. Marjoribanks*, 14 Sim. 198; decided, however, on the 34th Ord. of Aug., 1841; Sand. Ord. 884; 3 Beav. xxii.; *Matthews v. Chichester*, 11 Jur. 49, L. C.; decided on the 46th Ord. of May, 1845; Sand. Ord. 1000; 7 Beav. xli.; 1 Phil. lxxxvi., which was similar; overruling S. C. 5 Hare, 207.

⁵ *Jacobs v. Hooper*, 1 W. R. 6. For form of order, see Seton, 1257, No. 11; and for forms of petition and motion paper, see Vol. III.

⁶ Ord. XXXVII. 13 (3).

⁷ By the 33d Equity Rule of the United States Courts, the plaintiff may set down the

demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in Law and Equity they ought to avail him. [Where a demurrer is filed, and the record does not disclose what disposition was made of it, and an answer is subsequently filed, upon which the parties proceed to a hearing, it will be presumed on appeal that the demurrer was abandoned. *Basey v. Gallagher*, 2 Wall, 670.]

¹ Ord. VI. 4.

² Ord. XXI. 9; Reg. Regul. 15 March, 1860, rr. 1, 2, 3. For form of order, see Seton, 1257, No. 10; and for forms of petition, see Vol. III.

³ Ord. XIV. 10.

when the demurrer was filed, and whether it be to the whole, or part of the bill; and be subscribed by the solicitor; and, if presented to the Lord Chancellor, it does not require any fiat or stamp.⁴

If by inadvertence the demurrer is not actually set down on the day the petition or order is left at the Registrars' Office, it will nevertheless be considered to have been set down on that day.⁵

The order directs the demurrer to be set down next after the pleas, demurrers, and exceptions to answers already appointed for hearing; and it must be served upon the solicitor for the opposite party, at least two clear days before the day appointed for hearing.

If the defendant is desirous of withdrawing his demurrer, he may do so, even after it has been set down, on payment of costs.⁶

A demurrer is not usually put in the paper for hearing, in Vice-Chancellors' causes, until six clear days, and in Rolls' causes, until two clear days have elapsed since it was set down.

Before the demurrer is heard, two printed copies of the bill, and a copy of the demurrer must be left with the train-bearer of the Vice-Chancellor, or, in a Rolls' cause, with either the under-secretary or train-bearer, for the use of the Court.⁷

In general, the Court will not advance a demurrer;⁸ in cases, however, of bills for injunction, as an injunction will not usually be granted pending a demurrer, the Court will, upon application,

*596 * where the matter is pressing, order the demurrer to be argued immediately.¹

When a demurrer is called on for hearing, and the defendant omits to appear, the demurrer will be struck out of the paper, unless the plaintiff, if he has set down the demurrer, can produce an affidavit of service upon the defendant or his solicitor of the order to set it down; or, if the defendant set down the demurrer, unless the plaintiff can produce an affidavit of service upon himself of the order for setting down the demurrer.² If the plaintiff can produce such an affidavit, it is conceived that the demurrer would be overruled, as in the case of a plea.³ It has been held, however, that in such a case the demurrer is not necessarily overruled, but the plaintiff must be heard in support of the bill.⁴ When the defendant appears and the plaintiff does not, the

⁴ Reg. Regul. 15 March, 1860, r. 3.

⁵ Egremont v. Cowell, 5 Beav. 617; 7 Jur. 52.

⁶ Downes v. East India Company, 6 Ves. 586. In Rolls' causes, the order may, by consent, be obtained on petition of course; for form of petition, see Vol. III. For order, by consent, directing demurrer to be withdrawn, and extending time to answer, see Seton, 1259, No. 15.

⁷ If this is neglected, the solicitor may be ordered to pay cost. Ord. XXI. 12. Counsel's brief consists of copies of the bill and demurrer. In Ernest v. Partridge, 11 W. R. 715, V. C. W., the charge for observations was disallowed, on a party and party taxation; see Morgan & Davey, 354.

⁸ Anon., 1. Mad. 557.

¹ Cousins v. Smith, 13 Ves. 164, 167; Jones v. Taylor, 2 Mad. 181; Const v. Harris, T. & R. 510, n.; London, Chatham, and Dover Railway Co. v. Imperial Mercantile Credit Association, L. R. 3 Ch. Ap. 231; and see post, Chap. XXXVI. § 2, *Injunctions*. Where justice requires it, an injunction will be granted pending a demurrer. Wardle v. Claxton, 9 Sim. 412.

² For form of affidavit of service, see Vol. III.

³ Mazarredo v. Maitland, 2 Mad. 38. For form of order overruling demurrer on non-appearance of defendant, see Seton, 1258, No. 13.

⁴ Penfold v. Ramsbottom, 1 Swanst. 552.

demurrer will also be struck out of the paper, unless the defendant can produce an affidavit of service upon himself of the order for setting down the demurrer; or unless in the event of the defendant having himself set down the demurrer, he can produce an affidavit of service by him upon the plaintiff or his solicitor.⁶ On the production of such an affidavit, in either case, the defendant may have the demurrer allowed with costs.⁶

Where a demurrer has been struck out of the paper, a fresh order must be obtained for setting it down, which may be had upon petition of course as before explained, provided the application is made within the time allowed to set down the demurrer.⁷ If otherwise, a special application for leave to set it down must be made.

The usual course of proceeding, when the demurrer comes on for hearing, and all parties appear, is for the counsel in support of the demurrer to be first heard, next the plaintiff's counsel and then the leading counsel for the demurring party replies. In hearing a demurrer, the argument is strictly confined to the case appearing upon the record; and for the purposes of the argument the matters of fact stated in the bill are admitted to be true.⁸

Where it has appeared, upon the hearing of a demurrer to the *whole bill, that the defendant is entitled to demur to some *597 part only, the Court has permitted the demurrer to be amended, so as to confine it to the parts to which the defendant has a right to demur:¹ in such cases, however, the most usual course is to overrule the demurrer, and to give the defendant leave to put in a new demurrer to such part of the bill as he may be advised.²

Where a demurrer is ordered to stand over, it must be for a definite period.³

SECTION V. — *The Effect of allowing Demurrers.*

Strictly speaking, upon a demurrer to the whole bill being allowed, the bill is out of Court, and no subsequent proceeding can be taken in the cause.⁴ The Court often, however, on hearing the demurrer, gives leave to amend, and there are cases in which it has afterwards permitted an amendment to be made;⁵ and it seems that, even after a bill has

⁶ On an appeal from an order allowing a demurrer to the whole bill, the plaintiff is entitled to begin. *Attorney-General v. Aspinall*, 2 M. & C. 613.

⁶ *Jennings v. Pearce*, 1 Ves. J. 447.

⁷ *Ante*, p. 594; Ord. XIV. 14, 15.

⁸ *Ante*, p. 543. For form of order on the hearing of a demurrer, see Seton, 1258, No. 12.

¹ *Glegg v. Legh*, 4 Mad. 193, 207.

² *Thorpe v. Macauley*, 5 Mad. 218, 231. In *Marsh v. Marsh*, 1 C. E. Green (N. J.), 391, 398, the demurrer was overruled, with leave to amend by stating the grounds of demurrer.

³ Ord. XXI. 13.

⁴ *Smith v. Barnes*, 1 Dick. 67; *Watkins v. Bush*, 2 Dick. 701; see *Chuvete v. Mason*, 4 Green (Iowa), 231.

[An interlocutory injunction is, *ipso facto*, dissolved by the sustaining of a demurrer, although leave to amend the bill may have been given. *Schneider v. Lizardi*, 9 Beav. 468. So is a special injunction by amending the bill by making a new co-plaintiff. *Attorney-General v. Marsh*, 16 Sim. 572.]

⁵ *Lord Coningsby v. Sir J. Leke*, 2 P. Wms. 300; *Lloyd v. Loaring*, 6 Ves. 773, 779. It is not necessary in Massachusetts, even where a demurrer goes to the equity of

been dismissed by order, it has been considered in the discretion of the Court to set the cause on foot again.⁶

Where the plaintiff, after a demurrer had been allowed, improperly obtained an order to amend his bill, and the defendant demurred, it was held, that by demurring the defendant had waived the irregularity, and that the course he ought to have taken was, to apply to discharge the order to amend for irregularity.⁷

Although the effect of allowing a demurrer to the whole bill is to put the cause out of Court, the allowance of a partial demurrer *598 *is not attended with such a consequence. The bill, or that part of it which was not covered by the demurrer, still remains in Court, and the plaintiff may obtain an order to amend, or adopt any other proceedings in the cause, in the same manner that he might have done had there been no demurrer.¹

On hearing the demurrer, the Court will, where it sees that the defect pointed out by the demurrer can be remedied by amendment, and substantial justice requires it, make a special order at the hearing of the demurrer, adapted to the circumstances of the case;² and where an order was made allowing the demurrer, and giving leave to amend, and no amendment was made within the proper time, it was held that the bill was not out of Court.³

When the demurrer is allowed, and leave is given to amend, there is no rule that the defendant is to have his costs; but they are in the discretion of the Court.⁴

the whole bill, that the plaintiff should make a motion to amend, in anticipation of an adverse decision. According to the practice in this State, after a demurrer is sustained, the case is not regarded as out of Court so that it cannot be reinstated by amendment in matters of substance, because application therefor was not made before the decision on the demurrer was pronounced. The usual mode is to allow the plaintiff a reasonable time after a demurrer has been sustained, either on the ground of a defect in form or for want of equity, to move for leave to amend his bill for the purpose of supplying the defect, or alleging new or additional grounds for the equitable relief which he seeks. And such amendments are always allowed, unless sufficient cause is shown to the contrary. In this respect the practice of the Court is very liberal. But a motion to amend is not allowed as a matter of right. *Merchants' Bank of Newburyport v. Stevenson*, 7 Allen, 489, 491. By the 35th Rule of the United States Courts, if a demurrer shall be allowed upon the hearing, the Court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable. See *Alexander v. Moye*, 38 Miss. 640.

⁶ Per Lord Eldon in *Baker v. Mellish*, 11 Ves. 68, 72. It is conceived that this *dictum* would not be followed, unless in a very special case.

⁷ *Watkins v. Bush*, 2 Dick. 701; but see *ib.* 702, n.

¹ *Emans v. Emans*, 1 McCarter (N. J.), 114, 120. [The allowance of a demurrer for want of parties will not necessarily prevent the plaintiff from applying to the Court for an injunction or receiver; as where the granting of the injunction and receiver would be for the benefit of the absent parties. *Const v. Harris*, 1 T. & R. 514; or where the grant would not affect the absent parties. *Hamp v. Robinson*, 3 De G., J. & S. 97, 109.]

² *Wellesley v. Wellesley*, 4 M. & C. 554, 558; 4 Jur. 2; *Schneider v. Lizardi*, 9 Beav. 461, 468; *Rawlings v. Lambert*, 1 J. & H. 458; leave to amend is not given as a matter of course. *Osborn v. Jullion*, 3 Drew. 596; and see *Watts v. Lord Eglington*, 1 C. P. Coop. t. Cott. 29, and the cases there collected; and as to leave to amend given after demurrer for want of parties, see *Tyler v. Bell*, 2 M. & C. 89, 104, 110, and the cases there cited.

³ *Deeks v. Stanhope*, 1 Jur. N. S. 413, V. C. K.; see, however, *Hoflick v. Reynolds*, 9 W. R. 431, V. C. K.; and *Armistead v. Durham*, 11 Beav. 428.

⁴ *Schneider v. Lizardi*, *ubi sup.*; *Bothomley v. Squires*, 1 Jur. N. S. 694; and see *Harding v. Tingey*, 12 W. R. 703. In New Jersey, the Court has no discretionary power in such a case. The costs are fixed by the Chancery Act. *Hicks v. Campbell*, 4 C. E. Green, 183, 187.

Where, upon allowing the demurrer, leave is given to the plaintiff to amend his bill, he is not thereby prevented from appealing against the order;⁵ but if the defendant is desirous of appealing from such order, he ought to apply to stay the amendment, until the appeal has been disposed of;⁶ or, at any rate, he ought not to act upon the order giving the plaintiff leave to amend: as, for instance, by demurring to the amended bill.

It may be observed, that the amendment of a bill, in pursuance of an order made upon the hearing of a demurrer, if made before the defendant answers, will not preclude a plaintiff from making one amendment after answer, upon motion of course.⁷

A demurrer, being frequently on matter of form, is not, in general, a bar to a new bill; but if the Court, on demurrer, has clearly decided upon the merits of the question between the parties, the decision may be pleaded in another suit.⁸

Where a demurrer to the whole or part of a bill is allowed upon * argument, the plaintiff, unless the Court otherwise directs, is to *599 pay to the demurring party the costs of the demurrer; and if the demurrer be to the whole bill, the costs of the suit also,¹ including the costs of a motion for an injunction, or other motion pending in the suit.²

Where any grounds of demurrer are urged, on arguing a demurrer, beyond the grounds therein expressed, and those grounds which are so expressed are disallowed, the defendant will have to pay the same costs as if the demurrer were overruled,³ although the grounds of demurrer so newly urged may be allowed.⁴

In general, however, where the demurrer, *ore tenus*, has been allowed, and the Court has given the plaintiff leave to amend his bill, the course of the Court appears to be to make him liable to the costs of the demurrer.⁵ The rule, however, with respect to costs upon such occasions, is not imperative, and the Court has a discretionary power;⁶ and therefore, where Sir Lancelot Shadwell V. C. upon allowing a demurrer *ore tenus*, for want of parties, ordered the defendant to pay the costs of the

⁵ *Lidbetter v. Long*, 4 M. & C. 286; *Davis v. Chanter*, 2 Phil. 545, 547.

⁶ *Wellesley v. Wellesley*, 4 M. & C. 554, 556; 4 Jur. 2.

⁷ *Pesheller v. Hammett*, 3 Sim. 389; *Bainbrigg v. Baddeley*, 12 Beav. 152; 13 Jur. 997; and see Ord. IX. 13.

⁸ *Londonderry (Lady) v. Baker*, 3 Giff. 128; affirmed, 7 Jur. N. S. 811, L. J.J.; *Oriental Steam Company v. Briggs*, 8 Jur. N. S. 201, 204; 10 W. R. 125, L. C.

¹ Ord. XIV. 13; see Rule 35 of the United States Courts. For cases where the Court directed otherwise, see *Schneider v. Lizardi*, 9 Beav. 461, 468; *Bothomley v. Squires*, 1 Jur. N. S. 694, V. C. K.; *Morgan & Davey*, 21. For precedent of a bill of costs for preparing and setting down a demurrer, see *ib.* 463.

² *Gladstone v. Ottoman Bank*, 1 H. & M. 505; 9 Jur. N. S. 246; *Morgan & Davey*, 22.

³ That is to say, the costs occasioned by the demurrer, unless the Court otherwise directs; see Ord. XIV. 12.

⁴ Ord. XIV. 1; *Tourtoun v. Flower*, 3 P. Wms. 371; *Wood v. Thompson*, 2 Dick. 510; *Attorney-General v. Brown*, 1 Swanst. 265, 288; *Mortimer v. Fraser*, 2 M. & C. 173, 174; *M'Intyre v. Connell*, 1 Sim. N. S. 257, 258; see also *Lund v. Blanchard*, 4 Hare. 23; *Brown v. Douglas*, 11 Sim. 283; *Thompson v. University of London*, 10 Jur. N. S. 669, 671; 33 L. J. Ch. 625, 639, V. C. K.

⁵ *Newton v. Lord Egmont*, 4 Sim. 574, 585.

⁶ Ord. XIV. 1, 12.

demurrer on the record, although he had given the plaintiff leave to amend his bill generally, Lord Cottenham refused to interfere.⁷

Where a demurrer is put in on two grounds as to one of which it succeeds, but fails as to the other, no costs will in general be given.⁸

Where a demurrer to a bill is allowed, and afterwards the order allowing it is, upon re-argument, reversed, the defendant, if he has received the costs from the plaintiff, will be ordered to refund them, upon application by the plaintiff;⁹ and so, if a demurrer has been overruled, and the order is reversed upon re-hearing, the plaintiff, if he has received costs from the defendant, must refund them.

One of several defendants who has demurred successfully, is entitled, as of right, to have his name struck out of the record; and may apply to the Court by motion for this purpose.¹⁰

*600 * SECTION VI. — *The Effect of overruling Demurrers.*

A demurrer, being a mute thing, cannot be ordered to stand for an answer.¹

After a demurrer to the whole bill has been overruled, a second demurrer to the same extent cannot be allowed, for it would be in effect to re-hear the case on the first demurrer: as, on argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer.² A demurrer, however, of a less extensive nature, may, in some cases, be put in; and where the substance of a demurrer was good, but informally pleaded, liberty was given to take it off the file, and to demur again, on payment of costs;³ and a defendant has been allowed to amend his demurrer, so as to make it less extensive.⁴

A second demurrer, however, though less extended than the first, cannot, after the first demurrer has been overruled, be put in without leave of the Court; but the case is different where the first has been taken off the file for irregularity. This leave is generally granted, upon hearing the first demurrer; but it has been permitted upon a subsequent application by motion.

Although a defendant cannot, after the Court has overruled his demurrer to the whole bill, again avail himself of the same method of defence, yet, as it sometimes happens that a bill which, if all the parts

⁷ *Mortimer v. Fraser*, 2 M. & C. 173.

⁸ *Benson v. Hadfield*, 5 Beav. 546, 554; and see *Allan v. Houlden*, 6 Beav. 148, 150; *Morgan & Davey*, 18.

⁹ *Oats v. Chapman*, 1 Ves. S. 542; S. C. 2 Ves. S. 100; 1 Dick. 148.

¹⁰ *Barry v. Croskey*, 2 J. & H. 136; 8 Jur. N. S. 10; *Seton*, 1258. For form of notice of motion, see Vol. III.

¹ *Anon.*, 3 Atk. 530.

² *Ld. Red.* 217.

³ *Devonsher v. Newenham*, 2 Sch. & Lef. 199.

⁴ *Glegg v. Legh*, 4 Mad. 193, 207; *Thorpe v. Macauley*, 5 Mad. 218, 231. A clerical error may be amended, on an *ex parte* order, before the twelve days have expired. *Richardson v. Hastings*, 7 Beav. 58.

of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid showing upon the face of it any ground for demurring, the defendant may, in such case, make the same defence by plea: stating the facts which are necessary to bring the case truly before Court.⁵ As it is, however, the rule of the Court not to allow two dilatories without leave, or, in other words, as the defendant is only permitted once to delay his answer by plea or demurrer, without leave of the Court, he must, previously to filing his plea, obtain the leave of the Court to do so: otherwise, his plea may be taken off the file.⁶

From what has been said it results that, after a demurrer to the whole bill has been overruled, the defendant, unless he obtains leave to put in a demurrer of a less extended nature, or a plea either to the whole bill or to some part of it, must, if required, put in a full answer; and the Court, on overruling the demurrer, * will, on *601 the application of the defendant, fix a time for his so doing; if no time is fixed, the defendant must put in his answer within the usual time (if it has not expired), or make a special application, by summons, for further time.¹

Where the demurrer is not to the whole bill, and is accompanied by an answer, the plaintiff, after the demurrer is overruled, if he wishes for a further answer, must except to the answer for insufficiency; and, therefore, the defendant need not put in any further answer until after the plaintiff has taken exceptions to the answer already put in, and such exceptions have been either allowed or submitted to.² Generally, the plaintiff should not except to the answer until the demurrer has been decided upon: otherwise he admits the demurrer to be good.³ Where, however, the defendant demurs to the relief only, and answers as to the discovery, the plaintiff may, it seems, except to the answer before the demurrer is heard.⁴

Although, generally, where the plaintiff amends otherwise than by adding parties, he loses his right to except to the answer for insufficiency, yet, where a demurrer has been overruled, he is not, by amend-

⁵ *Ld. Red.* 216.

⁶ *Rowley v. Eccles*, 1 S. & S. 511, 512.

¹ *Trim. v. Baker*, 1 S. & S. 469; *T. & R.* 253; *Waterton v. Croft*, 6 Sim. 431, 438; see *Atlantic Ins. Co. v. Lemar*, 10 Paige, 385; *Henderson v. Dennison*, 1 Carter (Ind.), 152; *Fleece v. Russell*, 13 Ill. 31; *North Western Bank v. Nelson*, 1 Grattan, 108; *Sutton v. Gatewood*, 6 Munf. 398; *Lafavour v. Justice*, 5 Blackf. 336; *Puterbaugh v. Elliott*, 22 Ill. 157. Where a demurrer to a bill, for want of equity is overruled, a final decree, without giving the defendant an opportunity to deny the allegations in the bill, is erroneous. *Smith v. Ballantyne*, 10 Paige, 101; *Forrest v. Robinson*, 4 Porter, 44; *Bottoff v. Conner*, 1 Blackf. 287; *Cole County v. Augney*, 12 Miss. 132.

In *Maine*, *Walton J.* in *Lambert v. Lambert*, 52 Maine, 544, 545, remarked that the overruling of a demurrer in Equity is never followed by a decree making a final disposition of the case: the order is that the party demurring answer further. And he added: "The entry in this case should be, '*demurrer to crossbill overruled—further answer required.*'"

² *Cotes v. Turner*, Bunb. 123; and see *Attorney-General v. Corporation of London*, 12 Beav. 217; see *Kuypers v. Ref. Dutch Church*, 6 Paige, 570.

³ *Ld. Red.* 317; *London Assurance v. East India Company*, 3 P. Wms. 325; *Boyd v. Mills*, 13 Ves. 85.

⁴ *Ld. Red.* 317; 3 P. Wms. 327, n. (S).

ing generally, precluded from calling for an answer to that part of the interrogatories covered by the demurrer.⁵

Where a demurrer is overruled, and the plaintiff amends his bill, the defendant is not precluded from appealing against the order overruling the demurrer;⁶ but after the defendant has served the plaintiff with notice of the appeal, an order of course to amend the bill is irregular, and will be discharged with costs, and the amendments expunged.⁷

*602 *After a demurrer has been overruled, and notice of appeal given, the plaintiff cannot obtain an order of course to dismiss his bill, with costs.¹

The Court will often, although it overrules the demurrer, reserve to the defendant the right of raising the same question at the hearing of the cause;² and where there is a doubtful question on a title, the Court will sometimes overrule the demurrer, without prejudice to any defence the defendant may make by way of answer.³

Where any demurrer is overruled, the defendant is to pay to the plaintiff the taxed costs occasioned thereby: unless the Court otherwise directs.⁴

Where a demurrer to the whole bill is overruled, the plaintiff, if he does not require an answer, and proposes to file a traversing note, may

⁵ Taylor v. Bailey, 3 M. & C. 677, 681; 3 Jur. 308.

⁶ Jackson v. North Wales Railway Company, 13 Jur. 69, L. C. After demurrer to a bill was overruled, and time given to answer, the defendant was allowed to demur again without leave first obtained, on the plaintiff's amending his bill by joining a new party plaintiff. Moore v. Armstrong, 9 Porter, 697. So where an amendment is made to a bill before answer filed, even if it be immaterial and trivial, a defendant may demur, *de novo*, to the whole bill; the defendant may demur to the amendment at any time. Booth v. Stumper, 10 Geo. 109. But when an answer has been filed, the defendant cannot, after demurrer made and decided, demur again to the whole bill, unless the amendment is material. *Ibid.* [Ante, 582, n. 10.]

⁷ Ainslie v. Sims, 17 Beav. 174.

¹ Lewis v. Cooper, 10 Beav. 32; S. C. *nom.* Cooper v. Lewis, 2 Phil. 178, 181.

² Wilson v. Stanhope, 2 Coll. 629; Jones v. Skipworth, 9 Beav. 237; Norman v. Stiby, *ib.* 560, 566; Earl of Shrewsbury v. North Staffordshire Railway Company, 9 Jur. N. S. 787; 11 W. R. 742, V. C. K.; Baxendale v. West Midland Railway Company, 8 Jur. N. S. 1163, L. C.

³ Brownson v. Edwards, 2 Ves. S. 243, 247; Mortimer v. Hartley, 3 De G. & S. 316; Evans v. Evans, 18 Jur. 666, L. J.J.; Cochran v. Willis, 10 Jur. N. S. 162, L. J.J.; Collingwood v. Russell, 10 Jur. N. S. 1062; 13 W. R. 63, L. J.J.; *ante*, p. 542. [Where the Court below has considered that the question raised by the bill ought not to be decided on demurrer, it seems that the Court of Appeals will not ordinarily overrule that decision.

Sheffield Waterworks v. Yeomans, L. R. 2 Ch. App. 8.

A decree overruling a demurrer is not a final decree, and pending an appeal therefrom, the defendant may be ordered to answer. Forbes v. Tuckerman, 115 Mass. 115.

If upon a critical examination of the facts of a bill there is a possibility that the action may be sustained, though upon a different ground from that assumed, a demurrer to the whole bill will be overruled. Trafford v. Wilkinson, 3 Tenn. Ch. 449. After a demurrer has been overruled, the bill amended and the defendant has answered without taking in his answer the objection raised by the demurrer, the defendant may at the hearing raise the same objection. Johnsson v. Bonhote, 2 Ch. Div. 298. And, generally, the Court is not concluded, on final hearing, from looking into the bill upon the points of an overruled demurrer. Dormer v. Fortescue, 2 Atk. 284; Avery v. Holland, 2 Overton, 469; Bolton v. Dickens, 2 Cent. L. J. 477; Cronin v. Watkins, 1 Tenn. Ch. 119. Or of an overruled motion to dismiss the bill for want of equity. Shaw v. Patterson, 2 Tenn. Ch. 171.]

⁴ Ord. XIV. 12; see Schneider v. Lizardi, 9 Beav. 461, 468; Bothomley v. Squires, 1 Jur. N. S. 694, V. C. K.; Morgan & Davey, 21. As to the costs: where a demurrer *ore tenus* is allowed, see Ord. XIV. 1, *ante*, p. 599; and where a defendant succeeds on one ground, and fails on another, see *ante*, p. 599. Costs were refused where the bill did not show that relief must be granted at the hearing. Barber v. Barber, 4 Drew. 666; 5 Jur. N. S. 1197. For precedent of a bill of costs where demurrer overruled, see Morgan & Davey, 448.

file such note immediately: unless the Court, upon overruling such demurrer, gives time to plead, answer, or demur; and in such case, if the defendant files no plea, answer, or demurrer within the time so allowed by the Court, the plaintiff, if he does not then require an answer, may, on the expiration of such time, file such note.⁵

⁵ Ord. XIII. 4; *ante*, p. 516.

P L E A S.

SECTION I. — *The General Nature of Pleas.*

A DEMURRER has been mentioned to be the proper mode of defence to a bill, when any objection is apparent upon the bill itself: either from matter contained in it, or from defect in its frame, or in the case made by it.¹ When an objection to the bill is not apparent on the bill itself, if the defendant means to take advantage of it, he ought to show to the Court the matter which creates the objection: either by answer, or by plea, which has been described as a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred.² The object of a plea is to save to the parties the expense of going into evidence at large; and, therefore, where a defendant neglected to raise his defence by plea, the bill has been dismissed without costs.³

The defence proper for a plea is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to the part of it to which the plea applies.⁴ It is not, however,

necessary that it should consist of a single fact: for though a de-
*604 fence offered by way of plea consists of a great variety *of cir-

¹ *Ante*, p. 542.

² *Ld. Red.* 219; *Carroll v. Waring*, 3 Gill & J. 491; *Heartt v. Corning*, 3 Paige, 566; *Tappan v. Evans*, 11 N. H. 311. If a previous demurrer by the defendant has been overruled, he cannot plead without the leave of the Court. *Rowley v. Eccles*, 1 S. & S. 511, *ante*, p. 600.

³ *Sanders v. Benson*, 4 Beav. 350, 357; *Jackson v. Ogg*, John. 397, 402.

⁴ *Ld. Red.* 219, 295; *Goodrich v. Pendleton*, 3 John. Ch. 384; *Story Eq. Pl.* § 652; *Sims v. Lyle*, 4 Wash. C. C. 302, 304. The plea must be perfect in itself, so that if true in fact, it will put an end to the cause. *Allen v. Randolph*, 4 John. Ch. 693; *Drogheda v. Malone*, Finlay's Dig. 449. If the plea is the only defence, it must allege some fact, which is an entire bar to the suit or some substantive part of it; and, if defective in

this respect, whether true or false, the plaintiff should move to set it aside for insufficiency. *Newton v. Thayer*, 17 Pick. 129; *Piatt v. Oliver*, 1 McLean, 303; *Union Branch R. R. Co. v. East Tenn. and Georgia R. R. Co.* 14 Geo. 327. A demurrer is never resorted to for the purpose of settling the validity of a plea. *Travers v. Ross*, 1 McCarter (N. J.), 254. [*Ante*, 542, n. 1; *infra*, 692.]

A mere denial of a substantive fact alleged in the bill, without setting up new matter, and without answering as to collateral facts charged as evidence, is not a good plea. *Evans v. Harris*, 2 V. & B. 361; *Bailey v. Le Roy*, 2 Edw. Ch. 514; *Milligan v. Milledge*, 3 Cr. 220. Nor is a plea of matter already in the bill rendering it demurrable, as that the agreement is not in writing, when the bill shows it to be in parol. *Black v. Black*, 15 Geo. 445.]

cumstances, yet, if they all tend to one point, the plea may be good ;¹ they must, however, be material.²

In general, a plea relies upon matters not apparent on the bill, and, in effect, suggests that the plaintiff has omitted a fact which, if stated, would have rendered the bill demurrable ;³ and in most cases, where a defendant insists upon matter by plea which is apparent upon the face of the bill, and might be taken advantage of by demurrer, the plea will not hold.⁴ This rule, however, as will be seen presently, is in some cases liable to exception.

Where a plea merely states matter not apparent upon the bill, and relies upon the effect of such matter as a bar to the plaintiff's claim, it is called an *affirmative plea*. Such pleas usually proceed upon the ground that, admitting the case stated by the bill to be true, the matter suggested by the plea affords a sufficient reason why the plaintiff should not have the relief he prays, or the discovery which he seeks ; and when they are put in, the Court, in order to save expense to the parties, or to protect the defendant from a discovery which he ought not to make, instantly decides upon the validity of the defence : taking the plea, and the bill so far as it is not contradicted by the plea, to be true.⁵

Although pleas, generally, consist of the averment of some new fact, or chain of facts, not apparent upon the face of the bill, the effect of which is, not to deny the facts of the bill, but, admitting them *pro hac vice* to be true, to destroy their effect, there are cases in which the plea, instead of introducing new facts, merely relies upon a denial of the truth of some matter stated in the bill, upon which the plaintiff's right depends. A plea of this sort is called a *negative plea*.⁶ It seems, formerly, to have been made a question, how far a negative plea could be good ;⁷ and where a bill was filed by an individual claiming as heir to a person deceased, and the defendant pleaded that another person was heir, and that the plaintiff was not heir to the deceased, Lord Thurlow overruled * the plea, on the ground that it was a nega- *605
tive plea ;¹ but this decision was afterwards doubted, by the learned Judge himself,² when pressed by the necessary consequence,

¹ Fox v. Yates, 24 Beav. 271 ; Campbell v. Beaufoy, Johns. 320 ; Saunders v. Druce, 3 Drew. 140, 156 ; and for the plea in that case, see Drew. Eq. Pl. 146, and *ib.* 147, n. ; Story Eq. Pl. § 652 ; Rhode Island v. Massachusetts, 14 Peters, 211. But it is otherwise where the defence consists of a great variety of facts and circumstances, rendering it necessary to go into the examination of witnesses at large. Land v. Sergeant, 1 Edw. Ch. 164 ; Story Eq. Pl. §§ 653, 654.

² Andrews v. Lockwood, 2 Phil. 398 ; 11 Jur. 956 ; Bowyer v. Beamish, 2 Jo. & Lat. 228.

³ Wigram on Disc. 22, n. (e) ; see Andrews v. Lockwood, *ubi sup.*

⁴ Billing v. Flight, 1 Mad. 230, 236 ; [Black v. Black, 15 Geo. 445 ;] Phelps v.

Garrow, 3 Edw. Ch. 139 ; Varick v. Dodge, 9 Paige, 149.

⁵ Ld. Red. 295.

⁶ Story Eq. Pl. § 551, note, § 657 *et seq.* ; Wigram. Discov. (2d ed.) pp. 110-118. This class of pleas has two peculiarities : in the first place it relies wholly upon matters stated in the bill, negating such facts as are *material* to the rights of the plaintiff ; and in the next place it requires an answer to be filed, which is subsidiary to the purposes of the plea. Story Eq. Pl. § 670 ; see also Cosine v. Graham, 2 Paige, 177 ; Robinson v. Smith, 3 Paige, 222 ; Mitchell v. Lenox, 2 Paige, 280 ; Smets v. Williams, 4 Paige, 364.

⁷ Ld. Red. 230.

¹ Newman v. Wallace, 2 Bro. C. C. 143, 146 ; Gunn v. Prior, 2 Dick. 667 ; 1 Cox, 197

² Hall v. Noyes, 3 Bro. C. C. 483, 483.

that any person falsely alleging a title in himself, might compel any other person to make a discovery, which that title, if true, would enable him to require, however injurious to the person thus improperly brought into Court: so that any person might, by alleging a title, however false, sustain a bill in Equity against any person for any thing, so far as to compel an answer.³ Since that time, frequent instances have occurred in which negative pleas have been allowed. Thus, where to a bill praying that the defendant might redeem a mortgage or be foreclosed, the defendant pleaded that there was no mortgage, Lord Eldon allowed the plea;⁴ and so, where a bill prayed that the defendant might be restrained from setting up outstanding terms of years in defence to an action of ejectment, and the defendant pleaded that there were no outstanding terms, the plea was held good;⁵ and where a bill prayed an account of partnership transactions, a negative plea that there was no partnership was allowed.⁶ It has also been held, that negative matter ought to be pleaded negatively.⁷

It is proper here to mention another species of plea which often occurs in the books, and is not, strictly speaking, either a plea affirming new matter, or negating the plaintiff's title as alleged in the bill, but one which re-asserts some fact stated in the bill, and which the bill seeks to impeach, and denies all the circumstances which the plaintiff relies upon as the ground upon which he seeks to impeach the fact so set up. Thus, where a bill is brought to impeach a decree, on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit, with averments negating the charges of fraud.⁸ Of the same nature are pleas setting up the award itself, to a bill filed for the purpose of impeaching it on the ground of partiality or fraud in the arbitrators;⁹ or setting up stated accounts or releases, where bills have been filed for the purpose of setting them aside. Pleas of this nature have been objected to, because they are in fact *exceptiones ejusdem rei cujus petitur dissolutio*;¹⁰ but the frame of a bill in Equity, in such

*606 cases, necessarily produces this mode of pleading: for, in the instance above alluded to of a plea setting up the decree * to a

bill seeking to impeach it, it is obvious that, if the bill had stated the title under which the plaintiff claimed, without stating the decree under which the defendant claimed, the defendant might have pleaded the decree alone in bar. If the bill had stated the plaintiff's title, and also stated the decree, and alleged no fact to impeach it, and had yet sought relief on the title concluded by it, the defendant might have demurred: because, upon the face of the bill, the title of 'the plaintiff

³ *Ld. Red.* 231; *Jones v. Davis*, 16 *Ves.* 262, 264.

⁴ *Hitchens v. Lander*, *G. Coop.* 34, 38.

⁵ *Armitage v. Wadsworth*, 1 *Mad.* 189, 195; *Dawson v. Pilling*, 16 *Sim.* 203, 209; 12 *Jur.* 388.

⁶ *Drew v. Drew*, 2 *V. & B.* 159, 161; *Sanders v. King*, 6 *Mad.* 61; 2 *S. & S.* 277;

Yorke v. Fry, 6 *Mad.* 65; *Thring v. Edgar*, 2 *S. & S.* 274, 281; *Arnold v. Heaford*, 1 *M'Le.* & *Y.* 330.

⁷ *Roberts v. Madocks*, 16 *Sim.* 55, 57; 11 *Jur.* 938.

⁸ *Ld. Red.* 239.

⁹ *Id.* 260; *Tittenson v. Peat*, 3 *Atk.* 529.

¹⁰ *Pusey v. Desbourrie*, 3 *P. Wms.* 317.

would have appeared to be so concluded. But as, by the forms of pleading in Equity, the bill may set out the title of the plaintiff, and, at the same time, state the decree by which, if not impeached, that title would be concluded, and then avoid the operation of the decree, by alleging that it has been obtained by fraud: if the defendant could not take the judgment of the Court, upon the conclusiveness of the decree, by plea, upon which the matter by which that decree was impeached would alone be in issue, he must enter into the same defence (by evidence as well as by answer), as if no decree had been made, and would be involved in all the expense and vexation of a second litigation on the subject of a former suit, which the decree, if unimpeached, had concluded. It is, therefore, permitted to him to avoid entering into the general question of the plaintiff's title, as if it had not been affected by the decree, by meeting the case made by the plaintiff, which can alone give him a right to call for that defence, namely, the fact of fraud in obtaining the decree: which he does, by negative averments in his plea.¹ It seems to have been the opinion of Sir James Wigram that, in these cases, a negative plea, meeting the matter suggested in the bill, to avoid the effect of the bar set up, would alone be sufficient.²

Any matter arising between the bill and the plea, may be pleaded.³ It has been before stated, that this can be done where the bankruptcy of a plaintiff or of a defendant occurs after the bill has been filed;⁴ and so, where a bill was filed for a discovery and relief, by injunction to restrain the defendant from setting up outstanding terms to defeat a writ of right, and since the filing of the bill, the writ of right had been tried and determined against the plaintiff, a plea that it had been so tried and determined was allowed to be a good plea.⁵ This rule has been adopted from analogy to proceedings at Common Law, where any matter which arises between the declaration and the plea may be pleaded in bar.⁶ But the analogy, in this respect, between Courts of Law

* and Equity, will not extend further: for at Law, any matter which *607 would abate the suit, or operate as a bar, may, until the verdict has been given, be offered to the Court by a plea, termed a plea *puis darrein continuance*.¹ In Courts of Equity, however, such a plea does not seem admissible, but the effect of it may be obtained by means of a cross-bill.²

It is essential to observe that, whatever the nature of the plea may be, whether affirmative or negative, or of the anomalous nature above alluded to, the matter pleaded must reduce the issue between the plain-

¹ Ld. Red. 240, 242; Bailey v. Adams, 6 Ves. 586, 597; Lloyd v. Smith, 1 Anst. 253; Freeland v. Johnson, *ib.* 276.

² Wigram on Disc. pp. 185-189.

³ Sergrove v. Mayhew, 2 M.N. & G. 97, 99; 14 Jur. 158; De Minckwitz v. Udney, 16 Ves. 466, 468. [Payne v. Beech, 2 Tenn. Ch. 708.]

⁴ *Ante*, p. 63; Turner v. Robinson, 1 S. & S. 3; see Tarleton v. Hornby, 1 Y. & C. Ex. 333, 336; Lane v. Smith, 14 Beav. 49; 15 Jur. 735.

⁵ Earl of Leicester v. Perry, 1 Bro. C. C. 305; see Ld. Red. 254.

⁶ Turner v. Robinson, *ubi sup.*

¹ 15 & 16 Vic. c. 76, § 69.

² Ld. Red. 82; see Rowe v. Wood, 1 J. & W. 315, 337; Wood v. Rowe, 2 Bligh. 595; Hayne v. Hayne, 3 Cha. Rep. 19; Nels. 105; Wright v. Meek, 3 Iowa, 472. [Miller v. Fenton, 11 Paige, 18; Johnson v. Fitzhugh, 3 Barb. Ch. 360].

tiff and defendant to a single point.³ If a plea is double, *i.e.*, tenders more than one defence as the results of the facts stated, it will be bad.⁴ Thus, a plea which stated that the plaintiffs, who claimed as citizens of London, never were resident there, or paid scot and lot, and that they were admitted freemen by fraud for the purpose of enjoying the exemption claimed, was held bad: because the facts that the plaintiffs were not citizens of London, and that they were admitted by fraud, were totally inconsistent with each other.⁵ And so, where a defendant to a bill for the specific performance of an agreement, put in a plea, insisting upon the Statute of Frauds, and another defence, Lord Rosslyn would not allow it, as it was a double defence, and directed it to stand over till the hearing.⁶ Upon the same principle, where a bill was filed, praying a reconveyance of four estates, and the defendant put in a plea whereby he insisted upon a fine as to one, and averred that the estate comprised in that fine, was the only part of the premises in the bill in which he claimed an interest, Sir Lancelot Shadwell V. C. held it to be bad, as a double plea.⁷

The rule, that a plea must reduce the defence to a single ground, must be understood as not interfering with the proposition before laid down,⁸ that a plea may consist of a variety of facts and circumstances: all that it requires is, that those facts and circumstances should give, as their result, one clear ground upon which the whole equity of the bill may be disposed of.⁹ The rule upon *this subject, and the reasons upon which it has been established, are stated with great clearness by Lord Thurlow, in his judgment in *Whitbread v. Brockhurst*. His Lordship there said: "I cannot agree with the defendant's counsel, that any two facts which are not inconsistent may be pleaded in one plea. I think that various facts can never be pleaded in one plea, unless they are all conducive to a single point, on which the defendant rests his defence. Thus, many deeds may be stated in a plea, if they all tend to establish a single point of title; so in the case of papacy.¹ In the present case, the different matters pleaded do not conduce to one object. The plea of the statute is of itself a bar; but the plea, that

³ *Saltus v. Tobias*, 1 John. Ch. 214.

⁴ *Nobkissen v. Hastings*, 2 Ves. J. 84, 86; *Jones v. Frost*, 3 Mad. 1, 8; *Van Hook v. Whitlock*, 3 Paige, 409. Duplicity in one and the same plea is a vice in pleading in Equity, as well as at Law. *Moreton v. Harrison*, 1 Bland, 496; see *Saltus v. Tobias*, 7 John. Ch. 214; *Rhode Island v. Massachusetts*, 14 Peters, 211; *Goodrich v. Pendleton*, 3 John. Ch. 386; *Ridgeley v. Warfield*, 1 Bland, 494; *Story Eq. Pl. § 653*. A plea is not rendered double by the mere insertion therein of several averments, that are necessary to exclude conclusions arising from allegations which are made in the bill, to anticipate and defeat the bar which might be set up in the plea. *Bogardus v. Trinity Church*, 4 Paige, 178.

⁵ *Corporation of London v. Corporation of Liverpool*, 3 Anst. 738, 742.

⁶ *Cooth v. Jackson*, 6 Ves. 12, 17; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, 418.

⁷ *Watkins v. Stone*, 2 Sim. 49, 52.

⁸ *Ante*, p. 603.

⁹ *Ritchie v. Aylwin*, 15 Ves. 79, 82; *Rowe v. Teed*, *ib.* 372; *Strickland v. Strickland*, 12 Sim. 253, 259; *Fox v. Yates*, 24 Beav. 271; *Campbell v. Beaufoy*, Johns. 320; *Saunders v. Druce*, 3 Drew. 140, 156. Where the allegations of a plea, being taken as true, do not make out a full defence, or where the necessary facts are to be gathered by inference alone, the plea cannot be sustained. *Meeker v. Marsh*, Saxton (N. J.), 198. See *Davison v. Johnson*, 1 C. E. Green (N. J.), 112, 113, 114.

¹ *Harrison v. Southcote*, 1 Atk. 528, 588.

the agreement was not performed, is quite distinct: because, whether a part-performance take the agreement out of the statute, or be considered merely as a fraud, the point of equity is quite distinct from the agreement. It is a plea of two matters, perfectly and clearly distinct: of two things which furnish two different pleas to the points made in the bill. The reason why a defendant is not permitted to plead two different pleas in Equity, though he is permitted to plead them at Law, is plain: it is because at Law a defendant has no opportunity, as he has here, of answering every different matter stated in the bill. The reason of pleading in Equity is, that it tends to the forwarding of justice, and saves great expense, that the matter should be taken up shortly upon a single point; but that end is so far from being attained, if the plea puts as much in issue as the answer could do, that on the contrary it increases the delay and expense. But why, it may be asked, should not the defendant be permitted to bring two points, on which the cause depends, to issue by his plea? The answer is: because, if two, he may as well bring three points to issue; and so on, till all the matters in the bill are brought to issue upon the plea: which would be productive of all the delay and inconvenience which pleading was intended to remedy."²

Although the general rule of the Court is not to allow of double pleading, there are cases in which the rule will be relaxed: as, where great inconvenience would be sustained by the necessity of setting out long accounts, which could be obviated, if the defendant were to be allowed to plead several matters. Cases of this nature may occur where a bill is so framed that, if the principal case made by it cannot be supported, it may be sustained by some *subsidiary matter, *609 which has been introduced for the purpose of maintaining the suit.¹ Thus, in *Gibson v. Whitehead*,² where a bill was filed, by simple contract creditors, to charge the real estates of a deceased debtor: alleging, first, that the testator, by his will, subjected the real estates to the payment of his debts; and, secondly, that if it was not the true construction of his will, then his real estates were liable under the 47 Geo. III. sess. 2, c. 74,³ he having been a trader at the time of his death, Sir John Leach V. C. made an order, upon motion, that the defendant might be at liberty to plead: first, the will of the testator, for the purpose of showing that he did not thereby charge his real estates with the payment of his debts; and, secondly, that he was not, at the time of his death, a trader within the meaning of the Act.⁴ Although, in the above case, the necessity for a double plea arose from the

² See Sir S. Romilly's note of this judgment, 1 Bro. C. C. 415, Belt's ed., cited 2 V. & B. 153 n. [*Noyes v. Willard*, 1 Woods, 187; *Benson v. Jones*, 1 Tenn. Ch. 498.]

¹ Story Eq. Pl. § 657, and note; *Van Hook v. Whitlock*, 3 Paige, 409; *Mitford Eq. Pl.* by Jeremy, 295, note; *Didier v. Davidson*, 10 Paige, 515. Two distinct pleas in bar, different in their nature, as a plea of the Statute of Limitations, and a discharge

under the Insolvent Act, cannot be pleaded together, without the previous leave of the Court. *Saltus v. Tobias*, 7 John. Ch. 214.

² 4 Mad. 241, 246; *Kay v. Marshall*, 1 Keen, 190.

³ Repealed by 11 Geo. IV. & 1 Will. IV. c. 47.

⁴ See also *Hardman v. Ellames*, 5 Sim. 640, 645; 2 M. & K. 732; C. P. Coop. t. Brough. 351.

circumstance of there being a sort of double or alternative claim in the bill, this is not the only ground upon which the Court acts in allowing double pleas. The principle upon which the Court proceeds, depends very much upon the extraordinary inconvenience that might arise, if the defendant were not allowed to take this course; and upon this principle, where a bill was filed to restrain the infringement of a patent, and for an account, and the defendants were desirous of disputing the validity of the patent, on the grounds that, so far as the invention was new, it was useless, and that, so far as it was useful, it was not new, Lord Langdale M. R. gave the defendant leave to plead: first, that the invention was not useful; secondly, that it was not new;⁵ and in *Bampton v. Birchall*,⁶ the same Judge permitted the defendant, in an ejectment suit, to plead: first, that the person under whom the plaintiff claimed was not the heir; and, secondly, that even if he were such heir, the plaintiff's right was barred by the Statute of Limitations.

Before a defendant puts in a double plea, he must obtain an order, on motion, with notice, of which he will have to pay the costs, for leave to do so;⁷ and such a plea, if filed without such an order, is irregular, and liable to be overruled.⁸

*610 * With reference to the subject of multifarious or double pleading, it is to be noticed that, where the facts stated in the plea are sufficient to constitute a good plea, the introduction into the plea of a fact which, although it puts in issue a distinct matter, is not important to the validity of the plea itself, will not vitiate the plea.¹ Thus, if a defendant pleads a release, and then avers that it has been acted upon: the release being of itself a bar, whether it has been acted upon or not, the further allegation that it has been acted upon is unimportant, and will be rejected as surplusage.² Upon this ground, where a plea stated facts which, connected with the statement in the bill, would have amounted to a conspiracy to prevent a prosecution for felony, and then averred that the transactions stated in the bill, related to a fraudulent embezzlement by a banker's clerk, and suggested that the discovery sought might subject the defendant to pains and penalties, it was objected that the plea was multifarious, because, in addition to the statement of facts amounting to a conspiracy, it averred that the transactions related to a fraudulent embezzlement; Lord Eldon, however, overruled the objection: saying, that he should press a harder rule in Equity than prevails at Law by holding, that such an averment made a plea bad, which in other respects was good.³

The rule that a defendant cannot plead several matters, must not be understood as precluding a defendant from putting in several pleas to

⁵ *Kay v. Marshall*, 1 Keen, 190, 192, 197.
⁶ 4 Beav. 558; and see observations of Sir John Romilly M. R. in *Young v. White*, 17 Beav. 532, 540; 18 Jur. 277.

⁷ For form of notice of motion, see Vol. III.

⁸ *Kay v. Marshall*, *ubi sup.*; *Gibson v.*

Whitehead, 4 Mad. 241, 245; *Hardman v. Ellames*, *ubi sup.*; *Bampton v. Birchall*, *ubi sup.*; *Saltus v. Tobias*, 7 John. Ch. 214.

¹ Story Eq. Pl. § 663.

² *Claridge v. Hoare*, 14 Ves. 59, 65.

³ *Ibid.*

different parts of the same bill: it merely prohibits his pleading, without previous leave, a double defence to the whole bill, or to the same portion of it. A defendant may plead different matters to separate parts of the same bill, in the same manner that, as we have seen, a defendant may put in different demurrers to different portions of the bill.⁴ A defendant may, in like manner, plead and demur, or plead and answer, to different parts of the same bill, provided he points out, distinctly, the different portions of the bill which are intended to be covered by the plea, the demurrer, and the answer;⁵ he must, likewise, where he puts in several pleas to the same bill, point out to what particular part of the bill each plea is applicable. But, although the general rule is, that in the case of a partial plea, a defendant must specify distinctly what part of the bill he pleads to, the rule which has been stated, as applicable to a demurrer, namely, that it cannot be good in part and bad in part, is not applicable with the same strictness to a plea: for it has been repeatedly decided, that a plea in Equity may be bad in part and not in the whole, and the *Court will *611 allow it to so much of the bill as it is properly applicable to.¹

The rule that a plea may be allowed in part only, is to be understood with reference to its extent, that is, to the quantity of the bill covered by it, and not to the ground of defence offered by it; and if any part of the defence made by the plea is bad, the whole must be overruled.² Thus, if a defendant pleads a fine and non-claim, which is a legal bar, and a purchase for a valuable consideration without notice of the plaintiff's claim, which is an equitable bar: if either should appear not to be a bar, as if the defendant by answer should admit facts amounting to notice, or if the plea, with respect to either part, should be informal, the whole must be overruled. There seems to be no case in which the Court has separated the two matters pleaded, and allowed one as a bar, and disallowed the other.³

But, although it is the office of a plea to reduce the defence to a single point, it is necessary, in order to its validity, that all matters which are essential to bring it to that point, should be stated on the face of the plea, so that the Court may at once decide whether the case which the plea presents to the Court is a bar to the case made by the bill, or to that part of it which the plea seeks to cover. Thus, if a bill

⁴ *Emmott v. Mitchell*, 14 Sim. 432, 434; 9 Jur. 170; *ante*, p. 584.

⁵ He may not, therefore, simultaneously plead and demur to the whole bill; *Lowndes v. Garnett & Moseley Gold Mining Company*, 2 J. & H. 282; 8 Jur. N. S. 694.

¹ *Ld. Red. 295*; *Coop. Eq. Pl. 230*; *Beames on Pleas*, 45; *Earl of Suffolk v. Green*, 1 Atk. 450; *Duncalf v. Blake*, *ib.* 52; *Huggins v. York Buildings Company*, 2 Atk. 44; *Dormer v. Fortescue*, *ib.* 284; *Turner v. Mitchell*, 1 Dick. 249; *Roche v. Morgell*, 2 Sch. & Lef. 721, 725; *Mayor of London v. Levy*, 8 Ves. 403; *Harrison v. Southcote*, 1 Atk. 528, 539; 2 Ves. S. 389, 397; *Earl of*

Derby v. Duke of Athol, 1 Ves. S. 203, 205; 2 Ves. S. 337; *Bell v. Woodward*, 42 N. H. 193; *Ld. Chelmsford in United States of America v. McRae*, L. R. 3 Ch. Ap. 91, 92; *Story Eq. Pl. §§ 692, 693*; *French v. Shottwell*, 20 John. 668; S. C. 5 John. Ch. 555; *Kirkpatrick v. White*, 4 Wash. C. C. 595.

² *Ld. Red. 297*; *Salmon v. Dean*, 3 M'N. & G. 344, 348; 14 Jur. 235; and see *Hewitt v. Hewitt*, 11 W. R. 849, V. C. K.; see *Mad. Plank Road Co. v. Wat. Plank Road Co.*, 5 Wis. 173; [*Searight v. Payne*, 1 Tenn. Ch. 186.]

³ *Ld. Red. 295.*

is brought to recover the possession of an estate, a defendant may, in certain cases, protect himself by a plea: stating that he was the purchaser of the estate, and that he paid a valuable consideration for it, and that he had not, at the time of the purchase, any notice of the title or claim of the plaintiff to the property. This is called "a plea of purchase for valuable consideration, without notice," and is, if true, a good bar to the suit. It will not, however, be sufficient merely to state, by way of plea, that the defendant is a purchaser for a valuable consideration, without notice; he must state upon the plea, that the person from whom he purchased had, or pretended to have, such an interest in the property as entitled him to convey it to the defendant; that it was conveyed to the defendant by the proper mode of conveyance; that a valuable consideration was paid for it by the defendant; and, that

the defendant had no notice of the claim of the plaintiff: for the *612 coincidence of all these facts is * necessary to constitute a good

bar in Equity to a suit of the nature alluded to;¹ and the omission of any of them would render the defence invalid: because, the plaintiff has a right, by replying to the plea, to put all the matters contained in it in issue, and by that means to compel the defendant to support them, or at least such of them as are affirmatively stated, by evidence. The statements of these necessary facts, in a plea, are called "averments"; and the necessity of their introduction, points out the general distinction between demurrers and pleas: for, if the fact necessary to constitute a good plea, appears sufficiently upon the bill, so as to exclude the necessity of averments, the bill might, in most cases, be objected to by demurrer.²

Another office of averments in a plea is, to exclude intendments, which would otherwise be made against the pleader: for, if there is any charge in the bill which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded, such as fraud or notice of title, the Court will intend the matters so charged against the pleader, unless they are met by averments in the plea.³ Thus, where a bill was filed by a remainder-man against a tenant for life, for an account of timber cut upon the estate, embracing a period of many more than six years previous to the filing of the bill, which was in 1824, and alleging that, in answer to certain inquiries which the plaintiff had made as to the timber, the defendant had furnished certain accounts, from which it ap-

¹ *Id.* 275; *Jackson v. Rowe*, 4 Russ. 514, 523; *Hugh v. Butte*, 10 Yerger, 335; *Donnell v. King*, 7 Leigh, 393; *Griffith v. Griffith*, 1 Hoff. Ch. 153; *Malony v. Kernan*, 2 Dru. & War. 31; *Craig v. Leiper*, 2 Yerger, 193; *Jewett v. Palmer*, 7 John. Ch. 65; *Gallatian v. Cunningham*, 8 Cowen, 361; *Souzer v. De Meyer*, 2 Paige, 574; *Drogheda v. Malone*, Finlay's Dig. 449. A plea, setting up a forfeiture, by breach of a condition subsequent for the payment of money, in bar of a suit in Equity for relief, must distinctly

aver laches on the part of the plaintiff. *Hancock v. Carlton*, 6 Gray, 39.

² *Bicknell v. Gouch*, 3 Atk. 558; *Roberts v. Hartley*, 1 Bro. C. C. 56; *Billings v. Flight*, 1 Mad. 230, 236; *Steff v. Andrews*, 2 Mad. 6, 10. It is unnecessary to negative facts which, if stated in the bill, would have defeated the plea. *Ld. Red.* 299; *Forbes v. Skelton*, 8 Sim. 335, 345; 1 Jur. 117: see *Story Eq. Pl.* § 679 *et seq.*, and notes.

³ *Ld. Red.* 298; *Saunders v. Druce*, 3 Drew. 140, 161; *Drew. Eq. Pl.* 146; *ib.* 147, *n.*

peared that, since the year 1794 down to the year 1821, certain quantities of timber had been cut in each year, amounting to sums mentioned in the bill, and the defendant pleaded the Statute of Limitations in bar, confining his averments only to the date of the filing of the bill: the Court overruled the plea, because it held, that the alleged render of the accounts in the bill, bringing the accounts down to the period within six years before the filing of the bill (which was not negatived by any averment in the plea), defeated the operation of the statute.⁴ To have constituted a good plea in that case, there should have been an averment, that no such accounts as those alleged in the bill had been rendered.

*The necessity for the introduction of such averments into a *613 plea is obvious, when we consider that a plea, for the purpose of deciding on the validity of it, like a demurrer, admits all the facts stated in the bill to be true, so far as they are not controverted by the plea:¹ so that, whenever matters of fact are introduced in the bill, which, if true, would destroy the effect of the matter pleaded, the plea will be overruled, unless such matters are controverted by the averments.

From what has been said above it will be seen, that averments in pleas may naturally be divided into affirmative and negative averments. Affirmative averments are those which are not suggested by any matter upon the face of the bill which is inconsistent with the matter pleaded, but are necessary in order to render the matter pleaded a complete bar. Thus, if a stated account is set up by the plea, the defendant must aver that the account is just and true, to the best of his knowledge and belief; and so, in the instance above referred to, of a plea of purchase for valuable consideration without notice, it has been stated that the defendant must aver, in his plea, that the person from whom he purchased had, or pretended to have, such an interest as entitled him to convey the estate to the defendant; and that it was conveyed to the defendant in a proper manner; and that a valuable consideration was paid for it: and that the defendant had no notice of the plaintiff's title: the concurrence of all these matters being requisite to constitute a good equitable bar to the plaintiff's claim.² It may be objected, that the last matter averred, namely, the want of notice, being negative matter, cannot properly be called an affirmative averment; but it is not the mere fact of averring affirmatively or negatively which constitutes the distinction; but whether the matter be introduced by way of affirmation of the defendant's plea, or of negation of such of the plaintiff's statements as are inconsistent with the plea. Thus, the very fact of want of notice, in a plea of purchase for a valuable consideration, may be both affirmatively and negatively averred: for, if the bill merely sets out the plaintiff's title, and does not charge the defendant with having

⁴ *Hony v. Hony*, 1 S. & S. 568, 580.

¹ *Plunket v. Penson*, 2 Atk. 51; *Roche v. Morgell*, 2 Sch. & Lef. 721, 727; *McEwen v. Broadhead*, 3 Stockt. (N. J.) 131; *Davi-*

son v. Johnson, 1 C. E. Green (N. J.), 113, 114.

² *Ante*, p. 611; *Ld. Red.* 275.

any notice of it, the want of notice being one of the circumstances necessary to constitute the equitable bar, must be averred in the plea: in which case, according to the distinction above pointed out, the averment is affirmative. And so, if the bill actually charges the defendant with notice, the notice must be equally denied by averment; in which case the averment will be a negative averment.

*614 * A negative averment, therefore, is that species of averment which is made use of to contradict any statement or charge in the bill, which, if uncontradicted, would be to do away with the effect of the matter pleaded. The most common case in which this form of averment is used is, where notice or fraud is alleged in the bill, for the purpose of obviating some anticipated defence which may be set up by the defendant.¹ It is to be observed, that in *Meadows v. The Duchess of Kingston*,² Lord Bathurst seemed to be of opinion, that notice and fraud were to be denied, by way of averment in the plea, in cases only where the denial made part of the equitable defence, as in the cases of purchase for valuable consideration, where the want of notice creates the equitable bar: but in *Devie v. Chester*,³ a decree establishing a modus having been pleaded to a bill for tithes, in which the plaintiff stated that the defendant set up the decree as a bar to his claim, and, to avoid the effect of the decree, charged that it had been obtained by collusion, and stating facts tending to show collusion, the Lord Chancellor was of opinion that the defendants, not having denied the collusion by averments in the plea, although they had done so by answer in support of the plea, the plea was bad in form, and he overruled it accordingly.

This brings us to the consideration of the cases, in which it is necessary that a plea should be supported by an answer.⁴ We have before seen,⁵ that wherever a bill, or part of a bill, the substantive case made by which may be met by a plea, brings forward facts which, if true, would destroy the effect of the plea, those facts must be negated by proper averments in the plea: otherwise, they will be considered as admitted, and so deprive the defendant of the benefit of his defence. A plea, however, cannot be excepted to: and, as it is not necessary that an averment in a plea should do more than generally deny the facts charged in the bill,⁶ the plaintiff might, if it were not possible to require an answer from the defendant, in addition to his plea, be deprived of the indefeasible right which he has to examine the defendant upon oath, as to all the matters of fact stated in the bill which are neces-

¹ See *Fish v. Miller*, 5 Paige, 26.

² Ld. Red. 277, n.; Amb. 756, 761.

³ Ld. Red. 277, n.; see also *Hoare v. Parker*, *ibid.*; 1 Bro. C. C. 578, 580; 1 Cox, 224, 228.

⁴ See Story Eq. Pl. § 681 *et seq.*, and notes; *Sims v. Lyle*, 4 Wash. C. C. 303, 304. In Massachusetts, under Rule 10, of the Rules of Practice in Chancery, "in any case, in which the bill charges fraud or combination, a plea to such part must be ac-

companied with an answer supporting the plea, and explicitly denying the fraud or combination, and the fact on which the charge is founded." So under 32d Equity Rule of the United States Courts, where a plea is such, that an answer is required to support it, it will be overruled unless such answer is put in. *Hagthorp v. Hook*, 1 Gill & J. 270.

⁵ *Ante*, p. 612.

⁶ Ld. Red. 275, 297.

sary to support his case.⁷ To obviate this result, the rule under the * old practice (where an answer was always necessary), was, *615 that any statement or charge in the bill affording an equitable circumstance in favor of the plaintiff's case against the matter pleaded (such as fraud or notice of title), must be denied by way of answer.¹ In general, an answer in support of a plea could not be required in those cases where such negative averments as those above stated were not necessary; where the defence was by a pure plea, that is, a plea merely suggesting matter in avoidance of the plaintiff's right to sue, as stated in the bill, an answer in support of the plea was not required.² In such a case, the defendant, by his plea, admitted the plaintiff's case, and so full and complete was the admission, that if, after argument, issue was joined upon the truth of the plea, and the plea found false, there was an end of the dispute, and the plaintiff was entitled to a decree upon the implied admission of his case.³ Where, however, a plea was in substance negative, though in form affirmative, it was held, that it must be accompanied by an answer as to the allegations, which, if true, would have disproved the plea.⁴

The same principle also required, that a negative plea should be supported by an answer in those cases only in which the bill stated or charged facts by way of evidence of the plaintiff's right. It was required in those cases, because the plaintiff, having a clear right in equity to a discovery of all matters within the knowledge of a defendant which would enable him to support his case,⁵ it would have been against that principle if a defendant could, by merely denying the existence of the claim, have deprived the plaintiff of the means of proving its validity.⁶

Under the present practice, if no interrogatories are filed, the defendant need only aver the facts necessary to render the plea a complete equitable bar to the case made by the bill, and need not put in any an-

⁷ Wigram on Disc. 50. Where the plaintiff waives the necessity of an answer being put in on oath, if the defendant puts in a plea to the bill, he need not support it by answer. *Heartt v. Corning*, 3 Paige, 566.

¹ *Ld. Red.* 298; see, as to answering the statement or charge, *Denys v. Locock*, 3 M. & C. 205, 234; 1 Jur. 605; *Chadwick v. Broadwood*, 3 Beav. 530, 539; 5 Jur. 359; *Piatt v. Oliver*, 1 McLean, 295; *Bellows v. Stone*, 8 N. H. 280. If a bill sets forth matter which may avoid a bar to the suit, it must be particularly and precisely denied in the answer. *New Eng. Bank v. Lewis*, 8 Pick. 113, 117; *Bogardus v. Trinity Church*, 4 Paige, 178; *Souzer v. De Meyer*, 2 Paige, 574.

[A plea in Equity must state facts not conclusions; and if it rely on matter in the bill, must, in addition to the averment of such matter, negative the material facts stated in avoidance, and be accompanied by an answer giving the discovery to which the

complainant may be entitled in regard to those facts. *Greene v. Harris*, 11 R. I. 5; *Whitthorne v. St. Louis Mut. Life Ins. Co.*, 3 Tenn. Ch. 147.]

² See *Wheeler v. Piper*, 3 Jones Eq. (N. C.) 249.

³ Wigram on Disc. 56; *Wood v. Strickland*, 2 V. & B. 158; *Brownsword v. Edwards*, 2 Ves. S. 243; *Webster v. Webster*, 1 Sm. & G. 489; 4 De G., M. & G. 437.

⁴ *Harland v. Emerson*, 8 Bligh, N. S. 62.

⁵ *Sanders v. King*, 6 Mad. 61; 2 S. & S. 277; *Yorke v. Fry*, 6 Mad. 65; *Thring v. Edgar*, 2 S. & S. 274, 281; *Hardman v. Ellames*, 5 Sim. 640, 649; 2 M. & K. 732; *C. P. Coop. t. Brough*, 351.

⁶ *Story Eq. Pl.* §§ 670, 671, 681. A naked negative plea denying a partnership is not sufficient. It must be supported by an answer. *Innes v. Evans*, 3 Edw. Ch. 454; see *Everitt v. Watts*, 3 Edw. Ch. 486; *Hall v. Noyes*, 3 Bro. C. C. 483, 488, note. [*Seifred v. Peoples' Bank*, 1 Baxt. 200.]

swer in support of the plea. If interrogatories are filed, the principles of the old cases, with respect to an answer supporting the plea, still remain in force.

The cases in which it is necessary that a plea should be supported * by an answer, may be very conveniently divided into :

1. Those where the plaintiff admits the existence of a legal bar, and alleges some equitable circumstances to avoid its effect, and interrogates as to these circumstances; and, 2. Those where the plaintiff does not admit the existence of any legal bar, but states some circumstances which may be true, and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of a plea, and interrogates as to such circumstances.¹

1. With respect to the first class of cases, the limits to which the plea and answer respectively extend are plainly marked, and create no difficulty. The most simple cases of this class are those in which pleas are put in to bills brought to impeach a decree, on the ground of fraud used in obtaining it; ² to avoid the effect of a judgment by a Court of ordinary jurisdiction; ³ to set aside a release; ⁴ or an award; ⁵ or to open a stated account.⁶ In all these cases, and others which fall under a similar principle, the bill admits the existence of a fact which, taken alone, would be conclusive against the plaintiff, and then proceeds to state specific grounds why it should not have that effect; and the defendant, if interrogated, must answer the interrogatories as to these specific grounds.⁷

If the defendant be interrogated as to the equitable circumstances stated as the ground for relief, it makes no difference whether the bill be so framed that the bar be introduced by way of substantive statement, and the equitable circumstances averred for the purpose of affording ground for relief, in setting aside the bar; or whether the bar be merely suggested as a pretence set up by the defendant, and the equitable matter be introduced to avoid its effect.⁸ It sometimes, however, happens, that the plaintiff introduces the fact which would constitute the bar, in the form of a pretence, and meets it by naked denial, without interrogating as to any circumstances which might disprove it: in such cases, it seems that the defendant should merely plead the fact, and that there is no need of any other answer than the averments in the plea.⁹

2. With respect to the second class of cases before referred to, as those in which it is necessary that a plea should be accompanied by an answer, the limits to which the plea and answer are to extend are not so easily defined. It may, however, be laid down, as a general

¹ Hare on Disc. 30.

² Ld. Red. 243.

³ *Ib.* 255.

⁴ *Ib.* 262.

⁵ *Ib.* 260.

⁶ *Ib.* 259.

⁷ Hare on Disc. 33.

⁸ *Roche v. Morgell*, 2 Sch. & Lef. 721.

⁹ Hare on Disc. 30.

rule, that where no ostensible bar is, by the bill, admitted *to *617 exist, and yet the defendant wishes to plead in bar to the bill,

he must distinguish those facts which, if true, would not invalidate or disprove his plea, and plead to the relief and discovery sought as to them; and then, if interrogated as to the facts which, if true, would disprove or invalidate his plea, or to matters which are specially alleged as evidence of such facts, he must answer as to such facts and matters.¹

In former times, the application of these rules was a matter of very considerable difficulty, in consequence of the Court requiring of a defendant the greatest accuracy in the form of a joint plea and answer, and treating any deviation from the strict practice as a fatal objection to the validity of such a defence. In the first place, the defendant had to make it distinctly appear to what part of the bill he pleaded, and to what part he answered. Then, if it appeared to the Court that the plea covered more of the bill than the defendant was entitled to cover by it, it was overruled; or, on the other hand, if the answer extended to any portion of the bill properly covered by the plea, it was equally liable to be overruled.² The result of this extreme strictness was, that sometimes in cases to which a defence by plea and answer was strictly applicable, the bill might have been so framed as to render it practically impossible for the defendant to avail himself of such a form of pleading.³

This strict operation of the rules of pleading has, however, been materially modified: for now, it is provided no plea is to be held bad and overruled upon argument, only because such plea does not cover so much of the bill as it might have extended to, or because the answer of the defendant extends to some part of the same matter as is covered by the plea.⁴

These provisions were intended to meet the case of some part

¹ Hare on Disc. 34; and see *Hunt v. Penrice*, 17 Beav. 525; 18 Jur. 4; *Young v. White*, 17 Beav. 532; 18 Jur. 277.

² Story Eq. Pl. § 688, and notes. If the defendant answers to any matters covered by his plea, he overrules the plea. *Bolton v. Gardner*, 3 Paige, 273; *Chase's case*, 1 Bland, 217; *Ferguson v. O'Harra*, 1 Peters C. C. 493; *Clark v. Saginaw City Bank*, Harring. Ch. 240; *Bangs v. Strong*, 10 Paige, 11; *The Bank v. Dugan*, 2 Bland, 254. When an answer contains more than is strictly applicable to the support of the plea, it overrules the plea. *Stearns v. Page*, 1 Story, 204. If the defendant answers as to those matters, which by his plea he has declined to answer, he overrules the plea. *Souzer v. De Meyer*, 2 Paige, 374; see *Sims v. Lyle*, 4 Wash. C. C. 303; *Piatt v. Oliver*, 1 McLean, 295; *Robertson v. Bingley*, 1 McCord Ch. 352; *Joyce v. Gunnels*, 2 Rich. Eq. 259; *Bogardus v. Trinity Church*, 4 Paige, 178. If an answer commences as an answer to the whole bill, it overrules the plea or

demurder to any particular part of the bill, although such part is not in fact answered. *Leacraft v. Dempsey*, 4 Paige, 124; *Summers v. Murray*, 2 Edw. Ch. 205. An answer which is broader than the plea, in that it denies allegations not denied by the plea, overrules the plea. *Lewis v. Baird*, 3 McLean, 56. So when there is a plea and no answer is required to support it from any charges in the bill requiring a discovery; in such case an answer is impertinent and overrules the plea. Story Eq. Pl. 688.

[Since the adoption of the rule that a defence which could be made by plea may be made by answer, the answer is, in such case, a plea supported by an answer. *Greene v. Harris*, 11 R. I. 5.]

³ *Denys v. Locock*, 3 M. & C. 238; 1 Jur. 605.

⁴ Ord. XIV. 8, 9. A defendant cannot, under these rules, simultaneously plead and demur to the whole bill. *Lowndes v. Garnett & Moseley Gold Mining Company*, 2 J. & H. 282; 8 Jur. N. S. 694.

*618 of * the same ground being accidentally covered by each defence ; and do not justify two distinct defences, by plea and answer ;¹ nor do they in any way, interfere with the rule which renders it necessary that the plea should not cover a greater portion of the bill than that to which the defendant is strictly entitled to apply it.² Consequently, it is still incumbent upon the pleader to distinguish accurately between the parts to which he intends to plead, and those to which he intends to answer.

With respect to affirmative pleas, the difficulty of ascertaining the part of the bill to be answered is not, in general, very great. The most simple cases of this sort are those in which the bill, without expressly admitting or suggesting the existence of a legal or equitable bar, either by direct statement or by way of pretence, introduces and interrogates as to facts which are inconsistent with it, obviously for the purpose of anticipating and avoiding such a defence if set up. As, where a plaintiff, for the purpose of avoiding the effect of a plea of the Statute of Limitations, without intimating such purpose, states and interrogates as to circumstances which have arisen within the time of limitation, by which his claim has been admitted or revived : in such cases, a plea of the Statute of Limitations must be accompanied by an answer as to all such circumstances :³ otherwise, such circumstances will be considered as admitted, and will have the effect of overruling the plea. And so, where a plaintiff, in order to avoid the effect of a plea of purchase for valuable consideration, without notice, states and interrogates as to matters, the effect of which would be to show that the defendant had notice of the plaintiff's title, the defendant must accompany his plea by an answer as to such facts, and such facts shall be excepted from the plea.⁴

The same rule applies to all cases of a similar description ; and no distinction appears to exist between cases in which the matter in avoidance of the anticipated plea is stated in the bill by way of pretence, and those in which it occurs in the statement. Thus, if a bill be filed for the specific performance of an agreement, to which, if not in *619 writing, the Statute of Frauds would be a bar, it * is usual, in order to avoid a demurrer, to state the agreement to be in writing,¹ and to found an interrogatory on such statement, and then it is

¹ See *Mansell v. Feeney*, 2 J. & H. 313, where, to a bill for the accounts of an alleged partnership, a plea of no partnership, accompanied by an answer, raising the defences of laches and the Statute of Limitations, was held bad for duplicity. See also *Lowndes v. Garnett & Moseley Gold Mining Company*, *ubi sup.*

² *Salmon v. Dean*, 3 M'N. & G. 344, 348; 14 Jur. 245; *Hewitt v. Hewitt*, 11 W. R. 849, V. C. K.

³ *Bayley v. Adams*, 6 Ves. 586, 598. A plea of the Statute of Limitations is bad, unless accompanied by an answer supporting it, by a particular and precise denial of all the facts and circumstances charged in the

bill, and which in Equity may avoid the statute. *Goodrich v. Pendleton*, 3 John. Ch. 384; *Bloodgood v. Kane*, 8 Cowen, 360; *Lingan v. Henderson*, 1 Bland, 282; *Moreton v. Harrison*, 1 Bland, 393; *Bolton v. Gardner*, 3 Paige, 273.

So the answer must deny all the charges in the bill, which may avoid the bar by showing a new promise. *Chapin v. Coleman*, 11 Pick. 331.

⁴ *Lord Portarlington v. Soulby*, 6 Sim. 356.

¹ *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 566; see *Walker v. Locke*, 5 Cush. 90; *ante*, p. 561, n. 2.

necessary that a plea of the statute should be supported by an answer, denying the agreement to have been in writing.² And where several collateral facts are stated and interrogated to, as evidence of the agreement having been in writing, those collateral facts must also be answered.³

It is true, that, in all the above cases, the bar afforded by the plea appears, to a certain extent, to have been anticipated by the person who framed the bill, and who, therefore, so framed it as to avoid the bar, if set up; but the rule applies to all cases where the interrogatories are founded on matter stated in the bill, which, if true, would negative the plea, and whether such matter is stated incidentally, or in anticipation of any expected defence.⁴

The rule that allegations which, if true, would disprove the plea, must be answered, applies to pleas which are negative in substance, if they are affirmative in form.⁵

In the case of negative pleas the rule is, that when a defendant puts in a plea which has the effect of negating the plaintiff's title, he need not accompany it by an answer, as to any of the facts upon which that title depends, unless discovery is specially sought by the bill, and he is required to answer interrogatories as to such facts.⁶ If, however, this is done, the defendant is bound to accompany his plea by an answer as to such facts.⁷ The correctness of this rule has been questioned;⁸ but it seems to be now established.

Although a defendant, pleading a negative plea, exonerates himself from answering to any fact to which the plea extends, yet as the plaintiff is entitled to discovery from the defendant of all matters necessary to support his case, he has, consequently, a right to compel the defendant to answer specifically to all the facts stated in his bill, to which he considers it necessary to require an answer, in order to enable him to make out his claim by means of the evidence which may be afforded by the defendant's admission.⁹ Thus, if a bill were to be filed, alleging a partnership, and insisting * that the existence of such *620 partnership was made out by certain documents, or by settlements of accounts and admissions, it would not be sufficient to plead to such a bill a mere denial of the existence of the partnership;¹ the defendant must go further, and answer as to all the circumstances insisted

² *Ib.* 566; see also *Morison v. Turnour*, 18 Ves. 175, 182; *Spurrier v. Fitzgerald*, 6 Ves. 548, 555. Where the defendant in a suit for specific performance, pleads the Statute of Frauds, and answers, admitting the contract, the answer overrules the plea. *Episcopal Church v. Leroy*, Riley Ch. 156, per Johnson Ch.; but see *Ash v. Daggy*, 6 Ind. 259.

³ *Evans v. Harris*, 2 V. & B. 361, 364.

⁴ *Crow v. Tyrrell*, 2 Mad. 397, 409; *Bailie v. Sibbald*, 15 Ves. 185; *Roche v. Morgell*, 2 Sch. & Lef. 721; *Jones v. Davis*, 16 Ves. 262, 265; *Hunt v. Penrice*, 17 Beav. 525; 18 Jur. 4; *Young v. White*, 17 Beav. 532; 18 Jur. 277.

⁵ *Harland v. Emerson*, 8 Bligh. N. S. 62.

⁶ *Thring v. Edgar*, 2 S. & S. 274, 281.

⁷ *Sanders v. King*, 6 Mad. 61; 2 S. & S. 277; *Yorke v. Fry*, 6 Mad. 65.

⁸ See cases cited, *Wigram on Disc.* 142.

⁹ For a case where it was held, that defendant need not, under the new practice, answer as to certain facts, because they could not be made use of as evidence, see *Young v. White*, 17 Beav. 532; 18 Jur. 277.

¹ *Evans v. Harris*, 2 V. & B. 361, 364; *Harris v. Harris*, 3 Hare. 450, 453; 8 Jur. 978; *Mansell v. Feeney*, 2 J. & H. 313.

upon as evidence of the partnership.² This was the principle acted upon by Sir John Leach V. C. in *Sanders v. King*,³ where his Honor laid down the rule, that a plea which negatived the plaintiff's title, though it protected a defendant generally from answer and discovery as to the subject of the suit, did not protect him from answer and discovery as to such matters as were specially charged as evidence of the plaintiff's title. He afterwards repeated the same rule, in the case of *Thring v. Edgar*;⁴ and it was acted upon both by Lord Brougham and Sir Lancelot Shadwell V. C., in *Hardman v. Ellames*.⁵

In cases where the bill alleges that the defendant has admitted the plaintiff's title, the defendant, if he puts in what is in effect a plea of no title, must, if interrogated, answer as to the admission, although the plaintiff does not require discovery of it "as evidence" of his title.⁶

In the case of *Thring v. Edgar*, the plea was overruled solely upon the ground that the accompanying answer extended to facts not charged as evidence to rebut the matter of the plea;⁷ but it appears that it was also objectionable, in that the plea excepted from the bill the only allegation which constituted the title itself, and which it was the object of the plea to traverse. This objection was not adverted to by Sir John Leach V. C. in his judgment on the case, but has since been made the subject of comment by Lord Cottenham, in the case of *Denys v. Locock*,⁸ where he held, that a similar objection was fatal to the validity of a negative plea. The equity of the bill, in that case, depended upon an alleged promise: the object of the negative plea was to deny the fact that this alleged promise was ever made. Upon this Lord Cottenham said: "The plea negatives the allegation of the promise. What I particularly observe upon is, that, first it takes out of the bill the allegation of the promise, and then denies it. Now I apprehend that is not correct, and that no such plea can be supported. A negative plea is a mere traverse; it differs from an ordinary plea, inasmuch as the ordinary plea admits the truth of the bill, but states some matter
*621 *dehors*, which destroys the effect of the * allegation, and which assuming the allegation to be true, would be a defence." "A negative plea, however, is a mere traverse of that which constitutes the plaintiff's title. Now, to traverse that which is not alleged on the face of the bill, — to take out of the bill an allegation, and then by plea to negative the allegation, — is a mode of proceeding which leaves the record in a state which renders it impossible for the Court afterwards to deal with it." "Now, in point of fact, the bill to which the plea pleads, contains no allegation of promise at all; and the only way of trying how that would operate, is to suppose issue to be taken on the plea;

² See *Innes v. Evans*, 3 Edw. Ch. 454; *Everett v. Watts*, 3 Edw. Ch. 486.

³ 6 Mad. 61; 2 S. & S. 277; see also *Yorke v. Fry*, *ubi sup.*

⁴ 2 S. & S. 281.

⁵ 5 Sim. 640, 650; 2 M. & K. 732, 744;

C. P. Coop. t. Brough. 351, 360. [*Wilson v. Hammond*, L. R. 8 Eq. 323.]

⁶ *Harland v. Emerson*, 8 Bligh. N. S. 62.

⁷ See 2 S. & S. 281.

⁸ 3 M. & C. 205, 233, 235; 1 Jur. 605.

[See the comment of Prof. Langdell on these cases in his summary of Eq. Pl. 66-68.]

how would it be to be tried? It would be an issue taken on the traverse only; on the negative of that which nobody has affirmed."

The rule in *Thring v. Edgar* is applicable only to those facts which are covered by the plea; and with respect to collateral facts, or facts which are stated in the bill, as occurring since the title of the plaintiff is alleged to have arisen, the defendant is bound to answer, if interrogated, as to them. In this respect, there is no distinction between negative pleas, and pleas of any other description.

We now come to the consideration of the cases in which it is necessary that a plea should be accompanied by an answer, as to deeds, papers, and other documents in the defendant's possession, custody, or power.¹ This question is not of so much importance as it formerly was: because it is no longer necessary to file interrogatories, in order to obtain a discovery of such documents;² and the Court has expressed its determination to discourage, as much as possible, exceptions for insufficiency in answering them.³ The necessity for such an answer must, generally, depend upon the nature of the individual case; so far, however, as the subject is susceptible of a reduction into rules, the following are those by which it is regulated.

Where a bill states a case for the plaintiff, and interrogatories are filed, asking whether the defendant has in his possession documents, whereby the matters stated in the bill would appear, and the defendant pleads a pure affirmative plea, not denying any part of the plaintiff's case, he will not be required, indeed ought not, to answer, as to the possession of the documents: because the documents, being only charged in the bill to be of importance, as proving the plaintiff's case, which the defendant, by his plea does not controvert, the production of the documents would be unnecessary. * Thus, where defendants *622 pleaded the Statute of Limitations, but did not answer an allegation in the bill, "that they had in their possession books and documents relating to the matters aforesaid, or some of them," Sir Lancelot Shadwell V. C. held, that an objection to the plea, on the ground of the omission of such an answer, could not be sustained; he thought, that unless the allegation in the bill had gone further, and had averred that by the documents, or some of them, it would appear that a promise had been given within six years, the mere allegation that the defendants had in their possession papers relating to the matters aforesaid, and from which, if produced, the matters aforesaid would appear, was immaterial: there not being any allegation in the bill of any promise having been made within six years; and that, consequently, it was not necessary for the defendants to negative such an allegation, either by averments in their plea, or by answer in support of it.¹

¹ See Story Eq. Pl. § 683.

² Such discovery may be obtained on summons at Chambers; see 15 & 16 Vic. c. 86, § 18; and see *post*, Chap. XLII., *Production of Documents*.

³ Kidger v. Worswick, 5 Jur. N. S. 37, V.

C. W.; Barnard v. Hunter, 1 Jur. N. S. 1065, V. C. W.; Law v. London Indisputable Society, 10 Hare Ap. 20; see also Read v. Woodroffe, 24 Beav. 421.

¹ MacGregor v. East India Company, 2 Sim. 452, 455.

It is evident, from the above case, that if the bill had contained any allegation of a promise within six years, the Vice-Chancellor would have held, that the charge as to the documents ought to have been answered; and it may be laid down as a rule, that wherever the bill states any facts which are inconsistent with the defendant's plea, or which would take the plaintiff's case out of the operation of it, and interrogatories are filed, asking whether the defendant has in his possession documents relating to the subject-matter of the suit, it will then be necessary to accompany the plea by a discovery of the documents in the defendant's possession: for, as the introduction of such matter in the bill renders it imperative on the defendant to accompany his plea by an answer as to those facts, that answer, to be complete, must extend to the documents inquired after: because, as they are alleged to relate to the matters before mentioned, and the facts which go to negative the defendant's plea are amongst those matters, it may happen that the documents in the possession of the defendant will afford important evidence, to enable the plaintiff to avoid the effect of the plea. Thus, where a bill was filed by persons claiming an estate, as heirs of A., *ex parte maternâ*, and the defendant pleaded that another person was the heir of A., *ex parte paternâ*, the Court overruled the plea: because it did not answer as to a correspondence, by which it was charged in the bill that the defendant had admitted the plaintiff's title.²

Although the general rule is, that an interrogatory asking whether
 *623 the defendant has documents in his possession, from * which the matters stated in the bill would appear, must be answered, whenever there are facts stated in the bill which are inconsistent with the plea, yet, it does not apply to those cases where the bill misstates the effect of deeds which form the substance of the plea, and are stated in it. Thus, where a plaintiff claimed as heiress-at-law of a person who had devised real estates to various persons in tail, with ultimate remainder to his own right heirs, and alleged, by her bill, that the several estates tail had been determined by failure of issue, and that no valid recovery had been suffered, or, if it had, that the property had been so settled that she, the plaintiff, was still entitled as right heir of the original testator, and that it would so appear if the defendant would produce the deeds creating the tenant to the *præcipe*, and leading or declaring the uses of the recovery; and the defendant pleaded the recovery, and set forth the substance of the deeds making the tenant to the *præcipe*, and leading the uses of the recovery, under which it was apparent that the plaintiff had no title: the plea was held, by Sir John Leach V. C. to be good, although not supported by an answer as to the deeds, which his Honor held to be unnecessary, as the plea was, in fact, a direct denial of the averment, that the estate was so settled that the plaintiff was entitled to it.¹

² *Emerson v. Harland*, 3 Sim. 490, 492;
 see also *Hardman v. Ellames*, 5 Sim. 640,
 650; 2 M. & K. 732, 744: *Harris v. Harris*,
 3 Hare, 450, 455; 8 Jur. 978.

¹ *Plunkett v. Cavendish*, 1 R. & M. 713,
 718.

Perhaps the best course which a pleader can pursue in cases of this description is, in general, to consider how far any part of the matter alleged in the bill partakes of the nature of a special replication. If the matter charged amounts only to a general denial of the facts pleaded, the discovery is not necessary: because, then, the documents sought form part of the defendant's case only, and when the cause comes to be heard on the truth of the case, as put in issue by the plea, the plaintiff (his case being admitted by the plea) will not require the assistance of the documents in the defendant's possession to establish his right; and the defendant will derive no benefit from his plea, unless he can prove it to be true. If, on the contrary, the charge amounts to a special replication, that is, to a statement of facts, which, admitting the plea to be true, goes to do away with its effect, there the documents required may be important to assist the plaintiff in making out his own case, namely, the facts alleged in derogation of the plea: in such cases, therefore, there must be a discovery as to those documents, if required by the plaintiff.

With respect to negative pleas, the rule may be stated to be in conformity with the principles before adverted to: namely, that if a plaintiff indicates, by his interrogatories, that he requires an answer as to documents alleged to be in the defendant's possession, * in *624 proof of his title, the defendant must make the discovery; thus, if the interrogatories ask whether the defendant has in his possession documents from which the truth of the matters stated in the bill would appear, he must, if he negatives the plaintiff's title by his plea, accompany his plea by an answer as to those documents.¹ The plaintiff is entitled to a discovery of them, in order to enable him, in the language of Lord Brougham, "to negative the negative plea."² When, on the other hand, the interrogatories ask whether the documents are in the possession of the defendant, but do not ask whether from such documents the truth of the matters in the bill would appear, then it is presumed that, according to the rule in *Thring v. Edgar*,³ they ought not to be answered.⁴

It may be collected from the preceding observations, that an answer in support of a plea is no part of the defence.⁵ The defence is the matter set up by the plea; the answer is that evidence which the plaintiff has a right to require and to use, to invalidate the defence made by the plea; and the plaintiff is entitled to make use of it, not only upon the hearing of the cause, upon the issue raised by the plea, after the plea shall have been decided to be a good bar upon argument, but upon the argument of the plea itself, before any evidence can be given,⁶ for the purpose of counterproving the plea, by reading from it any facts or

¹ *Mansell v. Feeney*, 2 J. & H. 313.

² *Hardman v. Ellames*, 2 M. & K. 744; C. P. Coop. t. Brough. 36j.

³ 2 S. & S. 274, 281.

⁴ See, however, *Rigby v. Rigby*, 15 Sim. 90; 10 Jur. 126.

⁵ Ld. Red. 244, n.; [*Greene v. Harris*, 11 R. I. 5.]

⁶ Ld. Red. 244, n.

admissions which may negative the matters pleaded or averred in the plea.⁷ The answer, then, being no part of the defence, but only what the plaintiff has a right to require to enable him to avoid that defence, it follows, that it must be full and clear, otherwise it will not support the plea: for the Court will intend all matters alleged in the bill, to which the plaintiff is entitled to require an answer, to be against the pleader, unless they are fully and clearly denied.⁸ Thus, if a bill is filed to set aside a decree, or other instrument, on the ground of fraud, and the defendant pleads the decree or instrument sought to be set aside, in bar, the defendant must answer the facts of fraud alleged, so fully as to leave no doubt on the mind of the Court that, upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud cannot be established. If the answer should not be full in all material points, the Court will presume that the fact of fraud may be capable of proof in the point not fully answered, and will, therefore, not deem the answer sufficient to support the plea, and upon that ground will overrule the plea.⁹

Although an answer in support of a plea is required to be full *625 * and clear, yet, if the equitable matters charged are fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered.¹ In such cases, however, the plaintiff is not precluded, by the circumstance of the Court having held, upon the argument of the plea, that the charges in the bill are sufficiently denied to exclude intentment against the pleader, from afterwards excepting to the sufficiency of the answer, in any point in which he may think it defective.² He may also obtain leave to amend his bill, and thereby obtain an answer to any matter which may not have been so extensively stated or interrogated to as the case would warrant, or to which he may apprehend that the answer, though full in terms, may have been, in effect, evasive.³

The cases above referred to, as those in which the plea must be accompanied by an answer, are those only in which some fact or matter is stated or charged by the bill, which, if true, would have the effect of overruling the plea. There are cases, however, in which, even though no equitable circumstances are alleged in the bill, to defeat the bar offered by the plea, when, in fact, a pure plea may be pleaded, yet the defendant may support his plea by an answer, touching matters not charged in the bill.⁴ Thus, in the case of a plea of purchase for valuable consideration, a defendant may deny notice in his answer, as well

⁷ *Hildyard v. Cressy*, 3 Atk. 303; *Hony v. Hony*, 1 S. & S. 569, 580.

⁸ *Ld. Red.* 298; *Hildyard v. Cressy*, *ubi sup.*; *Gordon v. Shaw*, 14 Sim. 393.

⁹ *Ld. Red.* 244.

¹ *Ib.* 299; *Walter v. Glanville*, 5 Bro. P. C. ed. Toml. 555; *S. C. nom. Waters v. Glanville*, *Gillb. Rep.* 184. The only way of testing the sufficiency of an answer in support of a plea is, to consider every allegation

in the bill which is not sufficiently denied by the answer, as true; and then to inquire, whether these facts being admitted, the plea is a sufficient bar to the claim of the plaintiff for relief. *Bogardus v. Trinity Church*, 4 Paige, 178, 197.

² *Ld. Red.* 239.

³ *Ld. Red.* 245.

⁴ *Ib.* 299; *Beames on Pleas*, 37; *Forbes v. Skelton*, 2 Sim. 335, 345; 1 Jur. 117.

as in his plea: because, by so doing, he does not put anything in issue which he would cover by his plea from being put in issue.⁵ A defendant may also, by this means, put upon the record any fact which tends to corroborate his plea, so as to enable him afterwards to prove it. An answer of this sort is termed an answer *in aid* or *in subsidium* of the plea;⁶ and differs from what is usually termed an answer in support of a plea, in being an answer which the defendant is not obliged to put in, for the purpose of avoiding the effect of any equitable ground which may be alleged in the bill, for avoiding the bar offered by the plea.

SECTION II. — *The different Grounds of Pleas.*

A plea may be either to the relief, or to the discovery, or to both. If it is a good plea to the relief, it will be also good to the *discovery,¹ in the same manner that a demurrer which is valid *626 as to the relief prayed, is, as has been already mentioned, good to the discovery sought by the bill.² In *James v. Sadgrove*,³ the question was raised whether a defendant, pleading to the relief, could nevertheless give the discovery sought by the bill, without overruling his plea; and Sir John Leach V. C. said: "Admitting that a defendant may, at his pleasure, answer the whole bill, though he pleads to the relief, it does not follow from thence that he may plead to the relief and part of the discovery only, and at his pleasure, answer the rest of the bill: such a partial answer can serve no useful purpose, and the rule applies here, that he who submits to answer at all, must answer fully;" unless in those cases in which, as will be hereafter shown, he may protect himself from such discovery by plea to the discovery.

Pleas in Equity, to the relief prayed by the bill, have usually been ranged under the heads of pleas: To the jurisdiction; To the person of the plaintiff or defendant; and, In bar of the suit. This arrangement is the one recognized by Lord Redesdale, and Sir George Cooper;⁴ but the learned author of the "Treatise on the Elements of Pleas in Equity" has added another head of plea to those before enumerated; namely, Pleas to the bill. It appears to be the opinion of Mr. Beames, that pleas in Equity are primarily divisible into: pleas in abatement, and pleas in bar. He observes, that, "in a work on pleading at Law, pleas are thus described: 'Pleas are of two sorts — in abatement and in bar: the former question the propriety of the remedy, or legal suffi-

⁵ For. Rom. 58.

⁶ *Ibid.*

¹ See Story Eq. Pl. § 312; *Chapin v. Coleman*, 11 Pick. 337. A plea may be bad as to the relief, but good as to the discovery. *United States of America v. McRae*, L. R. 3 Ch. Ap. 79. Where the defendant wishes to avoid a full discovery, on the ground that there is a fact which defeats the plaintiff's

equity, he must allege such fact by plea. *Weisman v. Heron Mining Co.*, 4 Jones Eq. (N. C.) 112.

² *Ante*, p. 548; but in order that a plea may be good to the discovery, it must not be in terms confined to the relief. *King v. Heming*, 9 Sim. 59.

³ 1 S. & S. 4, 6.

⁴ *Ld. Red.* 219; *Coop. Eq. Pl.* 236.

ciency of the process, rather than deny the cause of action; the latter dispute the very cause of action itself; and that it is impossible to read this passage without perceiving how perfectly applicable it is to pleas in Equity, and how strongly appropriate, as marking the distinction between pleas to the jurisdiction, to the person, and the bill, and pleas in bar: the three former classes, while they question the propriety of the particular remedy or of the suit, tacitly concede the existence of a cause of suit; but the latter dispute the very cause of suit itself.”⁵ It is, however, to be observed, that it nowhere appears that any practical

consequence results, in Equity, from the distinction between *627 pleas in abatement and pleas in bar.⁶ * In the following observations, therefore, the distinction of pleas into pleas in abatement and pleas in bar will not be further noticed, but the different grounds of pleas will be offered to the consideration of the reader according to the above-mentioned arrangement.¹ Before we proceed, however, to a more minute discussion of pleas, according to the above distribution, it will assist the reader to point out in what respect pleas of each class differ from those of the other classes, and this will be done as briefly as possible, in the words of the learned writer himself:—

I. Those pleas which are commonly termed pleas to the jurisdiction, do not proceed the length of disputing the right of the plaintiff in the subject of the suit, nor allege any disability on the part of the plaintiff to prosecute the suit; but simply assert that the Court of Chancery is not the proper Court to take cognizance of those rights.²

II. Pleas to the person do not dispute the validity of the rights which are made the subject of the suit, or deny that the Court has jurisdiction over them;³ but they assert that the plaintiff is incapacitated to sue, or that the defendant is not the person who ought to be sued.

III. Those pleas in Equity, also, which Mr. Beames distinguishes as pleas to the bill, “do not dispute the validity of the right made the subject of the suit,” nor contend that generally the Court has not jurisdiction over it, nor do they allege that the plaintiff is under any disability to sue, or that the defendant ought not to be sued; but they assert that the suit, as it appears on the record, is defective to answer the purpose of complete justice, or ought not, for some other reason, to proceed.⁴

IV. Pleas in bar may be distinguished from all other pleas, as they

⁵ Beames on Pleas, 58.

⁶ It is stated in *Merrewether v. Mellish*, 13 Ves. 435, 437, that Lord Thurlow said he did not know what a plea in abatement in Equity was. This observation, however, must have been made by his Lordship with reference to the practical results of such a distinction; for the use of the term “plea in abatement,” as distinguished from a plea in bar, occurs in the *Practical Register*, 326, ed. Wyatt, and

many other books, and has been repeatedly used in the same manner by Lord Thurlow himself; see *Newman v. Wallis*, 2 Bro. C. C. 143; *Gun v. Prior*, 1 Cox, 198; 2 Dick. 657; see also Beames on Pleas, 58, *notis*.

¹ And see Story Eq. Pl. § 705.

² Beames on Pleas, 55; Story Eq. Pl. § 706.

³ Beames, 56; Story Eq. Pl. § 706.

⁴ Beames, 59, 60; Story Eq. Pl. § 706.

admit the jurisdiction of the Court, and do not dispute the ability of the plaintiff to sue, and the liability of the defendant to be sued, and tacitly concede that there are none of those objections to the suit which constitute the grounds of pleas to the bill; but yet they allege matter, which, if true, destroys the claim made by the suit, and, by showing that the right made the subject of the suit has no existence, or that it is vested in the defendant, they put an end to all litigation respecting it.⁵

Having thus stated the leading distinctions between the different classes of pleas above pointed out, we shall proceed to consider the particular pleas to relief under each head.

* 1. Pleas to the jurisdiction, as we have seen, do not dispute *628 the rights of the plaintiff in the subject of the suit, but simply assert, either: 1. That they are not fit objects of cognizance in a Court of Equity; or, 2. That the Court of Chancery is not the proper Court to take cognizance of those rights. That these are the only grounds of plea which can be put in to the jurisdiction seems to be generally admitted: for it is clear, that a plea that the subject of the suit is not cognizable in any municipal Court of justice whatever, could not prevail; because such a plea would amount to nothing more than that the subject of the suit is one upon which no action or suit can be maintained, which is, in effect, a plea in bar; not a plea to the jurisdiction of a particular Court, but of all Courts: which would be absurd, and repugnant in terms.¹

1. The generality of cases in which a Court of Equity has no jurisdiction, cannot easily be so disguised in a bill as to avoid a demurrer; but there may be instances to the contrary; and in such cases, a plea of the matter necessary to show that a Court of Equity has no jurisdiction, will hold.² Thus, where a bill was filed to restrain the setting up outstanding terms in bar to an action of ejectment, a plea that there were no outstanding terms was allowed;³ and so, it is presumed, if the jurisdiction were attempted to be founded on the loss of an instrument, a plea showing the existence of the instrument, and that it is in the power of the plaintiff to obtain the production of it, would be admissible.⁴

⁵ Beames, 62; Story, Eq. Pl. § 706.

¹ *Nabob of Arcot v. East India Company*, 3 Bro. C. C. 292, 301; *S. C. nom. Nabob of the Carnatic v. East India Company*, 1 Ves. J. 371, 388; Story Eq. Pl. § 711. In case of a bill brought in a Court of Equity of a limited jurisdiction, as to persons, or as to subject-matter, if the bill should allege all the necessary facts to establish and support that jurisdiction, the defendant may also negative the existence of those facts by a plea to the jurisdiction. Story Eq. Pl. § 720. If, in the Courts of the United States, there are distinct averments of the citizenship of the plaintiff, and of that of the defendant, upon the record, so that upon the face of the bill the jurisdic-

tion attaches, the defendant, if he means to contest the alleged citizenship, must do it by a plea to the jurisdiction; for he is not at liberty to put the citizenship in issue by a general answer; as such an answer admits the jurisdiction of the Court to inquire into the general merits of the suit, and put them in issue. Story Eq. Pl. § 721; *Livingston v. Story*, 11 Peters, 351, 393; *Dodge v. Perkins*, 4 Mason, 435; see *Bank of Bellows Falls v. Rut. & Bur. R. R. Co.*, 28 Vt. 470.

² *Ld. Red.* 222.

³ *Armitage v. Wadsworth*, 1 Mad. 189, 195; *Dawson v. Pilling*, 16 Sim. 203, 209; 12 Jur. 388.

⁴ *Ld. Red.* 222.

2. A plea that the Court of Chancery is not the proper Court to have cognizance of the plaintiff's case, arises principally where the suit is for land within a county palatine;⁵ or where the defendant claims the privileges of an university;⁶ or other particular jurisdiction, such as that of the Benchers of the Inns of Court.⁷ Of this description, *629 also, is a plea that the defendant * is an officer of another Court of competent jurisdiction, and, therefore not to be drawn from his duties in that Court for the purpose of defending a suit in another.¹

It is a rule, that the Court of Chancery being a superior Court of general jurisdiction, nothing shall be intended to be out of its jurisdiction which is not shown to be so.² It is requisite, therefore, in a plea to the jurisdiction of the Court, both to allege that the Court has not jurisdiction, and to show by what means it is deprived of it.³ It is likewise necessary to show what Court has jurisdiction;⁴ and if the plea omits to set forth these particulars, it is bad in point of form.⁵

It is also a rule, that a plea to the jurisdiction must show that the particular jurisdiction, alleged to be entitled to the exclusive cognizance of the suit, is able to give a complete remedy.⁶ A plea, therefore, of privilege of the University of Oxford, to a bill for specific performance of an agreement, touching lands in Middlesex, was overruled: because the university could not give complete relief.⁷ It is to be observed also, that if a suit be instituted against different persons, some of whom are privileged, and some not,⁸ or if one or more of the defendants are not amenable to the particular jurisdiction,⁹ a plea will not hold;¹⁰ and so, if there is a particular jurisdiction, and yet the parties to litigate any question are both resident within the jurisdiction of the Court of Chancery: as upon a bill concerning a mortgage of the Isle of Sark, both mortgagee and mortgagor residing in England: the Court of Chancery will hold jurisdiction of the cause: for a Court of Equity *agit in personam*, and may give effect to its decree by constraining the person or property of the defendant till he perform it.¹¹

⁵ *Ib.* 223; see *ante*, p. 554.

⁶ *Ld. Red. 224*; see *Temple v. Foster*, Cary, 65; *Cotton v. Manering*, *ib.* 73; *Draper v. Crowther*, 2 Vent. 362; *Stephens v. Berry*, 1 Vern. 212; *Pratt v. Taylor*, 1 Cha. Ca. 237; *Anon.*, *ib.* 258.

⁷ *Cunningham v. Wegg*, 2 Bro. C. C. 241. For the plea in that case, see *Beames on Pleas*, 324.

¹ See *Gibson v. Whitacre*, 2 Vern. 83.

² *Ld. Red. 224*; *Earl of Derby v. Duke of Athol*, 1 Ves. S. 204; 2 Ves. S. 357.

³ *Ld. Red. 224*; *Nabob of Arcot v. East India Company*, 3 Bro. C. C. 292, 301; *S. C. nom. Nabob of the Carnatic v. East India Company*, 1 Ves. J. 371, 388.

⁴ *Ld. Red. 224*; *Strode v. Little*, 1 Vern. 59; *Earl of Derby v. Duke of Athol*, 1 Ves. S. 203; 1 Dick. 129; and see *Moor v. Somerset*, Nels. 51.

⁵ *Ld. Red. 224*; *Foster v. Vassall*, 3 Atk. 587; *Nabob of Arcot v. East India Company*, *ubi sup.*

⁶ *Ld. Red. 224*; *Newdigate v. Johnson*, 2 Cha. Ca. 170; *Wilkins v. Shalcroft*, 22 Vin. Ab. 10; *Green v. Rutherford*, 1 Ves. S. 463, 471.

⁷ *Draper v. Crowther*, 2 Vent. 362; *Stephens v. Berry*, 1 Vern. 212.

⁸ *White v. Lowgher*, Cary, 55; 22 Vin. Ab. 9; *Fanshaw v. Fanshaw*, 1 Vern. 246.

⁹ *Grigg's case*, Hutton, 59; 4 Inst. 213; *Hilton v. Lawson*, Cary, 48.

¹⁰ *Ld. Red. 225*; *Hendrick v. Wood*, 9 W. R. 588, V. C. W.; *Central Georgian Railroad Company v. Mitchell*, 13 W. R. 428, V. C. W.; 2 H. & M. 452; 11 Jur. N. S. 258.

¹¹ *Ld. Red. 225*; *Toller v. Carteret*, 2 Vern. 494; see also *Earl of Derby v. Duke of Athol*, *ubi sup.*; *Lord Cranstown v. Johnston*, 3 Ves. 170, 182; and see *Norris v. Chambers*, 29 Beav. 246; 7 Jur. N. S. 59; *ib.* 689, L. C.; 3 De G., F. & J. 583; [*Paget v. Ede*, L. R. 18 Eq. 118.]

It is said, that one plea only will be admitted to the jurisdiction, and that, therefore, if the defendant plead such a plea as is not sufficient in its nature, or plead the matter insufficiently, he will be put to answer.¹²

* We have before seen, that an objection on the ground of jurisdiction must be taken either by demurrer or plea, before answer: otherwise, the Court will entertain the suit, although the defendant may object to it at the hearing, unless it is in a case in which no circumstance whatever can give the Court jurisdiction.¹

II. Pleas to the person, like pleas to the jurisdiction, do not necessarily dispute the validity of the rights which are made the subject of the suit, but object to the plaintiff's ability to sue, or the defendant's liability to be sued, respecting them.² They are generally divided into such as regard the person of the plaintiff, and such as regard the person of the defendant.

1. Of the former kind are pleas of: Alienage;³ Outlawry; Attainder; Infancy; Coverture; Idiocy or lunacy; Bankruptcy;⁴ to which may be added, Pleas that the plaintiff does not sustain the character he assumes.⁵ All the above grounds of objection to the person of the plaintiff, except the last, have been before discussed.⁶ With respect to the last, it is to be observed, that the plea may either deny the existence of the person in whose behalf the bill has been exhibited, or of the character in which the plaintiff affects to sue; or it may show that, for some reason not disclosed in the bill, the title under which the plaintiff claims never vested in him.⁷ Thus, a plea may show, that the alleged plaintiff, or one of several plaintiffs, is a fictitious person;⁸ or was dead at the time of commencing the suit.⁹ So, if a plaintiff files a bill stating himself to sue as administrator or executor, a plea that he is not administrator or executor will be good.¹⁰ Where a plaintiff entitled himself as administrator, and the defendant pleaded that the supposed intestate was living, the plea was allowed.¹¹ A plea that the plaintiff is not heir to the person under whom he claims as heir, has also, as we have seen, been considered a good plea.¹² *In like manner, *631

¹² Wyatt's P. R. 325.

¹ *Ante*, p. 555. [The plea may show more than one reason why the Court has not jurisdiction. *Blake v. Blake*, 18 W. R. 944.]

² Beames on Pleas, 99.

³ A plea of "alien enemy" is sufficiently answered by a treaty of peace made after it was filed; and there is no need for the plaintiff to reply that fact; the Court is bound to notice it *ex officio*. *Johnson v. Harrison*, Litt. Sel. Cas. 226.

⁴ The objection that the plaintiff is bankrupt, and his assignee not a party, should be taken *in limine* by way of plea, and cannot be insisted on to avoid exceptions taken by the plaintiff to the answer. *Kittredge v. Claremont Bank*, 3 Story, 591.

⁵ Story Eq. Pl. § 722 *et seq.*

⁶ *Ante*, Chap. III., *Suits by Persons under Disability*. For forms of pleas of alien enemy,

see Beames on Pleas, 329; 2 Van Hey. 94; and of outlawry, and bankruptcy, and of plaintiff not sustaining his assumed character, *ib.* 96, 104, 106.

⁷ Story Eq. Pl. § 727.

⁸ Coop. Eq. Pl. 249; Com. Dig. Abatement, E. 16; Bac. Ab. Abatement, F.; 1 Wils. 302; Gilb. C. P. 248.

⁹ Coop. Eq. Pl. 249; Bac. Ab. Abatement, L.; Com. Dig. Abatement, E. 17.

¹⁰ *Winn v. Fletcher*, 1 Vern. 473; *Simons v. Milman*, 2 Sim. 241. Such a plea, however, is untenable, if the plaintiff take out letters of administration before the hearing. *Horner v. Horner*, 23 L. J. Ch. 10, V. C. K.; see also *ante*, p. 318.

¹¹ *Ord. v. Huddleston*, 2 Dick. 510, 512; cited 1 Cox, 198.

¹² *Ante*, pp. 604, 609; see *Bourke v. Kelly*, 1 Hogan, 172; *Gleason v. Cook*, 1 Hogan,

a plea that the plaintiff is not a partner, has been allowed to a bill filed by a person claiming in that character.¹ Upon the same principle, if, from any circumstance not stated in the bill, it can be shown that nothing ever vested in the plaintiff, or that the title which the plaintiff had has been transferred to another, the defendant may show the circumstance by way of plea.

2. Pleas to the person of the defendant are more limited than those to the person of the plaintiff: for it is a rule at Law, that persons who are disabled to sue, cannot plead their own disabilities, when they are themselves sued.² This rule is equally applicable to proceedings in Courts of Equity, in all cases where the suit seeks to compel the performance of a duty by the defendant.

It will not, however, apply to cases where the proceeding is *in rem*, and the disability is of such a nature that, besides the personal disqualification which it imposes, the interest in the defendant's property which is the subject of the suit has become vested in another.³ Upon this principle, it is presumed that persons outlawed or attainted of treason or felony may state their outlawry or attainder to the Court by way of plea, for the purpose of showing that whatever interest they had in the property is vested in the Crown;⁴ in the same manner that bankrupts may, if sued respecting property which has become vested in their assignees, plead their bankruptcy, whether it happened before or after the bill was filed, in abatement of the suit.⁵ In fact, such a plea amounts to no more than a plea of want of interest in the subject-matter of the bill.

The rule, that a person who is under disability cannot plead his own disqualification, will not extend to cases where the disqualification is only partial; thus, it seems that a woman, sued as a *feme sole*, may plead that she is *covert*.⁶

A defendant may also plead that he is not the person he is alleged to be, or does not sustain the character he is stated to bear: such as heir, executor, or administrator.⁷ He may likewise show, that he is not sole heir, executor, or administrator, and that others are joined with him in those capacities;⁸ such a plea, however, partakes more of the

297: Story Eq. Pl. § 727. Formerly, it was doubted whether it was not necessary, in such cases, to state in the plea who was the heir-at-law; but now it seems that such a statement is unnecessary. Jones v. Davis, 16 Ves. 262, 264, 265. [As to a plea that the plaintiff is not the son of defendant, see Wilson v. Hammonds, L. R. 8 Eq. 323.]

¹ *Ante*, pp. 605, 620.

² Beames on Pleas, 122.

³ Turner v. Robinson, 1 S. & S. 3.

⁴ *Ante*, p. 156.

⁵ Turner v. Robinson, *ubi sup.*; see also Turner v. Nicholls, 16 Sim. 565; Lane v. Smith, 14 Beav. 49; *ante*, p. 158. A similar rule applied, in the case of insolvent debtors;

see Story Eq. Pl. § 732. [For form of plea, see Pepper v. Henzell, 2 H. & M. 486.]

⁶ Beames on Pleas, 130; Story Eq. Pl. § 732. [But an order is, it seems, necessary to enable her to put in the plea separate from her husband. Heygate v. Thompson, L. R. 8 Eq. 355; Illeginson v. Wilson, 17 L. J. Ch. 22.]

⁷ *Ibid.*; Ld. Red. 234; Cooke v. Gittings, 21 Beav. 497; and see Jones v. Williams, 10 Jur. N. S. 1068; 13 W. R. 1, V. C. S.; Hinde v. Skelton, 2 H. & M. 690; Tempest v. Lord Camoys, 1 W. N. 16; 14 W. R. 327, M. R.; Story Eq. Pl. § 732. For forms of such plea, see 2 Van Hey. 95.

⁸ Beames on Pleas, 130.

nature of a plea for want of parties than * of a plea to the person. *632
He may also plead the disability of a co-defendant.¹

If a defendant has not that interest in the subject of a suit which can make him liable to the demands of the plaintiff, and the bill, alleging that he has or claims an interest, avoids a demurrer, he may plead the matter necessary to show that he has no interest.² Thus, where a witness to a will was made a defendant to a bill, brought by an heir-at-law to discover the circumstances attending the execution, and the bill contained a charge of pretence of interest by the defendant: though a demurrer for want of interest was overruled, because it admitted the truth of the charge to the contrary in the bill, yet the Court expressed an opinion that the defence might have been made by plea.³

It is to be observed, that a plea of want of interest in the defendant is proper only where the case is such that he cannot satisfy the suit by general disclaimer.⁴

III. It has been already stated,⁵ that the object of pleas to the bill is to show that, although the plaintiff may be entitled to the relief he asks against the defendant, he is not entitled to have it in that suit; or that the bill as framed, is insufficient to answer the object.⁶

1. Where a bill seeks relief, a defendant may plead that there is another suit already depending, in this or in another Court of Equity, for the same matter.⁷ This plea corresponds with the *exceptio litis pendentis* of the civilians, and is analogous to the plea, at Common Law, that there is another action depending.⁸

But, although it is necessary that the first suit should be for the same matter as the second, the second suit need not be for the whole matter embraced by the first; ⁹ it is, however, requisite * that *633 the whole effect of the second suit should be attainable in the first; ¹ and if it appears upon the face of the plea that this is not the

¹ *Sergrove v. Mayhew*, 2 M'N. & G. 97, 99; [Taylor v. Wemyss, L. R. 8 Eq. 512.]

² Ld. Red. 235.

³ *Plummer v. May*, 1 Ves. S. 426; see also *Cartwright v. Hatley*, 3 Bro. C. C. 238; 1 Ves. J. 292; *Story Eq. Pl.* § 734.

⁴ Ld. Red. 235; see *post*, Chap. XVI.

⁵ *Ante*, p. 627.

⁶ See *Story Eq. Pl.* § 735.

⁷ Ld. Red. 246; *Coop. Eq. Pl.* 272; *Beames on Pleas*, 134; *Ord. XIV.* 6, 7; see also *Long v. Storie*, 9 Hare, 542; *Way v. Bragaw*, 1 C. E. Green (N. J.), 213; see *Johnson v. Bower*, 4 Hen. & M. 487; *Curd v. Lewis*, 1 Dana, 352; *Cummins v. Bennet*, 8 Paige, 79; *Story Eq. Pl.* § 737; *Matthews v. Roberts*, 1 Green Ch. 338; *Cleveland, &c., R. R. Co. v. City of Erie*, 27 Penn. St. 380; *Brice v. Mallett*, 2 Hayw. 244. [It is a former bill brought by the same plaintiff, or some person in the same right, which is thus pleadable. *Dumford v. Dumford*, Rep. temp. Finch, 179; *Simpson v. Brewster*, 9 Paige, 245.] The defendant may content himself with stating the pendency and object of the former suit, and averring that the present suit was brought for the same

matters; *Beames on Pleas*, 330; *Eq. Drafts*, 658; *post*, Vol. III.; or he may omit the averment that the suits are for the same subject-matter, provided he states facts sufficient to show that they are so. *Flagg v. Bonnel*, 2 Stockt. (N. J.) 82; *Davison v. Johnson*, 1 C. E. Green (N. J.), 114. A plea of another suit pending should be taken before the hearing, and it can only be a good objection, when the first suit is between all the same parties, and a full decree can be therein had. *Hartell v. Van Buren*, 3 Edw. Ch. 20; see *post*, p. 635. For form of such pleas, see 2 Van Hey, 117.

[As to plea on the ground of splitting of causes, see Ld. Red. 221; *Dear v. Webster*, 15 W. R. 395.]

⁸ *Beames on Pleas*, 134.

⁹ *Moor v. Welsh Copper Company*, 1 Eq. Ca. Ab. 39, pl. 14; *Saunders v. Frost*, 5 Pick. 275, 276. See *Mann v. Richardson*, 21 Pick. 259.

¹ *Law v. Rigby*, 4 Bro. C. C. 60, 63; *Pickford v. Hunter*, 5 Sim. 122, 129; *Way v. Bragaw*, 1 C. E. Green (N. J.), 213, 218. [The former suit need not be between the same parties. *Green v. Neal*, 2 Heisk. 217.

case, the Court will at once overrule it.² It sometimes, however, happens that the second bill embraces the whole subject in dispute more completely than the first: in such cases, the practice appears to be to dismiss the first bill with costs, and to direct the defendants in the second cause to answer, upon being paid the costs of a plea allowed, which puts the case upon the second bill in the same situation that it would have been in if the first bill had been dismissed before the filing of the second.³

A plea of another suit depending will be good, whether the other suit be in this or any other Court of Equity in England.⁴ It will not however, be a good plea, if it is depending in a Court in another country; ⁵ therefore, such a plea will not prevail where the suit already pending is in Ireland,⁶ or in the colonies.⁷ Where the original suit has been commenced in a Court of inferior jurisdiction, the plea will not be good if

But its equity and effect should be the same. *Macey v. Childress*, 2 Tenn. Ch. 24.]

² *Pickford v. Hunter*, *ubi sup.*

³ *Crofts v. Wortley*, 1 Cha. C. 241; Ld. Red. 248.

⁴ Ord. XIV. 6, 7; Ld. Red. Cae. 246; *Behrens v. Sieveking*, 2 M. & C. 602. [Upon issue taken to the plea of a former suit pending in another Chancery Court of the same State, the plea was held to be sustained to the extent that the two suits were for the same matter and the same object, but the dismissal of the bill to that extent was made without prejudice, and with leave, if the former suit should be discontinued before decree (the position of the parties being reversed in the two suits), to the complainant to file a supplemental bill to bring the fact before the Court, and for the same relief. And query, whether the plea is good, where the complainants are not the same in both suits, unless it shows that the former suit has proceeded to a decree. *Moore v. Holt*, 3 Tenn. Ch. 141. See, *infra*, 635, n. 8.] Where two Courts have concurrent jurisdiction, the fact that an appeal lies from one to the other, will not authorize a proceeding in the appellate Court, pending an action for the same cause in the Court below. *Cleveland, &c., v. R. R. Co. v. City of Erie*, 27 Penn. St. 380.

⁵ The mere pendency of a suit in a foreign Court, or in a Court of the United States, cannot be pleaded in abatement or in bar to a suit for the same cause in a State Court. *Mitchell v. Bunce*, 2 Paige, 606; *Salmon v. Wooten*, 9 Dana, 423; [*Hatch v. Spofford*, 22 Conn. 495, overruling] *Hart v. Granger*, 1 Conn. 154; see *Low v. Mussey*, 41 Vt. 393; *Brown v. Lexington & Danville R. R. Co.*, 2 Beasley (N. J.), 191.

[The pendency of a suit at Law in another State for the identical object and purpose is no defence to a bill in Equity, and, *à fortiori*, if the suit be by the defendant against the plaintiff in Equity. *Fulton v. Golden*, 10 C. E. Green, 353. And in Tennessee, an attachment bill by a creditor may be prosecuted, although the plaintiff is at the same time prosecuting a suit in the Chancery

Court of another State for the purpose of subjecting property of the debtor to the satisfaction of the same debt. *Lockwood v. Nye*, 2 Swan, 515.

The pendency of a prior suit at Law in a State Court is not a bar to a suit in a Circuit Court of the United States, or in the Supreme Court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action. *Stanton v. Embrey*, 93 U. S. 548. Nor is the pendency of a prior suit in Equity. *Insurance Co. v. Brune*, 96 U. S. 588. To a suit on the same claim. *Grider v. Apperson*, 32 Ark. 332. See also *Loring v. Marsh*, 2 Cliff. 522; *Smith v. Lathrop*, 44 Penn. St. 328; *Davis v. Morton*, 4 Bush, 444. And the pendency of a general creditor's bill in the State Court does not preclude a creditor, who is no party thereto, from bringing an action in a United States Court to recover judgment on his demands. *Parsons v. Greenville &c. R. Co.*, 1 Hughes, 279. But the pendency of a suit in a State Court of another State, in which property enough to satisfy the demand has been attached, is ground for the abatement of a suit in the Circuit Court of the United States. *Lawrence v. Remington*, 6 Biss. 44. The pendency of a suit against the defendant in another State cannot be pleaded in bar or in abatement of an action in the Courts of Illinois, even if between the same parties, and for the same cause of action. *Allen v. Watt*, 69 Ill. 655. See also *Grider v. Apperson*, 32 Ark. 332; *Cole v. Flitcraft*, 47 Md. 312. The defence is only available in the last suit, not in the first. *Ratzer v. Ratzer*, 2 Abb. N. Cas. 461. It is a plea in abatement, not in bar. *Sullings v. Goodyear Dental Vulcanite Co.*, 36 Mich. 313. And see *Phosphate Sewage Co. v. Molleson*, 1 App. Cas. 780, where a stay of proceedings in Scotland was refused because of the pendency of a suit for the same matter in England.]

⁶ *Lord Dillon v. Alvares*, 4 Ves. 357, 359.

⁷ *Foster v. Vassall*, 3 Atk. 587, 589; see also *Bayley v. Edwards*, 3 Swanst. 703, 710.

the defendant has avoided the effect of the suit, by going out of the jurisdiction of that Court.⁸

A suit depending must, to afford a good ground for a plea in Equity, be a suit in a Court of Equity ;⁹ and therefore, where an infant legatee sued an executor in the Ecclesiastical Court, and afterwards in Chancery, it was held that the suit depending in the Ecclesiastical Court could not be pleaded to the suit in Chancery : because there was not the same security for an infant's advantage in the Ecclesiastical Court, as in Chancery.¹⁰

* It appears to have been held formerly, that if after a suit * 634 commenced at Common Law, a bill should be exhibited in this Court, to be relieved for the same matter, the dependency of the action at Law might be admitted as a good plea, and the defendant would not be put to a motion for an election or dismissal.¹ The practice in this respect, has, however, undergone a material alteration ; and now, if a plaintiff sues a defendant at the same time and for the same cause at Common Law and in Equity, the defendant may, after full answer put in, or, in case no answer is required, after the expiration of the time for the service of interrogatories, obtain, as of course, on motion or petition,² an order that the plaintiff may take his election in which Court he will proceed ; and he cannot plead the pendency of the suit at Common Law, in bar of the suit in Equity.³

It is stated in an anonymous case in *Moseley*,⁴ that the objection that another suit is depending for the same matter, may, in the Court of Chancery, be taken by motion, instead of plea ; but in *Murray v. Shadwell*,⁵ Lord Eldon said, that, according to the practice, the regular way of obtaining this reference is by plea. There are cases, however, in which the Court will interfere to restrain a second suit brought against the defendant, for the same matter, upon motion, without requiring him to plead the pendency of the former suit ; as in the case of two or more suits, instituted on behalf of an infant for the same matter : in such case, the Court will, as we have seen, upon represen-

⁸ Ld. Red. 246.

⁹ See *Way v. Bragaw*, 1 C. E. Green (N. J.), 213 ; [*Fulton v. Golden*, 10 C. E. Green, 353.]

¹⁰ *Howell v. Waldron*, 2 Cha. Ca. 85.

¹ Beames's Orders, 177 ; Ld. Red. 249.

² See *post*, Chap. XIX. § 4, *Election*. For forms of motion paper and petition, see Vol. III.

³ See *post*, Chap. XIX. § 4, *Election* ; Ld. Red. 249 ; Ord. XLII. 5, 6, 7 ; see *Story Eq. Pl.* §§ 741, 742 ; *Livingston v. Kane*, 3 John. Ch. 224 ; *Sanger v. Wood*, 3 John. Ch. 416 ; *Rogers v. Vosburg*, 4 John. Ch. 84 ; *Gibbs v. Parkinson*, 4 Hen. & M. 415. Where a suit is pending for the same cause in a Court of Law, all that the defendant can ask, is an order putting the plaintiff to his election, whether he will proceed at Law or in Equity. But the plaintiff will not be put to his elec-

tion, unless the suit at Law is for the same cause, and the remedy afforded co-extensive and equally beneficial with the remedy in Equity. *Way v. Bragaw*, 1 C. E. Green (N. J.), 213 ; see *Conover v. Conover*, Saxton (N. J.), 409 ; *Rogers v. Vosburg*, 4 John. Ch. 84 ; 1 Hoff. Ch. Pr. 342 ; *Story Eq. Pl.* § 742. Where the remedies at Law and in Equity are inconsistent, any decisive act of the party, with the knowledge of his rights and of the facts, determines his election. *Sanger v. Wood*, 3 John. Ch. 416, 421. So if he neglects to make his election in proper time. *Conover v. Conover*, 1 Saxton (N. J.), 403, 409 ; *Rogers v. Vosburg*, 4 John. Ch. 84. He need not make his election until after the defendant has answered. *Conover v. Conover*, 1 Saxton (N. J.), 409.

⁴ P. 268.

⁵ 17 Ves. 353.

tation of the fact, immediately direct an inquiry which suit is most for the infant's benefit, without requiring the defendant to plead the pendency of another suit.⁶ It is to be observed, however, that in the case of suits instituted on behalf of infants, the reference is not to inquire into the fact of two or more suits having been instituted, but which of them is most for the benefit of the infant.

*635 * In the case, also, of creditors suing an executor or administrator, after a decree for an account at the suit of other creditors, the Court will, upon motion by the defendant, stay the proceedings in the second cause, without requiring him to plead the pendency of the first suit;¹ but both courses are open to him, and, in some cases, that of a plea may be more advantageous.²

It is not necessary to the sufficiency of a plea of this nature, that the former suit should be precisely between the same parties as the latter,³ for, if a man institutes a suit, and afterwards sells part of the property to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold, although filed by a different plaintiff.⁴ So, where one part-owner of a ship filed a bill against the ship's husband for an account, and afterwards the same part-owner and the rest of the owners filed another bill for the same purpose, the pendency of the first suit was held a good plea to the last;⁵ for, although the first bill was insufficient for want of parties, yet, by the second bill, the defendant was doubly vexed for the same cause. And where a decree has been made, upon a bill brought by a creditor on behalf of himself and all other creditors, and another creditor comes in, to take the benefit of the decree and prove his debt, and then files a bill on behalf of himself and all other creditors, the defendant may plead the pendency of the former suit: for a person coming in under a decree, is *quasi* a party.⁶ The proper way for a creditor to proceed, if the plaintiff in such original suit is dilatory, is by application to the Court for liberty to conduct the cause himself.⁷

It was said by Sir John Leach V. C. in *Houlditch v. The Marquis of Donnegal*,⁸ that the pendency of another suit for the same object, in a Court of concurrent jurisdiction, could not be pleaded in bar, before a decree in such other suit; this observation, however, can only be appli-

⁶ *Ante*, p. 69.

¹ *Post*, Chap. XIX., § 1, *Dismissing Bills and Staying Proceedings*.

² *Pickford v. Hunter*, 5 Sim. 122; see *Miers v. Zanesville & Maysville Turnpike Co.*, 11 Ohio, 273.

³ See *Hartell v. Van Buren*, 3 Edw. Ch. 20; [*Green v. Neal*, 2 Heisk. 217.]

⁴ *Ld. Red.* 248; *Moor v. Welsh Copper Company*, 1 Eq. Ca. Ab. 39, pl. 14; *Story Eq. Pl.* § 740.

⁵ *Durand v. Hutchinson*, *Ld. Red.* 248.

⁶ *Neve v. Weston*, 3 Atk. 557.

⁷ *Ld. Red.* 249.

⁸ 1 S. & S. 491, 492. [If the bill is by the same person, the plea would be good. *Aliter*, if by a different person, for the suit might not be brought to a decree. *Rogers v. King*, 8 Paige, 210; *Innes v. Lansing*, 7 Paige, 583; *Moore v. Holt*, 3 Tenn. Ch. 141; *Macey v. Childress*, 2 Tenn. Ch. 26; *Mortimer v. West*, 1 Swanst. 359; *Gage v. Lord Stafford*, 1 Ves. 544; *Venning v. Loyd*, 1 De G., F. & J. 207. And see where the former bill is by the defendant in the new suit. *Neafie v. Neafie*, 7 John. Ch. 4; *Fulton v. Golden*, 10 C. E. Green, 154.]

cable to creditors' suits, where, as in the case last put, the plaintiff in the second suit will not have become *quasi* a party to the first till after the decree. In other cases, all that seems to be necessary to a plea of this nature is, that there should be a suit actually pending: for which purpose, there need not have been more than either an appearance, or process requiring appearance.⁹ That one or other of such steps, at least, should have been taken, is, however, absolutely necessary.¹⁰

* It is to be observed, that a cross-bill, although between the *636 same parties as an original suit, cannot be met by a plea of this nature;¹ thus, it has been held that, after a bill brought in the Exchequer to foreclose a mortgage, the defendant may bring a bill in the Court of Chancery to redeem, and the pendency of the former suit is not pleadable.² And it seems that such a plea will not lie, in any case where the second bill was not brought on the same right as the first: so that a decree, dismissing the original suit, would not be a bar to a new proceeding; thus, where a plaintiff mistook his right, and being the executor of an administrator, conceived himself to be the personal representative of a deceased person, and filed a bill in that capacity, but afterwards, finding that he did not properly sustain the character he had assumed, obtained letters of administration *de bonis non*, and filed a new bill, a plea of the former suit depending was overruled by Lord Hardwicke;³ and we have seen, that a suit by a husband and wife, against the trustees of the wife's separate property, cannot be pleaded in bar to a subsequent suit by her and her next friend against the trustees and her husband, although the relief prayed in both suits is the same: because the first suit is considered as the suit of the husband alone, and a decree of dismissal in it would be no bar to the wife.⁴

From what has been before said, it is obvious that it is necessary to the validity of a plea of a former suit depending, that it should contain a distinct averment that the second suit is for the same matter as the first; and, therefore, a plea which did not expressly aver this, though it stated matter tending to show it, was considered as bad in point of form, and was overruled upon argument.⁵ The plea must also aver, that there have been proceedings in the suit: as appearance, or process requiring appearance at the least.⁶ It seems likewise regular to aver,

⁹ Ld. Red. 246; *Anon.*, 1 Vern. 318.

¹⁰ *Moor v. Welsh Copper Company*, 1 Eq. Ca. Ab. 39, pl. 14.

¹ See Story Eq. Pl. § 400.

² *Lord Newbury v. Wren*, 1 Vern. 220; [*Brandon Man. Co. v. Prime*, 14 Blatchf. 371.]

³ *Huggings v. York Buildings Company*, 2 Atk. 44; Story Eq. Pl. § 739.

⁴ *Ante*, p. 108; *Reeve v. Dalby*, 2 S. & S. 464; see also *Stooke v. Vincent*, 1 Coll. 527, 529; 9 Jur. 99.

⁵ Ld. Red. 246; *Devie v. Lord Brownlow*, 2 Dick. 611. But in *McEwen v. Broadhead*, 3 Stockt. (N. J.) 131, 132, the Chancellor, in giving judgment, said: "But, if the facts

stated in the plea plainly show that the second suit is for the same subject-matter as the first, I can see no reason why it should be held necessary that there should be an express averment to that effect. It would be accurate and correct pleading to make the averment, but accuracy may demand, what is not required as absolutely necessary. The Courts are not as much inclined to regard mere technicality in pleading as they were three quarters of a century ago." And he held that a plea of another suit pending might be good, though it did not contain that averment.

⁶ Ld. Red. 247.

that the suit is still depending:⁷ though it has been held that a positive averment of that fact is not necessary.⁸ It is, however, necessary

that the time when the suit was instituted should be distinctly
*637 *averred; and where a plea merely stated that in or about such

a year the plaintiff filed his bill, praying the like account, and the same relief with the present, Lord Hardwicke held the plea to be defective in form.¹

A plea of a former suit depending, being clearly a good plea, if true, the plaintiff, if he dispute the truth thereof, should not set it down for argument, but the plaintiff should, on motion or petition of course,² obtain an order for an inquiry as to the truth thereof.³ If such order, and a certificate in pursuance thereof, are not obtained within one month after the filing of the plea, the defendant may obtain, as of course, an order to dismiss the bill with costs.⁴ If, instead of taking this course, the plaintiff set down the plea for argument, it is considered that he admits the fact that a former suit for the same matter is depending, and the plea must, therefore, be allowed, unless it is defective in form.⁵ If, however, the plaintiff considers the plea defective in form, he may set it down for argument.⁶ In the case of *Jones v. Segueira*,⁷ the plaintiff, instead of obtaining an inquiry as to the truth of a plea of this kind, filed a replication; whereupon the defendant, after the expiration of a month from the filing of the plea, moved upon notice, that the bill might be dismissed with costs, and an order to that effect was made by Lord Lyndhurst on appeal: who, moreover, was of opinion, that the application ought to have been made by a motion of course.⁸ Where, however, a plaintiff, after a plea of another suit depending to part of the bill, and an answer to the rest, without moving for the usual reference, replied generally to the answer, without noticing the plea, and witnesses were examined on both sides, and the cause heard and decided in favor of the plaintiff, the defendant, who petitioned for a rehearing, was held to

⁷ Ld. Red. 247.

⁸ *Umlin v. Hudson*, 1 Vern. 332; see the forms of such a plea, 2 Van Hey. 117; *Beames on Pleas*, 330.

¹ *Foster v. Vassall*, 3 Atk. 587. A plea of proceedings in another Court, must also show that the object is the same, and that the Court has competent jurisdiction, and that the result of the proceedings therein would be conclusive, so as to bind every other Court. *Behrens v. Sieveking*, 2 M. & C. 602, 603.

² For forms of motion paper and petition, see Vol. III.; and see *Leigh v. Turner*, 14 W. R. 361, M. R.

³ "The correct practice is a reference to a Master." *McEwen v. Broadhead*, 3 Stockt. (N. J.) 132.

⁴ Ord. XIV. 6, 7. If the defendant takes the objection by answer, instead of plea, it seems that he will not be allowed his costs, although the inquiry be answered in his favor. *Long v. Storie*, 9 Hare, 542; 16 Jur. 349.

⁵ Ld. Red. 247. [The practice mentioned in the text is based upon a rule of Lord Clarendon. *Beames's Orders*, 176; *Jones v. Segueira*, 1 Phil. 83. That rule has not been followed in the United States. In New York, the practice was regulated by an order of Court. 1 Hoff. Ch. Pr. 225. In New Jersey, by statute. *McEwen v. Broadhead*, 3 Stockt. 132; *Matthews v. Roberts*, 1 Green Ch. 338. In Tennessee, by the Code, § 4393; *Olwell v. Montgomery*, 1 Tenn. Ch. 183; *Green v. Neal*, 2 Heisk. 217; *Macey v. Childress*, 2 Tenn. Ch. 23; *Allen v. Allen*, 3 Tenn. Ch. 145.]

⁶ *Tarleton v. Barnes*, 2 Keen, 632, 636.

⁷ 1 Phil. 82; 6 Jur. 183.

⁸ Where upon such plea, the defendant obtains the Master's report in favor of the truth of the plea, he cannot have an order to dismiss the plaintiff's bill on motion. But he must bring the case on to be heard upon the plea and the Master's report, to enable the Court to decide upon the validity of the plea. *Hart v. Phillips*, 9 Paige, 293.

have waived his plea, and was not allowed to avail himself of the objection arising from the plaintiff's irregularity.⁹

If the result of an inquiry into the truth of the plea is, that *both suits are for the same matter, the plea will then be allowed; *638 but if otherwise, the plea will be overruled. Where, however, it appeared that the second suit embraced more objects than the first, a special order was, as we have seen, made, dismissing the first bill with costs, and directing the defendant to answer the second, upon being paid his costs, as upon plea allowed.¹

As the pendency of a former suit, unless admitted by the plaintiff, is made the immediate subject of inquiry, a plea of this kind is not put in upon oath.²

2. A plea which offers any matter tending to show that the bill, as framed, is insufficient to answer the purposes of complete justice, must, it is evident, be ranked amongst pleas to the bill; for it does not, in general, dispute the right of the plaintiff, as stated in the record, but merely offers a reason why the suit should not proceed as framed. The only reported cases of pleas of this description are, where the objection arises from want of sufficient parties to the bill. There can be no doubt, however, that if it can be shown to the Court that with the parties already before it, the suit has been so framed as to be insufficient to answer the purpose of complete justice, a plea suggesting the facts necessary to make such a case would prevail.

The question of necessary parties to a suit has been before so fully discussed, that it is unnecessary to enter any further into it in this place.³ It is merely requisite to remind the reader, that when the defect is not apparent upon the face of the bill, it may be pointed out to the Court by plea: the peculiarities arising from which course of proceeding have been before made the subject of inquiry.⁴

IV. Whatever shows that there is no right which can be made the subject of suit, or whatever is a complete and perpetual bar to the right sued for, may constitute the subject of a plea in bar; or, as it is expressed in a work on Pleadings at Law, "Whatever destroys the plaintiff's suit, and disables him for ever from recovering, may be pleaded in bar."⁵

Pleas in bar are usually ranked under the heads of: 1. Pleas of Acts of Parliaments; 2. Pleas of Matters of Record, or as of

⁹ *Lucas v. Holder*, 1 Eq. Ca. Ab. 41, pl. 3.

¹ *Crofts v. Wortley*, 1 Ch. Ca. 241; *ante*, pp. 632-634; and see *Leigh v. Turner*, 14 W. R. 361, M. R.

² *Umlin v. Hudson*, 1 Vern. 332; Ld. Red. 247. It is not very distinctly stated in the books whether the rule that a plea of this nature need not be upon oath, will apply where the suit already pending is in another Court. The reason for its adoption in cases where the suit is in the Court itself, is sufficiently evident when we consider that the pendency of it must be apparent from its own

proceedings, of which the Court always takes notice, without further evidence; but with respect to proceedings in another Court (unless they are in the state of perfect records, which can hardly be the case when the suit is still pending), the fact of the pendency of the suit must be established by evidence upon oath in the usual manner. See *post*, § 3. *Form of Pleas*.

³ *Ante*, Chap. V., *Parties to a Suit*.

⁴ *Ante*, p. 290.

⁵ *Beames on Pleas*, 160, citing *Law on Pl. 40*.

*639 *Record, in the Court itself, or some other Court; and 3. Pleas of Matters *in pais*.¹

1. Any statute, public or private, which may be a bar to the demands of the plaintiff, may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute.²

Amongst other statutes which may be thus set up in bar of the plaintiff's demands, may be mentioned the various statutes which have, from time to time, been passed for the limitation of the time within which actions or suits at Law may be commenced. Pleas of this description are called Pleas of the Statute of Limitations; and the statute which, until recent enactments, afforded the most ordinary grounds for pleas of this sort, was the 21 Jac. I. c. 16.³ By that Act, § 1, it is enacted that all writs of formedon must be sued out, and all entries into lands by persons having a right of entry must be made, within twenty years next after the title to the person suing out the writ or making the entry accrued; and, by § 3, that all actions upon the case (otherwise than for slander), or for account (other than such accounts as concern the trade of merchandise, between merchants and merchants, their factors or servants), and all actions for trespass, debt, detinue, replevin, &c., and the action of trespass *quare clausum fregit*, must be commenced within six years next after the cause of such action or suit, and not after. This statute, although its provisions apply only to actions or suits at Law, has, nevertheless, been considered as available as a bar to suits in Equity for analogous purposes, in cases where they were not commenced within the period limited by the Act;⁴ therefore, where a plaintiff's right to lands had accrued thirty years before the filing of the bill, the Court allowed a plea of the Statute of Limitations to prevail: the plaintiff having been so circumstanced that, although he could not bring an ejectment, he might have brought a bill in Equity. And so it has been held, that the statute may be pleaded to a bill to redeem a mortgage, if the mortgagee had been in possession twenty years.⁵

*640 The statute * may also be pleaded to a bill to prevent the setting

¹ Beames on Pleas, 160; Coop. Eq. Pl. 251; Story Eq. Pl. § 749. The arrangement adopted by Lord Redesdale is somewhat different; see *Ld. Red.* 236. For form of a plea in bar, see Vol. III.

² *Ld. Red.* 274. *Semble*, defendant may have the benefit of a statute extinguishing a right, without pleading it. *De Beauvoir v. Owen*, 5 Exch. 166, Cam. Seac.

³ See also 9 Geo. IV. c. 14, *post*, p. 645. For forms of pleas under this statute, see 2 Van Hey. 113, 114.

⁴ See *Ld. Red.* 273, n. (z); Coop. Eq. Pl. 251; Beames on Pleas, 161; Story Eq. Pl. § 751. The rule in Courts of Equity now is, that they will take notice of the Statute of Limitations, and apply it in the same manner as Courts of Law. *Conover v. Conover*, 1 Saxton (N. J.), 403; see *ante*, 559, 560, and notes; Story Eq. Pl. § 751, *et seq.*; Miller v.

McIntire, 6 Peters, 61; Stackhouse v. Barnston, 10 Sumner's Ves. 453, note (c), and cases cited; Townshend v. Townshend, 1 Bro. C. C. (Perkins's ed.) 555, note (d), and American cases cited; Watkins v. Harwood, 2 Gill & J. 307; Carroll v. Waring, 3 *ib.* 491; Harris v. Mills, 28 Ill. 44.

⁵ *Ld. Red.* 271, 272; Coop. Eq. Pl. 254; Beames on Pleas, 162; Story Eq. Pl. 757. Now, however, the statutes properly applicable to lands, rents, redemption of mortgages, &c., are the 3 & 4 Win. IV. c. 27; 7 Will. IV. & 1 Vic. c. 28; and see *post*, p. 598; Hardy v. Reeves, 4 Sumner's Ves. 466, note (b) and cases cited; Story Eq. Pl. § 757; Acherley v. Roe, 5 Sumner's Ves. 573, Perkins's note (a), and cases cited; Trash v. White, 3 Bro. C. C. (Perkins's ed.) 291, notes. If the mortgagee gets into possession, and continues in possession twenty years

up of an outstanding term, and for discovery:¹ and to a bill for discovery only:² though it was formerly considered that the latter could not be done.³

The statute may also be pleaded to a bill which seeks the payment of a debt, provided such debt be due upon simple contract. It appears, formerly, to have been considered, that although the statute is a bar to the claim of a debt, it would not operate as a bar to the discovery when the debt was due: for, if that had been set forth, it would have appeared to the Court whether the time limited by the statute had elapsed; but later decisions have been to the contrary, and a defendant pleading the statute, must not answer to that part of the bill which calls upon him to set out when the debt became due.⁴ If, however, the bill alleges that if the defendant would discover books and papers in his possession, the plaintiff would thereby be enabled to show that the debt became due, or was acknowledged since the period limited by the statute, the defendant must answer that part of the bill.⁵

The statute 21 Jac. I. c. 16, may also be pleaded to all bills for account, except where the account relates to the trade of merchandise between merchants: which species of account is, as we have seen, expressly excepted out of the statute.⁶ Thus, where one had received the profits of an infant's estate, and, after six years had elapsed from his coming of age, the infant brought a bill for an account, the Court held that the Statute of Limitations was a bar to such

without any acknowledgment of the mortgage title, the mortgagor is barred of his redemption. *Gates v. Jacob*, 1 B. Mon. 308; *Hatfield v. Montgomery*, 2 Porter, 58; *Phillips v. Sinclair*, 20 Maine, 269; *Demarest v. Wynkoop*, 3 John. Ch. 129. So when the statutory period necessary to bar a recovery at Law has passed, a foreclosure in Equity will be barred. *Harris v. Mills*, 28 Ill. 44. But an acknowledgment of the mortgage title within twenty years before filing the bill for redemption or for foreclosure, maintains the equity of redemption, or the right to foreclosure. *Hodde v. Healey*, 6 Madd. 181; *Rayner v. Castlee*, *ib.* 274; *Cheever v. Perley*, 11 Allen, 584. As where the mortgagee has treated it as a mortgage by keeping accounts, and in other ways. See *Glee v. Manhattan Co.*, 1 Paige, 48; *Fenwick v. Macey*, 1 Dana, 279; *Hughes v. Edwards*, 9 Wheat. 489; *Dexter v. Arnold*, 3 Sumner, 152; *Edsell v. Buchanan*, 3 Bro. C. C. (Perkins's ed.) 254, 256. The time is to be computed from the last period at which the parties treated the transaction as a mortgage. *Shepherd v. Murdock*, 3 Murph. 218.

¹ *Jeremy v. Best*, 1 Sim. 373, 375.

² *Beames on Pleas*, 275; *Gait v. Osbaldeston*, 1 Russ. 158; *Mendizabel v. Machado*, 1 Sim. 68, 77; *Macgregor v. East India Company*, 2 Sim. 452, 455; *Scott v. Broadwood*, 2 Coll. 447, 456; 10 Jur. 214; *Wigram on Disc.* 35; see also *Ld. Red.* 269, and *post*, Chap. XXXIV. § 2, *Bills of Discovery*.

³ *Hindman v. Taylor*, 2 Bro. C. C. 7, 10; *Scott v. Broadwood*, 2 Col. 447; *Hamilton v. Wood*, 3 Edw. Ch. 106; see the remarks upon the case of *Hindman v. Taylor*, cited in support of the text, in *Wigram on Discov.* (1st Am. ed.) Pl. 66, *et seq.* p. 33, *et seq.*, where the learned author expresses his dissent from the judgment of Lord Thurlow in that case, and cites the authorities which refer to and notice it. See *Mendizabel v. Machado*, 1 Sim. 68; *Macgregor v. East India Company*, 2 Sim. 452; *Cork v. Willock*, 5 Mad. 331; *Story Eq. Pl.* § 821 and notes, in which the author remarks that the reasoning of Mr. Wigram, dissenting from Lord Thurlow, is very able.

⁴ *Ld. Red.* 269.

⁵ *Ante*, p. 618.

⁶ The accounts must be "such as concern the trade of merchandise," "between merchant and merchant, their factors and servants." See *W. W. Story Contracts*, 702; *Blair v. Drew*, 6 N. H. 235; *Codman v. Rodgers*, 10 Pick. 118; *Spring v. Gray*, 5 Mason, 528; *S. C. 6 Peters*, 151; *Coster v. Murray*, 5 John. Ch. 522, 583, 592, 599; [*Price v. Upshaw*, 2 Humph. 142.] Unliquidated accounts between merchants in the capacity of principal and factor have been held to be within the exception. *Stiles v. Donaldson*, 2 Dall. 264; *S. C. 2 Yates*, 105. The exception of merchants' accounts does not apply to stated accounts. *Toland v. Sprague*, 12 Pet. 300.

suit, as it would be to an action at Common Law for the same purpose.¹ It is to be observed, that, notwithstanding the exception as to merchants' accounts in the third section, it has been held that the Statute of Limitations will operate as a bar, where the accounts have ceased six years before the filing of the bill.²

In *Jones v. Pengree*,³ it was doubted whether transactions between principal and agent came within the exception in favor of merchants' accounts. It has been decided, that transactions with a foreign Prince and his government, do not concern the trade of merchandise within this statute;⁴ and also that a letter of attorney from a merchant to authorize the getting in of debts, will not constitute the person thereby deputed a merchant, within the meaning of the exception.⁵ It may be mentioned, that the exception has been considered as applying only to merchants trading beyond sea, and not to inland merchants.⁶ The clause relating to merchants' accounts, also, is only applicable to cases where there are mutual accounts and reciprocal demands between two persons: it is inapplicable to accounts between a tradesman and his customer; and it has been determined that, in such accounts,
*642 and in all *others where the items are all on one side, the circumstance of the last item happening to be within six years, does not draw after it those which are of a longer standing.¹ In such cases, the proper course is, to plead the statute as to all the items which are within the statute, and answer as to the rest.

The Statute of Limitations, 21 Jac. I. c. 16, cannot be pleaded in

¹ *Lockey v. Lockey*, Prec. in Ch. 518. [See *Knox v. Gye*, L. R. 5 H. L. 656.] Long acquiescence and lapse of time are, by analogy, or in obedience to the Statute of Limitations, a bar to a bill for an account. *Acherley v. Roe*, 5 Ves. 565; *Baker v. Biddle*, 1 Bald. 394, 418; *Graham v. Torrance*, 1 Ired. Eq. 210; *Parks v. Rucker*, 5 Leigh, 149; *Rayner v. Pearsall*, 3 John. Ch. 578; *Burton v. Dickenson*, 3 Yerger, 112; *Drummond v. Duke of St. Albans*, 5 Ves. 439, note (3); *Andrew v. Wrigley*, 4 Bro. C. C. (Perkins's ed.) 125, 138, and notes; *Spring v. Gray*, 5 Mason, 527, 528; *Sherwood v. Sutton*, 5 Mason, 143; *Lewis v. Marshall*, 1 McLean, 17; *Raymond v. Simonson*, 4 Blackf. 83; *George v. Johnson*, 45 N. H. 456; *Atwater v. Fowler*, 1 Edw. Ch. 417; see also *Randolph v. Randolph*, 1 Hen. & M. 180; *Botifear v. Weyman*, 1 McCord Ch. 161; *Cave v. Saunders*, 2 A. K. Marsh. 64; *Love v. White*, 4 Hayw. 211; *Kingsland v. Roberts*, 2 Paige, 193; *Moore v. White*, 6 John. Ch. 360; *Ives v. Sumner*, 1 Dev. Eq. 338; *Bertien v. Varian*, 1 Edw. 343; *Farnum v. Brooks*, 9 Pick. 213. Between partners. *Cowart v. Perrine*, 3 C. E. Green (N. J.), 454; *George v. Johnson*, 45 N. H. 456.

[Delay in suing, which results in loss of evidence, and places the defendant at a disadvantage, will operate to bar relief, although the time allowed by the Statute of Limitations has not yet elapsed. *Lawrence v.*

Rokes, 61 Me. 38; *Harrison v. Gibson*, 23 Gratt. 212.]

² *Welford v. Liddel*, 2 Ves. S. 400; *Crawford v. Liddel*, cited 6 Ves. 582; *Jolliffe v. Pitt*, 2 Vern. 694; *Bridges v. Mitchell*, Gilb. 224; *Bunb. 217*; *Barber v. Barber*, 18 Ves. 286; *Coster v. Murray*, 5 John. Ch. 522, 531; *Spring v. Gray*, 528; S. C. 6 Peters, 151; *Union Bank v. Knapp*, 3 Pick. 36; *Jones v. Pengree*, 6 Ves. 680.

But in *Bass v. Bass*, 6 Pick. 362, it was held that the Statute of Limitations could not be pleaded to an account "concerning the trade in merchandise between merchant and merchant," although none of the items came within six years. See also S. C. 8 Pick. 187; *Mandeville v. Wilson*, 5 Cranch, 15; *Davis v. Smith*, 4 Greenl. 339; *M'Lellan v. Crofton*, 6 Greenl. 308; *Hancock v. Hancock*, 18 Pick. 30.

³ 6 Ves. 580, 582.

⁴ *Sturt v. Mellish*, 2 Atk. 612.

⁵ *Ib.* 613.

⁶ *Sherman v. Withers*, 1 Ch. Ca. 152; but see *Farrindon v. Lee*, 1 Mod. 269, 2 Mod. 311.

¹ *Coop. Eq. Pl.* 253; *Coster v. Murray*, 5 John. Ch. 522; *Buntin v. Lagow*, 1 Blackf. 375; *Kimball v. Brown*, 7 Wend. 322; *Ingram v. Sherard*, 17 Serg. & R. 347; *Gold v. Whitcomb*, 14 Pick. 188; [*Spring v. Gray*, 6 Pet. 151; *Price v. Upshaw*, 2 Humph. 142; *Craighead v. Bank*, 7 Yerg. 399].

bar to a trust;² and upon this ground it was held, that a demand upon the separate estate of a married woman was not barred: because all the separate estate of a *feme covert* is a trust.³ Upon the same principle, it is held, that where a debtor creates, by his will, a trust or charge for the payment of his debts out of real estate, such a trust will prevent the statute from operating upon a debt not barred at the time of the creation of the trust.⁴ The rule does not apply to a trust for the payment of debts out of personal estate;⁵ and it seems that a devise for the payment of debts will not have the effect of reviving debts barred by the statute, upon the death of the devisor.⁶

It may also be noticed that, in *Andrews v. Brown*,⁷ it was held, that although, if a man has a debt due to him, and has made no demand of it for six years, he is barred by the Statute of Limitations, yet if the debtor, after the six years, publish an advertisement in the Gazette, or any other newspaper, that if all persons, who have any debts owing to them from him, will apply to such a place they will be paid, the operation of the statute will be defeated; and in *Jones v. Scott*,⁸ the question was discussed, whether such a notice, by a personal representative, would have the same effect. In that case, however, the Court did not come to any express decision upon the point: though Lord Brougham appears to have intimated an opinion that it would.⁹ It is to be observed that, in *Jones v. Scott*, the advertisement requested all persons, having claims on the estate, to send in their statements prior to their being laid before a particular person, by whom the persons claiming were to submit them to be examined; and that (according to the reporter's marginal note) the Court appeared to think that such an advertisement would not take a debt, previously barred, out of the operation of the statute. It may here be mentioned, * that where *643 a debt had become barred by the statute after the death of the creditor, it was held to be revived by the debtor proving the creditor's will.¹

The principle of the rule, that the creation of a trust for the benefit

² *Hollis' case*, 2 Ventr. 345; *Sheldon v. Weldman*, 1 Cha. Ca. 26; *Freem.* 156. [The Statute of Limitations applies to all that class of trusts that become such by matter of evidence, but not to express trusts or trusts over which Equity has exclusive jurisdiction. *Shelby v. Shelby*, Cooke, 179; *Merriman v. Cannovan*, 1 Tenn.; *Leg. Rep.* 94.]

³ *Norton v. Turvill*, 2 P. Wms. 144.

⁴ *Burke v. Jones*, 2 V. & B. 275; *Hughes v. Wynne*, T. & R. 307, 309; *Hargreaves v. Michell*, 6 Mad. 326; *Rendell v. Carpenter*, 2 Y. & J. 484; *Scott v. Jones*, 4 Cl. & Fin. 382; *S. C. Jones v. Scott*, 1 R. & M. 255; see also *Freake v. Cranefeldt*, 3 M. & C. 499; 2 Jur. 1080. [See next note.]

⁵ *Jones v. Scott*, *ubi sup.*; *Lyon v. Colville*, 1 Coll. 449; *Evans v. Tweedy*, 1 Beav. 55, 58. [The reason is, that the personal estate is already liable by law for the pay-

ment of debts. And, for the same reason, where, as in the United States, the reality is already liable for debts, a devise for the payment of debts will not create a trust which will prevent the running of the statute. *Gardner v. Gardner*, 3 Mason, 178; *Hines v. Spruill*, 1 D. & B. Eq. 101; *Hubbard v. Epps*, 1 Tenn. *Leg. Rep.* 320; *Glen v. Maguire*, 3 Tenn. Ch. 698; *Perry on Trusts*, § 560.]

⁶ *Burke v. Jones*, 2 V. & B. 275, 291; see also *Executors of Fergus v. Gore*, 1 Sch. & Lef. 107; *Stackhouse v. Barnston*, 10 Ves. 453, 469; *Ex parte Roffey*, 19 Ves. 468, 470; *Stanton v. Knight*, 1 Sim. 482. [See *Poole v. Poole*, L. R. 7 Ch. App. 17, for a curious case on the subject.]

⁷ *Prec. in Cha.* 385.

⁸ 1 R. & M. 255; *Rev.* 4 Cl. & Fin. 383.

⁹ 1 R. & M. 270; but see 3 M. & C. 502.

¹ *Ingle v. Richards* (No. 2), 28 Beav. 366; 6 Jur. N. S. 1178.

of creditors, will prevent the application of the Statute of Limitations, extends to proceedings in bankruptcy; and, therefore, it was determined that, after a commission had issued, the Statute of Limitations did not prevail against the creditor of a bankrupt.² It was also held, that where a man had taken advantage of the Act for the relief of insolvent debtors, the statute did not apply; and that, where a person who had taken the benefit of the act twice had died, leaving assets more than sufficient to pay all the debts contracted after his second insolvency, the debts scheduled under his first insolvency were not barred by the statute.³

A decree for the payment of debts, under a creditor's bill for the administration of assets, is also considered as a trust for the benefit of creditors, and will, in like manner, prevent the statute from barring the demand of any creditor coming in under the decree;⁴ the creditor's demand, however, must not have been barred at the time when the suit was instituted: for, if the creditor's demand would have been barred by the statute before the commencement of the bill, the statute may be set up.⁵ It is to be remarked upon this point, that it has been held that it was the decree only which created the trust; and that the mere circumstance of the bill having been filed, although it might have been pending six years, would not take the case out of the statute;⁶ but according to the later decisions, it seems that the filing of the bill will operate by itself to save the bar of the statute, though the plaintiff, by delay in prosecuting the suit, may disentitle himself to relief.⁷ And the dismissal of the bill will not prevent the defendant, in a new suit, from taking the benefit of the statute.⁸

It may be noticed in this place, that, in *Ex parte Dewdney*,⁹ it was laid down by Lord Eldon, that, in the administration of assets under a creditor's bill, executors are not bound to plead the Statute of *644 Limitations.¹⁰ If the statute has not been taken advantage of * by the executors, and a decree for an account of debts has been pronounced, the statute may be set up in the course of the proceed-

² *Ex parte Ross*, 2 Glyn & J. 46.

³ *Barton v. Tattersall*, 1 R. & M. 237.

⁴ *Sterndale v. Hankinson*, 1 Sim. 393, 398; *Foster v. McKenzie*, 17 Beav. 414.

⁵ *Shewen v. Vanderhorst*, 1 R. & M. 347, 352; *Udike v. Doyle*, 7 R. I. 446, 460-462.

⁶ *Lake v. Hayes*, 1 Atk. 281; *Anon.*, 2 Atk. 1.

⁷ *Coppin v. Gray*, 1 Y. & C. C. C. 205, 207; 6 Jur. 312; *Purcell v. Blennerhassett*, 3 Jo. & Lat. 24, 45; *Forster v. Thompson*, 4 Dr. & War. 303, 318; *Hele v. Lord Bexley*, 20 Beav. 127.

⁸ *Sterndale v. Hankinson*, *ubi sup.*

⁹ 15 Ves. 498; *Alston v. Trollope*, L. R. 2 Eq. 205, M. R.

¹⁰ *Lord Castleton v. Lord Fanshaw*, 1 Eq. Ca. Ab. 305, pl. 13; *Prec. in Ch.* 99. [And the executor is entitled, in such a suit, to retain his own debt though barred by the

statute. *Stallschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166.] In *Scott v. Hancock*, 13 Mass. 164, it is said to be settled that an administrator is not bound to plead the general Statute of Limitations in bar to an action on a debt of his intestate. [So in Tennessee, although the heir may, to protect realty descended. *Pea v. Waggoner*, 5 Hayw. 1; *Brown v. Porter*, 7 Humph. 372. And if there are several heirs, one may plead the statute in protection of his share while the others do not. *Woodfin v. Anderson*, 2 Tenn. Ch. 331. And see *Briggs v. Wilson*, 5 De G., M. & G. 12, note; *Ritter's Appeal*, 23 Penn. St. 95; *Miller v. Dorsey*, 9 Md. 317. But see *contra*, *Patterson v. Cobb*, 4 Fla. 481. See also *West v. Smith*, 8 How. N. S. 402, 412.] See also *Smith's Estate*, 1 Ashmead, 352; but see the remarks of Bayley J. in *McCulloch v. Dawes*, 9 Dowl. & Ryl. 40, on this point.

ings under the decree, as well by a creditor or legatee, as by a personal representative,¹ against all the creditors except the plaintiff.²

The rule, that trusts are not within the Statute of Limitations, applies only between trustees and *cestui que trusts*:³ not between trustees or *cestui que trusts* and third persons; and, therefore, it has been held, that where an executor, or administrator, or trustee for an infant, neglects to sue within the time, the Statute of Limitations will bind the infant, and prevent his suing the debtor,⁴ although it would not prevent the infant from suing his trustee for a breach of trust; and so it has been determined, that the Statute of Limitations will bar a bill for an account of rent of land held of trustees.⁵ The rule also will not hold, where the claim is made against a trustee by implication; more especially where such implication is raised upon a doubtful point.⁶ The rule, in fact, can only be taken to apply to those cases where the possession of the trustee cannot be considered as adverse to that of the *cestui que trust*: if the possession of the trustee is adverse, the statute may be pleaded; thus, it was held, that in the case of parceners and joint-tenants, they are accountable to each other, without regard to the length of time, because the possession of one being the possession of all, there is a mutual possession between them; but it is otherwise in the case of tenants in common, where the possession of one may be adverse to that of the other.⁷ This distinction is clearly pointed out by Lord Redesdale, in *Hovenden v. Lord Annesley*,⁸ who lays it down as a rule, that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will * bar; but if a party is to be *645 constituted a trustee by the decree of a Court of Equity, founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time that the circumstances of the fraud were discovered.

¹ *Shewen v. Vanderhorst*, *ubi sup.*; *Moodie v. Bannister*, 4 Drew. 432; 5 Jur. N. S. 402; *Fuller v. Redman*, 26 Beav. 614.

² *Briggs v. Wilson*, 5 De G., M. & G. 12; *Fuller v. Redman*, *ubi sup.*; *Adams v. Waller*, 1 W. N. 200; 14 W. R. 783. [*Phillips v. Beal*, 32 Beav. 26. And as to the Court taking the objection, see *Alston v. Trollope*, 35 Beav. 466; L. R. 2 Eq. 205.]

³ In case of a direct trust, no length of time bars the claim between trustee and *cestui que trust*. *Cook v. Williams*, 1 Green Ch. 209; *Baker v. Whiting*, 3 Sumner, 476; *Armstrong v. Campbell*, 3 Yerger, 201; *Overstreet v. Bate*, 1 J. J. Marsh. 370; *Coster v. Murray*, 5 John. Ch. 224; *Gist v. Cattel*, 2 Desaus. 53; *Thomas v. White*, 3 Litt. 177; *Pinkerton v. Walker*, 3 Hayw. 221; *Trecothick v. Austin*, 4 Mason, 16; *Terrill v. Murry*, 4 Yerger, 104; *Wisner v. Barnett*, 4 Wash. C. C. 631; *Bryant v. Puckett*, 3 Hayw. 252; *Fisher v. Tucker*, 1 M'Cord Ch. 169; *Van Rhyne v. Vincent*, *ib.* 314; *Decouche v. Savetier*, 3 John. Ch. 216; *Wamburzee v. Kennedy*, 4 Desaus. 474; *Pinson*

v. Ivey, 1 Yerger, 297; *Turner v. Debell*, 2 A. K. Marsh. 384; *Bigelow v. Bigelow*, 6 Ham. 97; *Kane v. Bloodgood*, 7 John. Ch. 90; *Farnum v. Brooks*, 9 Pick. 242-244; *Williams v. Watkins*, 3 Peters, 51, 52; *Cowart v. Perrine*, 3 C. E. Green, 454, 457; *Conover v. Conover*, Saxton, 403; *Wanmaker v. Van Buskirk*, *ib.* 635; *Allen v. Woolley*, 1 Green Ch. 209; *Stark v. Hutton*, 2 Green Ch. 311; *Burdick v. Garrick*, L. R. 5 Ch. Ap. 233. [See, now, Supreme Court of Judicature Act, 1873, L. R. 8 Stat. 319.]

⁴ *Wych v. East India Company*, 3 P. Wms. 309.

⁵ *Hercy v. Ballard*, 4 Bro. C. C. 468.

⁶ *Townshend v. Townshend*, 1 Cox, 28; 1 Bro. C. C. 550, 554.

⁷ *Prince v. Hevlin*, 1 Atk. 493; *Cox v. Dolman*, 2 De G., M. & G. 592, 597. [Where the trustee could not set up the analogy of the statute, his representative cannot do so. *Brittlebank v. Goodwin*, L. R. 5 Eq. 545.]

⁸ 2 Sch. & Lef. 633.

Although it is a rule in Equity that no length of time will bar a fraud, yet a transaction cannot be impeached on the ground of fraud, where the fact of its having been committed has been within the knowledge of the party for many years;¹ if, therefore, the bill states circumstances of fraud, and that the plaintiff did not become apprised of them till after the period limited by the statute had expired, a plea of the Statute of Limitations will not prevail, unless the defendant meets such statement by an averment and answer, negating the fraud² or the fact of the discovery within the time specified in the bill.³ The same rules which are applied by Courts of Equity to cases of fraud, will also be applied to cases of mistake; and it has been held, where there has been a mistake, that the statute will not operate till after the expiration of six years from the discovery of it.⁴ The principle upon which this rule is founded is, that the statute runs from every new right of action or suit which accrues to the plaintiff, and that the discovery of the fraud gives to the plaintiff a new right; but, if he does not proceed within the time limited by the statute from such discovery, he will be barred.⁵ This rule, which appears to have been the one relied upon by the Courts under the old Statute of Limitations, 21 Jac. I. c. 16, has been distinctly embodied in the Act of 3 & 4 Will. IV. c. 27, § 26.⁶

*646 * Acting upon the principle above laid down, that the period when every new right of action or suit accrues to the party, should be the period from which to date the operation of the statute, the Courts have held, that where any new promise or any acknowledg-

¹ Gould v. Gould, 3 Story, 516.

² See Goodrich v. Pendleton, 2 John. Ch. 384.

³ Hovenden v. Lord Annesley, *ubi sup.*; Blennerhassett v. Day, 2 Ball & B. 118; Whalley v. Whalley, 3 Bligh, 1, 12; Blair v. Bromley, 2 Phil. 354, 360; 11 Jur. 617; Beaden v. King, 9 Hare, 499.

In cases of fraud the Statute of Limitations begins to run from the time of the discovery of the fraud. See Homer v. Fish, 1 Pick. 438; Wells v. Fish, 3 Pick. 74, 76 (2d ed.); Jones v. Conoway, 4 Yeates, 109; Sherwood v. Sutton, 5 Mason, 143; Harsell v. Kelley, 2 M'Cord, 426; Bishop v. Little, 3 Greenl. 405; Moreton v. Chandler, 8 Greenl. 9; Hamilton v. Sheppard, 2 Murph. 115; Payne v. Hathaway, 3 Vt. 212; 2 Story Eq. Jur. §§ 1521, 1521 *a*, and notes and cases cited; Shelby v. Shelby, Cooke, 183; Pugh v. Bell, 1 J. J. Marsh. 401; Crane v. Prather, 4 *id.* 77; Croft v. Arthur, 3 Desaus. 323; Wamburze v. Kennedy, 4 Desaus. 474; Hadix v. Davison, 3 Mon. 40; Cole v. M'Glatry, 9 Greenl. 131; Shield v. Anderson, 3 Leigh, 729; Egleburger v. Kibler, 1 Hill Ch. 121; Haywood v. Marsh, 6 Yerger, 60; [Lafferty v. Turley, 3 Sneed, 170;] Pennock v. Freeman, 1 Watts, 401; Bertine v. Varian, 1 Edw. Ch. 342; Hunter v. Spotswood, 1 Wash. 146; Warner v. Daniels, 1

Wood. & M. 90; Radcliff v. Rowley, 2 Barb. Ch. 23; Baker v. Grundy, 1 Duvall (Ky.), 281; Gibson v. Fifer, 21 Texas, 260; Myers v. Hanlon, 12 Rich. (S. C.) Eq. 196; Martin v. Martin, 35 Ala. 560; Longworth v. Hunt, 11 Ohio (N. S.), 194; Smith v. Fly, 24 Texas, 345; [Smith v. Drake, 8 C. E. Green, 302]. But the bar created by the Statute of Limitations is not avoided by mere constructive fraud. Farnam v. Brooks, 9 Pick. 212. Nor is the bar avoided by a fraud which the party has the full means of discovering. Farnam v. Brooks, 9 Pick. 212; Cole v. M'Glatry, 9 Greenl. 131; Dodge v. Essex Ins. Co., 12 Gray, 65, 71; [Haynie v. Hall, 5 Humph. 290].

⁴ Brooksbank v. Smith, 2 Y. & C. Ex. 58, 60; Dodge v. Essex Ins. Co., 12 Gray, 65, 71; Hough v. Richardson, 3 Story, 659; Thomas v. Marshall, 36 Ala. 504; Gibson v. Fifer, 21 Texas, 260; Smith v. Fly, 24 Texas, 345.

⁵ Hovenden v. Lord Annesley, 2 Sch. & Lef. 636; South Sea Company v. Wymondsell, 3 P. Wms. 143.

⁶ So in Massachusetts, where the fraud is concealed by the person liable to the action. Genl. Sts. c. 155, § 12. In Maine, there must be proof of actual fraud and concealment by the party sought to be charged. Cole v. M'Glatry, 9 Greenl. 131.

ment has been given by the debtor to the creditor or his agent,¹ it confers a new right of action upon the creditor; and that, therefore, the time within which the creditor's remedy would be barred must be reckoned from the time of such acknowledgment or promise being given.² Upon this principle the Courts have held, that payment of any part of the principal or interest, within the period limited, is a sufficient acknowledgment to take the case out of the statute.³ So they have held the rendering an account, or an offer to account, to be sufficient to prevent the bar.⁴

Formerly, the Courts acted with very considerable laxity in their decisions upon the nature of the acknowledgment which, in the case of demands arising upon simple contracts, would be sufficient to take them out of the Statute of Limitations: which laxity gave rise to various questions as to the proof and effect of acknowledgments and promises, offered in evidence, for the purpose of taking the case out of the operation of the statute. These questions have now, however, in a great measure, been set at rest: for, by Lord Tenterden's Act, it has been declared, that, in actions of debt or upon the case, grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the statute, 21 Jac. I. c. 16, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby;⁵ and by the Mercantile Law Amendment Act, 1856,⁶ an acknowledgment or promise by writing, signed by the duly authorized agent of the party chargeable thereby, has, with reference to the provisions of Lord Tenterden's Act, the same effect as if such writing had been signed by the party himself.

* Lord Tenterden's Act does not, however, alter or take away *647 or lessen the effect of any payment of any principal or interest made by any person whatever; so that the payment of any interest, or any part of the principal, within the period limited by the 21 Jac. I.

¹ Fuller v. Redman, 26 Beav. 614; [Bachman v. Roller, 1 Leg. Rep. 337].

² See Bangs v. Hall, 2 Pick. 378; Exeter Bank v. Sullivan, 6 N. H. 135; Whitney v. Bigelow, 4 Pick. 110; Porter v. Hill, 4 Greenl. 41; Deshon v. Eaton, 4 Greenl. 413; Russell v. Copp, 5 N. H. 154; Bailey v. Crane, 21 Pick. 324; Illsley v. Jewett, 2 Met. 168. Upon this subject of the revival of the remedy by an acknowledgment of and a new promise to pay the debt, see *ex parte* Dewdney, 15 Sumner's Ves. 479, note (a), and cases cited; Baillie v. Sibbald, *ib.* 185, note (a).

³ Hony v. Hony, 1 S. & S. 568, 580; Briggs v. Wilson, 17 Beav. 330. [The weight of authority seems to be, that a payment before the bar of the statute has attached will take the case out of the statute, but not a payment afterwards without more. Steel v. Matthews, 7 Yerg. 313; Ellicott v.

Nichols, 7 Gill, 86; Schindel v. Gates, 6 Rep. 112; 6 Rich. 28; 6 Ired. 341; 18 B. Mon. 643. But in Lock v. Wilson, 9 Heisk. 784, it was held that a payment before the statute had run would, of itself, be no more efficacious than a payment afterwards.]

⁴ Earl Pomfret v. Lord Windsor, 2 Ves. S. 485; and see Briggs v. Wilson, 5 De G., M. & G. 12.

⁵ 9 Geo. IV. c. 14, § 1. It is also declared, by the same section, that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractors, executor, or administrator shall lose the benefit of the 21 Jac. I. c. 16, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them. To the same effect, see Gen. Sts. Mass. c. 155, § 13 *et seq.*

⁶ 19 & 20 Vic. c. 97, § 13.

c. 16, § 3, will still have the effect of taking the case out of the statute; but by the 14th section of the Mercantile Law Amendment Act, 1856, it is enacted that no co-contractor or co-debtor, executor, or administrator of any contractor shall lose the benefit of the 21 Jac. I. c. 16, § 3, so as to be chargeable in respect, or by reason only, of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators.¹

It is to be observed, that the operation of Lord Tenterden's Act is confined to cases of demands arising upon simple contracts: in which cases only it was held, before the passing of the Act, that parol promises or undertakings would destroy the operation of the statute 21 Jac. I. c. 16. Where the cause of action was a *tort*, subsequent acknowledgments were held nugatory;² and in actions arising upon specialty, the statute did not apply.

The statute 21 Jac. I. c. 16 provides, by § 2, that if any person entitled to the writs therein named, or who shall have a right of entry, shall be under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas,³ such person or his heirs may, notwithstanding the twenty years, by the preceding section limited as the period within which such writs might be sued out or entries made, bring his action or make his entry, as he might have done before the Act, so that such action or entry was brought or made within ten years after his disqualification ceased; and by § 7, that persons under any of such disqualifications may bring the several actions enumerated in the third section,⁴ so that the same be brought within the time before limited for bringing the same after the termination of the disqualification; but now, the absence beyond the seas, or the imprisonment of a creditor, does not entitle him to any time within which to bring his action

or suit beyond the time fixed by 21 Jac. I. c. 16, § 3.⁵

*648 * Although the 7th section of the 21 Jac. I. c. 16, provided, as above mentioned, for the statute not attaching where the plaintiff was under any of the disabilities therein mentioned, no provision was made to prevent its operating as a bar, during the time the debtor might be out of the jurisdiction. The 4 & 5 Anne, c. 16, § 19, has, however, remedied that defect, and the creditor has under it the

¹ See *Seager v. Aston*, 3 Jur. N. S. 481, V. C. S. Section 14 is not retrospective. *Jackson v. Woolley*, 8 El. & Bl. 778; 4 Jur. N. S. 656; and see *Thompson v. Waithman*, 3 Drew. 628; 2 Jur. N. S. 1080; *Cockrill v. Sparke*, 3 F. & F. 150; 9 Jur. N. S. 307.
² *Arguendo*, *Hony v. Hony*, 1 S. & S. 568, 578.

³ It is held in Ohio that the term "beyond seas," in their statute of 1804, is equivalent to "without the limits of the State." *Richardson v. Richardson*, 6 Ham. (Ohio), 125. As to the construction of this term in the statutes of other States, see 2 Stark Ev. (5th Am. ed.) 485, note (3), tit. Limitations. In Massachusetts,

it has been decided that a citizen of another State, who has never been in that Commonwealth, is not a person "beyond seas, without any of the United States," and therefore not within the saving clause in the Statute of Limitations. St. 1786, c. 52, § 4; see *Genl. Sts. Mass. c. 155, § 6*. *Whitney v. Goddard*, 20 Pick. 304.

⁴ *Ante*, p. 639.

⁵ Mercantile Law Amendment Act, 1856 (19 & 20 Vic. c. 97), § 10. [This section is retrospective. *Cornell v. Hudson*, 8 Ell. & B. 429; *Pardo v. Bingham*, L. R. 4 Ch. App. 735.]

same privilege, where the debtor is beyond the seas, as he had by the statute of James, where he was beyond the seas himself;¹ but no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the Queen's dominions, is to be deemed to be beyond seas within the meaning of the last-mentioned Act.²

It is right to notice here, that it has been considered, that the 21 Jac. I. c. 16, will not be a good plea in a suit against an executor or administrator, where he has not proved the will, or administered: because no *laches* can be imputed to a plaintiff for not suing, while there is no executor or administrator against whom he can bring his action;³ but where the allegation of the bill, upon a fair construction, was, that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort*, a plea of the Statute of Limitations, by an executor who had not taken out probate till some years after the testator's death, was allowed.⁴ And it may be laid down as a general rule, that, wherever a party takes by assignment, from another, the assignee will not be in a better position than the assignor: and therefore, where the Statute of Limitations might have been pleaded against the assignor, it may be equally so against the assignee, whether such assignment be by act between the parties, or by act of law.⁵

It is to be remarked, that previously to the passing of the statute 3 & 4 Will. IV. c. 27,⁶ neither the 21 Jac. I. c. 16, nor any of the other statutes for the limitation of actions, applied specifically to Courts of Equity: though those Courts have, in all cases where legal titles and demands were the subject of litigation, held themselves bound by them, and, in respect of equitable titles and demands, have been influenced in their determination by analogy to them.⁷ The first-mentioned statute specifically mentions *suits in Equity amongst the ac- *649 tions and suits to be limited by its operation: it does not, however, apply to any suits but those relating to real property, and moneys charged upon land, and legacies.¹ These provisions have since been extended by the 23 & 24 Vic. c. 38² to the case of claims on the personal estates of intestates. The statute 21 Jac. I. c. 16, may therefore still be insisted upon, by way of plea, in all cases not included in the 3 & 4 Will. IV. c. 27, and the 23 & 24 Vic. c. 38, in which it might before have been pleaded.³

¹ *Sturt v. Mellish*, 2 Atk. 612. In Genl. Sts. Mass. c. 155, § 9, there are provisions on this subject.

² Mercantile Law Amendment Act, 1856 (19 & 20 Vic. c. 97), § 12. This section is not retrospective. *Flood v. Patterson*, 29 Beav. 295; 7 Jur. N. S. 324.

³ *Joliffe v. Pitt* 2 Vern. 694; 1 Eq. Ca. Ab. 305, pl. 11; see also Lord Eldon's observations in *Webster v. Webster*, 10 Ves. 93.

⁴ *Webster v. Webster*, *ubi sup.*; *Story Eq. Pl.* § 753; *Burditt v. Gew*, 8 Pick. 108.

⁵ *South Sea Company v. Wymondsell*, 3 P. Wms. 143.

⁶ Amended by 7 Will. IV. & 1 Vic. c. 28.

⁷ See *ante*, p. 559.

¹ See § 40. For the cases on this section, see *Shelford R. P. Acts*, 248-262; *Sugd. R. P. Acts*, 129 *et seq.*

² See § 13.

³ For a collection of cases on the 21 Jac. I. c. 16, and 9 Geo. IV. c. 14, see *Shelford R. P. Acts*, 283-310.

It may be useful, in this place, to point out the cases in which the Statute of Limitations of the 3 & 4 Will. IV. c. 27, operates as a bar to suits in Equity. By the 24th section, all suits in Equity are barred, as against persons claiming any land or rent (within the meaning of the definitions contained in the first section of the Act), unless within the period during which, by virtue of the provisions thereinbefore contained, they might have made an entry or distress, or brought an action to recover the same respectively, if they had been entitled at Law to such estate, interest, or right, as they claim in Equity. This right, however, in the case of an express trust, it is declared, by the 25th section, shall be deemed not to have accrued against the trustee, or those claiming through him, until the actual conveyance to a purchaser for valuable consideration. It is also declared, that it is only against such purchaser, and any one claiming through him, that the right shall then be deemed to have accrued: so that, as between the trustee and the *cestui que trust*, the law remains the same as it did before the statute.⁴

It is also declared, by the 26th section, that, in every case of concealed fraud, the right to bring a suit in Equity for the recovery of any land or rent, shall be deemed to have accrued at, and not before, the time at which such fraud has, or with reasonable diligence might have been known or discovered.⁵ It also provides, that nothing in that section shall enable any owner of lands or rents to have a suit in Equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, * and had no reason to believe, that any such fraud had been committed; and the 27th section saves the jurisdiction of Courts of Equity on the ground of acquiescence.¹

It has been before stated, that, previously to the passing of the Act now under consideration, a plea of the Statute of Limitations, 21 Jac. I. c. 16, was held to be a good bar to a bill for the redemption of a mortgage, if the mortgagee had been in possession of the mortgaged premises upwards of twenty years;² and, indeed, as we have already seen, demurrers upon that ground have been allowed.³ The Courts, however, permitted the redemption of mortgages, if, at any time within the period of twenty years, the mortgagee had acknowledged that the estate was redeemable property. For this purpose, a positive acknowledgment of the mortgage was not required; but any act on the part of the mortgagee, or of any one claiming under him, tending to

⁴ For the cases on §§ 24, 25, see *Shelford R. P. Acts*, 211-214-222; *Sugd. R. P. Acts*, 93 *et seq.* In cases of equitable waste, see *Duke of Leeds v. Earl Amherst*, 2 Phil. 117, 125; 10 Jur. 956; and as to the Act generally, *Dixon v. Gayfere*, No. 1, 17 Beav. 421; *Sugd. R. P. Acts*, 105; see *Farnam v. Brooks*, 9 Pick. 212; *Cole v. M'Glattry*, 9 Greenl. 131; *ante*, 643, note.

⁵ *Cole v. M'Glattry*, 9 Greenl. 131; *ante*, 645, note.

¹ For the cases on §§ 26, 27, see *Shelford R. P. Acts*, 222-227-229; *Sugd. R. P. Acts*, 98.

² *Id. Red.* 271; *Coop. Eq. Pl.* 254; *Beames on Pleas*, 162; *Story Eq. Pl.* 757.

³ *Ante*, p. 560.

show that he considered the mortgage as still subsisting (such as the keeping of accounts), was considered as sufficient to keep alive the interest of the mortgagor;⁴ nor was it necessary that the acknowledgment should have been made to the mortgagor, or to one claiming under him: any act by which the existence of the mortgage was admitted, even in transactions with a third party, was held sufficient;⁵ and so has a recital in a will, or any other deliberate instrument;⁶ and even a parol acknowledgment, provided it was clear and unimpeachable, and made within twenty years, has been permitted to take the case out of the bar created by the statute.⁷ The statute 3 & 4 Will. IV. c. 27, § 28, has, however, made a considerable alteration in the law, in this respect, by enacting, that where a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt: unless, in the mean time, an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case, no such suit shall be brought but within twenty years *next after *651 the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. So that, according to that section no acknowledgment will take a suit for the redemption of a mortgage out of the operation of the Act, unless it is in writing, signed by the mortgagee, or the person claiming through him, and given to the mortgagor himself, or to the person claiming the estate, or the agent of such mortgagor or person.¹

The same section then proceeds to enact, that when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, the acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all of them; but where there shall be more than one mortgagee, or more than one person claiming the estate and interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing the same, and the person or

⁴ Edsell v. Buchanan, 4 Bro. C. C. 254, 256; 2 Ves. J. 84.

⁵ Hardy v. Reeves, 4 Ves. 466, 479; Smart v. Hunt, cited *ib.* 478.

⁶ Ord v. Smith, 2 Eq. Ca. Ab. 600, pl. 27; Perry v. Marston, 2 Bro. C. C. 397, 399; Hansard v. Hardy, 18 Ves. 455, 459; Price v. Copner, 1 S. & S. 347, 355.

⁷ Raynor v. Oastler, 6 Mad. 274; Whiting v. White, 2 Cox, 290, 295; Perry v. Marston, *ubi sup.*

¹ The acknowledgment need not be given within twenty years after the mortgagee has entered into possession. Stansfeld v. Hobson, 3 De G., M. & G. 629, 624; see also Pendleton v. Rooth, 1 Giff. 35; 5 Jur. N. S. 849; 1 De G., F. & J. 81; 6 Jur. N. S. 182; Sugd. R. P. Acts, 113, as to effect of acknowledgment by tenant in tail and heir of the mortgagee.

persons claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or interest, to take effect after or in defeasance of his or their estate or estates, interest or interests;² and shall not operate to give to a mortgagor or mortgagors a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent. It also provides, that where such of the mortgagees or persons as shall have given an acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.³

The above Act not only limits the right of the mortgagor to redeem, but it provides, by § 40, against the mortgagee, or other
 *652 *person entitled to any money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at Law or in Equity, or to any legacy, bringing any action, suit, or other proceeding to recover such money, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same: unless, in the mean time, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent: in which case, no such action, suit or proceeding can be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.¹

It has been decided, that a bill of foreclosure is a suit for the recovery of the estate, and not of the money, although it may lead to the payment thereof; and that, therefore, this section of the statute cannot be pleaded in bar to such a suit.²

² It is to be observed, that the above clause renders the acknowledgment valid after twenty years, not only against the person signing the same, and those claiming under, or in privity with him, but against all others, whether claiming by descent or purchase, in remainder or reversion; and that there is no saving clause in the Act in favor of persons under disabilities, such as infancy, coverture, &c.

³ For the cases on § 28, see *Shelford R. P. Acts*, 229-236; *Sugd. R. P. Acts*, 111-118; [*Richardson v. Young*, L. R. 10 Eq. 275.]

¹ See *Cheever v. Perley*, 11 Allen, 584. Absence beyond the seas, and imprisonment are no longer disabilities within this section.

See 19 & 20 Vic. c. 97, § 10. By the 23 & 24 Vic. c. 38, § 13, a provision similar to § 40 is enacted with respect to the case of claims, on the personal estate of intestates. For the cases on § 40, see *Shelford R. P. Acts*, 248-262; *Sugd. R. P. Acts*, 119-151. [See also *Cadbury v. Smith*, L. R. 9 Eq. 37.]

² *Wrixon v. Vize*, 3 Dr. & War. 104, 120, 121; *Sugd. R. P. Acts*, 121, 122; see *contra*, *Dearman v. Wyche*, 9 Sim. 570, 582; see, also, *Searle v. Colt*, 1 Y. & C. C. C. 36; *Du Vigier v. Lee*, 2 Hare, 326, 334; 7 Jur. 299; *Sinclair v. Jackson*, 17 Beav. 405. [The weight of American authority is in accord with the text. *Bank of Metropolis v. Guttschlick*, 14 Pet. 19, 32; *Heyer v. Pruyn*,

Before the passing of the 3 & 4 Will. IV. c. 27. it had been repeatedly held, that the Statute of Limitations could not be pleaded to suits for the recovery of legacies: although the Court, after the lapse of a great time, would, under certain circumstances, presume payment.³ It is now, however, provided by § 42, that no interest in respect of any legacy shall be recovered but within six years next after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. In the case of *Phillipo v. Munnings*,⁴ Lord Cottenham considered it clear, that a sum of * money, which had been bequeathed by a testator, *653 upon certain trusts, and which was severed from the personal estate by the executor, for the purpose of those trusts, ceased to bear the character of a legacy, and assumed that of a trust fund, as soon as it was severed from the general estate; consequently, he decided, that the statute did not bar a suit to recover the fund from the executor. It was doubted whether the Act, in any case, extended to legacies not charged upon land;¹ but in *Sheppard v. Duke*,² Sir Lancelot Shadwell V. C. held, that it applied to legacies payable out of personal estate.

The Act also provides, that no arrears of dower, or any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years before the commencement of such action or suit, and that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, by the person by whom the same was payable or his agent.³ It is, however, provided, that where any prior mortgagee, or other incumbrancer, shall have been in possession of any land, or in receipt of the profits thereof, within one

7 Paige, 465; Thayer v. Mann, 19 Pick. 535; Barned v. Barned, 6 C. E. Green, 245; Terry v. Rosell, 32 Ark. 478; Harris v. Vaughn, 2 Tenn. Ch. 483. In some of the States, a mortgage is treated as a chose in action, a mere security for the debt, and the debt being barred, the lien is also. Anderson v. Baxter, 4 Oreg. 107; Witherell v. Wiberg, 4 Sawy. 232; Newman v. De Lorimer, 19 Iowa, 244; McMillan v. Richards, 9 Cal. 409; Bludworth v. Take, 33 Cal. 264; Moon v. Trask, 7 Wis. 512; Russel v. Ely, 2 Black, 576. And it seems, an action on the mortgage may be barred although the debt be not. Eubanks v. Leveridge, 4 Sawy. 274.]

³ Anon., Freem. 22, Pl. 20; Parker v. Ash, 1 Vern. 256; Fotherby v. Hartridge, 2 Vern. 21; Wood v. Briant, 2 Atk. 521; Jones v. Turberville, 2 Ves. J. 11, 13; 4 Bro. C. C. 115; cited 2 Ves. J. 280; Higgins v. Crawford, *ib.* 571; Sauzer v. De Meyer, 2

Paige, 574; Kane v. Bloodgood, 7 John. Ch. 90; Andrews v. Sparkhawk, 13 Pick. 393. Though the Statute of Limitations is no bar to a legacy, yet the Court, in regard to very stale demands, will adopt the provisions of the statute, in the exercise of their discretion. Arden v. Arden, 1 John. Ch. 313; see Inby v. M'Crea, 4 Desaus. 422; Wilson v. Kilear, non, 4 Hayw. 185; Lindsay v. Lindsay, 1 Desaus. 151. [Or disallow interest. Thomson v. Eastwood, 2 App. Cas. 215; Laura Jane v. Hagen, 10 Humph. 332.]

⁴ 2 M. & C. 309, 314.

¹ See Sauzer v. De Meyer, 2 Paige, 574.

² 9 Sim. 567, 569; 3 Jur. 168; and see Paget v. Foley, 2 Bing. N. C. 679.

³ 3 & 4 Will. IV. c. 27, §§ 41, 42. Absence beyond the seas or imprisonment is no longer a disability within these sections. 19 & 20 Vic. c. 97, § 10.

year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover, in such action or suit, the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years.⁴ It has been decided, that § 42 does not apply to a case where the relation of trustee and *cestui que trust* has existed, between the person in possession of the land, and the parties entitled to the legacies and annuities.⁵ A testator,

*654 * by charging his estate with the payment of an annuity, does not make the devisee a trustee for the annuitant, so as to prevent the operation of the statute.¹

Care must be taken, in framing a plea of a Statute of Limitations, to set up the proper statute.² Thus, in all cases where the suit relates to a debt or money due upon simple contract, or an account, the statute of 21 Jac. I. c. 16, should be pleaded; where the subject-matter of the suit is land or rent, or the redemption of a mortgage, or where it relates to the recovery of the principal money secured on mortgage, judgment, or lien, or otherwise charged upon or payable out of land or rent, at Law or in Equity, or to the payment of a legacy, the 3 & 4 Will. IV. c. 27, must be pleaded. And this statute must also be the one pleaded, where the suit is for the recovery of the arrears of dower, or for the arrears of rent, or interest accrued in respect of any charges upon land or rent, or in respect of any legacy.³

The statute of 3 & 4 Will. IV. c. 27, also contains provisions for the limitation of demands by ecclesiastical or eleemosynary corporations sole,⁴ and of suits for enforcing the right of presentation to any church, vicarage, or other ecclesiastical benefice;⁵ in all these cases, the Act must be pleaded.

⁴ On this section, see the cases of *Sinclair v. Jackson*, 17 Beav. 405; *Elvy v. Norwood*, 5 De G. & Sm. 240; 16 Jur. 493; *Greenway v. Bromfield*, 9 Hare, 201; *Bolding v. Lane*, 3 Giff. 561; 8 Jur. N. S. 407; *Re Ashwell*, John. 112; *Round v. Bell*, 30 Beav. 121; 7 Jur. N. S. 1183; *Mason v. Broadbent*, 33 Beav. 296; *Marshall v. Smith*, 10 Jur. N. S. 1174; 13 W. R. 198, V. C. S.; *Edmunds v. Waugh*, L. R. 1 Eq. 418; 12 Jur. N. S. 326, V. C. K.; and see *Shelford*, R. P. Acts, 262-273; *Sugd. R. P. Acts*, 119, 136-151.

⁵ *Young v. Lord Waterpark*, 13 Sim. 204; 6 Jur. 656; on app. 10 Jur. 1; *Ward v. Arch*, 12 Sim. 472, 475; *Cox v. Dolman*, 2 De G., M. & G. 532, 597; *Hunter v. Nockolds*, 1 M. N. & G. 640-650; *Snow v. Booth*, 8 De G., M. & G. 69; 2 K. & J. 132; *Lewis v. Duncombe*, 29 Beav. 175; 7 Jur. N. S. 695; *Shaw v. Johnson*, 1 Dr. & Sm. 412; 7 Jur. N. S. 1005.

¹ *Francis v. Grover*, 5 Hare, 39, 49; 10 Jur. 280; and see *Hargreaves v. Michell*, 6 Mad. 323; *Jacquet v. Jacquet*, 27 Beav. 332.

² [*Graham v. Nelson*, 5 Humph. 605.]

See the form of such a plea, *Willis*, 562; 2 Eq. Drafts. 113, 114. In setting up a defence under a public statute, it is not necessary, either in a Court of Chancery or in a Court of Law, that the pleader should set forth the statute in his plea, or that he should allege the existence of a statute of which the Court is judicially bound to take notice. It is sufficient for him to state the facts which are necessary to bring the case within the operation of the statute; and to insist that upon these facts the plaintiff's right or remedy is at an end. The Court will then judicially take notice of the existence of the statute and declare its legal effect upon the case as made by the pleadings. *Bogardus v. Trinity Church*, 4 Paige, 148, 197; see *Salter v. Tobias*, 3 Paige, 338.

³ As to suits in respect of an intestate's personal estate, see 23 & 24 Vic. cc. 38, § 13.

⁴ Sect. 29.

⁵ Sects. 30, 31, 32, 33. For the cases on §§ 29-33, see *Shelford R. P. Acts*, 236; *Sugd. R. P. Acts*, 152-154.

A plea of a Statute of Limitations must contain sufficient affirmative averments to bring the case within the statute pleaded.⁶ Thus, a plea of the statute 21 Jac. I. c. 16, to a bill for a debt, must aver, besides reciting the statute, that the debt accrued more than six years before the filing of the bill; and so, where a demand is of any thing executory, as a note for the payment of an annuity, or of money at a distant period, or by instalments, the defendant must aver that the cause of action has not accrued within six years: because the statute bars only what was actually due six years before the action brought.⁷ It does not appear, however, that a particular form of words is necessary in such averments, provided those made use of are sufficient to bring the case within the statute; therefore, where the plea, instead of averring that *the money in question was not received within the last six *655 years, averred, that no cause of action accrued within that time, it was held sufficient.¹

Whenever any matters are stated in the bill which are calculated to take the case out of the statute, these must be met by negative averments.² Thus, if the bill charges fraud, the plea must deny the fraud,³ or aver that the fraud, if any, was discovered above six years before the filing of the bill.⁴ So, if the bill alleges, that the fraud was not discovered till within six years before the bill was filed, the plea must aver that the fraud (if any) was not discovered within that time.⁵ If, moreover, the defendant is interrogated as to any statements in the bill which allege matter ancillary to, or afford evidence of facts directly negatived by the plea, such statements ought to be met by an answer in support of the plea.⁶ Where no answer is required, the defendant has been allowed to plead the statute orally at the hearing.⁷

The Statute of Frauds⁸ may be pleaded in bar to a suit to which the provisions of that Act apply.⁹ Thus, to a bill for a discovery and execution of a trust, the statute, with an averment that there was no

⁶ See *Andrews v. Huckabee*, 30 Ala. 143. For forms of such plea, see 2 Van Hey. 113, 114.

⁷ *Ld. Red.* 271.

¹ *Sutton v. Lord Scarborough*, 9 Ves. 71, 75.

² *Ante*, pp. 605, 614.

³ *Bicknell v. Gough*, 3 Atk. 558.

⁴ *Ld. Red.* 269; *South Sea Company v. Wymondsell*, 3 P. Wms. 143.

⁵ *Ibid.*; *Ld. Red.* 269; *Sutton v. Lord Scarborough*, 9 Ves. 71, 75.

⁶ *Dearman v. Wyche*, 9 Sim. 570, 582; *Foley v. Hill*, 3 M. & C. 475, 480; 2 Jur. 440. But where the plea sets up the Statute of Limitations in defence, it is not necessary in such plea to deny a new promise within six years, unless the bill alleges such promise; but if so denied in the plea it will be mere surplusage. *Davison v. Schermerhorn*, 1 Barb. Ch. 480.

⁷ *Lincoln v. Wright*, 4 De G. & J. 16; 5 Jur. N. S. 1142; *Snead v. Green*, 8 Jur. N. S.

4, M. R.; but see *Holding v. Barton*, 1 Sm. & G. Ap. 25.

⁸ 29 Car. II. c. 3.

⁹ *Ld. Red.* 265; *Story Eq. Pl.* § 761 *et seq.*; *Cozine v. Graham*, 2 Paige, 177; *Meach v. Perry*, D. Chip. 182; *Thornton v. Henry*, 2 Scam. 219; *Kinzie v. Penrose*, 2 Scam. 520. The defence of this statute must be insisted on by answer, or the defendant must set it up by way of plea; he cannot by demurrer to the bill rely on the Statute of Frauds, unless it clearly appears, on the face of the bill, that the agreement is within the statute. *Switzer v. Skiles*, 3 Gilman, 529. But when it does so appear the objection may be taken by demurrer. *Walker v. Locke*, 5 Cush. 90; see *Dudley v. Bachelor*, 53 Maine, 403, 406; *Farnham v. Clements*, 51 Maine, 426; *Cranston v. Smith*, 6 R. I. 231; *ante*, p. 561, [n. 2, 365, n. 3. See as to the duty of a personal representative to set up the statute. *Re Garratt*, 18 W. R. 684.] For forms of such plea, see 2 Van Hey. 107, 112.

declaration of the trust in writing, may be pleaded:¹⁰ though, in the case cited, the plea was overruled by an answer admitting in effect the trust.¹¹ To a bill for the specific performance of an agreement, the same statute, with an averment that there was no agreement in writing signed by the parties, has also been pleaded.¹² The Statute of Frauds

may also be pleaded to a bill to enforce a parol variation of a *656 written contract, unless * the variation is such as amounts to a mere waiver of a term in the agreement: such as the time for the commencement of a lease.¹

A plea of this sort must contain an averment, that there was no declaration of trust or agreement in writing, duly signed;² and where there are any equitable facts alleged, which may have the effect of taking the case out of the operation of the statute, they must be met by negative averments in the plea,³ and must also, if interrogated to, be denied, by answer in support of the plea.⁴ This proposition appears to be strictly in conformity with the principles before laid down,⁵ as well as with the existing authorities. It is right, however, to state, that in Lord Redesdale's treatise,⁶ his Lordship mentions it as a position which was formerly considered to be well founded, but which the decision of the Court, in one case,⁷ had rendered it impossible now to sustain; and it cannot be denied, that the point is one of considerable difficulty; and as it is now placed beyond all doubt that the benefit of the statute may be had, if insisted on by answer, although a *parol* agreement be admitted,⁸ there can be little use in pleading it in bar: at least to bills seeking the specific performance of a contract.

With respect to bills relating to trusts, where there is no declaration of trust in writing, it seems that there is some doubt whether the rule which has been applied to parol agreements, namely, that, although the defendant confesses them by his answer, yet, if he insists on the protection of the statute, no decree can be made merely on the ground of that confession, will be extended to the confession of a trust by answer. In such cases, therefore, the safest course will be to meet the case made by the bill by a plea of the statute, negating any matter charged

¹⁰ Cottington v. Fletcher, 2 Atk. 155.

¹¹ Ld. Red. 265; see Dean v. Dean, 1 Stockt. (N. J.) 425. If the Court can execute the trust from the admissions made by the answer, so that the plaintiff is not under the necessity of resorting to *parol proof* of the trust, to entitle him to relief, such admissions will exclude the defendant from the benefit of the statute, if not insisted on in the answer. Dean v. Dean, *ubi sup.*

¹² *Ib.* 266; Mussell v. Cooke, Prec. in Ch. 533; Child v. Godolphin, 1 Dick. 39, 42; S. C. *nom.* Child v. Comber, 3 Swanst. 423, n.; Hawkins v. Holmes, 1 P. Wms. 770; Clerk v. Wright, 1 Atk. 12; Story Eq. Pl. § 671; Stevens v. Cooper, 1 John. Ch. 425. For form of such plea, see 2 Van Hey. 112.

¹ Jordan v. Sawkins, 1 Ves. J. 402.

² Ld. Red. 266.

³ As to negative averments, see *ante*, pp. 605, 614.

⁴ Coop. Eq. Pl. 256; Beames on Pleas, 172; and for form of such plea, see 2 Van Hey. 107; see also Denys v. Locock, 3 M. & C. 205, 234; 1 Jur. 605; Dearman v. Wyche, 9 Sim. 570, 582.

⁵ *Ante*, pp. 613, 614.

⁶ Ld. Red. 268.

⁷ Whitbread v. Brockhurst, 1 Bro. C. C. 404, 416; 2 V. & B. 153, n.

⁸ Ld. Red. 267; Moore v. Edwards, 4 Ves. 23; Cooth v. Jackson, 6 Ves. 17; Blagden v. Bradbear, 12 Ves. 466, 471; Rowe v. Teed, 15 Ves. 375; Jackson v. Oglander, 2 H. & M. 465. As to the mode of insisting on the statute by answer, see Skinner v. M'Douall, 2 De G. & Sm. 265; 12 Jur. 741.

by the bill which may avoid the bar: generally by way of averment in the plea, and particularly and precisely by way of answer in support of the plea, if discovery is required as to such matter.⁹

It should be added, that if a defendant, in an answer, admits the agreement, and does not claim the benefit of the statute, he will be considered to have waived it, and he cannot afterwards be allowed to insist on it, although he claims it by answer to the bill, when amended.¹⁰ Where no answer was required, *the defendant *657 has been allowed to plead the statute orally at the hearing:¹ and if the defendant denies, or does not admit, the agreement, the plaintiff must prove that it can be enforced.²

Before quitting the subject of the Statute of Frauds, it should be observed, that the Court will not allow a party to avail himself of the Statute of Frauds for the purpose of committing a fraud;³ and, therefore, where a mere mortgage was contemplated, and an absolute conveyance was made by one, with the intention of a defeasance being executed by another, which was never carried into effect, the Court refused to allow a defendant to avail himself of the Statute of Frauds, to protect him in the enjoyment of the estate under the conveyance.⁴ And so, where an heir-at-law filed a bill against a devisee, alleging that the devise was upon a secret trust, for a charitable purpose, contrary to the statute 9 Geo. II. c. 36, a plea of the Statute of Frauds was overruled.⁵ And the Court will never permit a party to protect himself, by a plea of the statute, from discovering whether a devise was obtained or prevented by the undertaking of the devisee or heir to do certain acts in favor of individuals.⁶

It is to be observed here, that sales conducted under a decree or order of the Court, are not within the Statute of Frauds.⁷

The above statutes, namely, those for the limitation of actions and suits, and for the prevention of frauds and perjuries, have been the object

⁹ Ld. Red. 268; see Beames on Pleas, 179 *et seq.*

¹⁰ Beames on Pleas, 178, and notes; Skinner v. M'Douall, 2 De G. & Sm. 265; 12 Jur. 741; Baskett v. Cafe, 4 De G. & Sm. 388; Ridgway v. Wharton, 3 De G., M. & G. 677, 691; Jackson v. Oglander, 2 H. & M. 465. It is now settled, that a party, who admits a parol agreement by answer, may nevertheless have the benefit of the statute, if he, by his answer, prays the benefit of it. If he does not thus insist on the benefit of the statute, he must be taken to renounce it. Woods v. Dike, 11 Ohio, 455; 2 Story Eq. Jur. §§ 755-758; Flagg v. Mann, 2 Sumner, 528, 529; Newton v. Swasey, 8 N. H. 9; Thompson v. Todd, 1 Peters C. C. 388; Talbot v. Bowen, 1 Marsh. 437; Rowton v. Rowton, 1 Hen. & M. 91; Stearns v. Hubbard, 8 Greenl. 320; Story Eq. Pl. § 763; Ontario Bank v. Root, 3 Paige, 478; Cozine v. Graham, 2 Paige, 177; Thornton v. Henry, 2 Scam. 219; Moore v. Edwards, 4 Sumner's Ves. 23, note (a); Whitechurch v. Bevis 2

Bro. C. C. (Perkins's ed.) 566, 567, note (c); Van Duyne v. Vreeland, 1 Beasley, 142; S. C. 3 Stockt. 370; Dean v. Dean, 1 Stockt. 425; Ashmore v. Evans, 3 Stockt. 151.

¹ Lincoln v. Wright, 4 De G. & J. 16; 5 Jur. N. S. 1142; Snead v. Green, 8 Jur. N. S. 4, M. R.; S. C. *nom.* Green v. Snead, 30 Beav. 231; but see Holding v. Barton, 1 Sm. & G. Ap. 25.

² Ridgway v. Wharton, *ubi sup.*

³ Story Eq. Pl. § 767.

⁴ Dixon v. Parker, 2 Ves. S. 219, 224.

⁵ Stickland v. Aldridge, 9 Ves. 516.

⁶ *Ib.* 519; Story Eq. Pl. § 768; Chamberlain v. Ager, 2 V. & B. 259; see also Burrow v. Greenough, 3 Sumner's Ves. 152, note (a); 1 Story Eq. Jur. § 256; 2 *id.* § 781; Guallaher v. Guallaher, 5 Watts, 200.

⁷ Attorney-General v. Day, 1 Ves. S. 218, 221; Blagden v. Bradbear, 12 Ves. 466, 472. [So of execution sales. Nichol v. Ridley, 5 Veng. 63. And see Dromgoole v. Spence, 1 Memph. L. J. 159.]

of particular attention in the preceding pages, because they are those which have been most frequently the subject of discussion before the Court, but any other public statute, which may be a bar to the demands of the plaintiff, may be taken advantage of by a plea, containing the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar *658 which the statute creates.⁸ * Thus, in *Hitchens v. Lander*,¹ the statute 32 Hen. VIII. c. 9, against buying and selling pretended titles, was pleaded, and the plea allowed. And so, where a bill was filed against a bankrupt, in respect of a demand occurring before his bankruptcy, the 5 Geo. II. c. 30,² was pleaded, and the plea allowed.³ And so, it has been held, that where a mortgagee of an advowson appears and presents to the Church, which he is not entitled to do before foreclosure, a bill by the mortgagor, seeking to compel a resignation, must be brought within six months after the death of the late incumbent: being the period within which, by the Statute of Westminster 2,⁴ a *quare impedit* must be brought.⁵

A private or local statute may also be pleaded in the same manner; thus, to a bill impeaching a sale of land in the fens, by the conservators under the statute for draining the fens, the defendant pleaded the statute, and that the sale was made within and according to the statute, and the plea was allowed.⁶ It is to be observed, that a plea of a private Act of Parliament must state the Act, or at least so much of it as relates to the matter insisted upon; and it seems that, although an Act, which is in its nature private or local, contains a clause directing that it shall be recognized in Courts as a public Act, such a clause will not dispense with the necessity of setting the Act out.⁷

A plea of a statute must be put in upon oath; for, although the statute itself is matter of record, the averments necessary to bring the case within it are matters *in pais*, which must be supported by the oath of the party.⁸

2. We come now to the consideration of those pleas in bar which

⁸ *Id.* Red. 274. Of this nature are 2 & 3 W. IV. c. 71; 3 & 4 W. IV. c. 42; as to § 5 of which last Act, see *Moodie v. Bannister*, 4 Drew. 432, 5 Jur. N. S. 402; *Roddam v. Morley*, 1 De G. & J. 1; 3 Jur. N. S. 449; 2 *id.* 805; 2 K. & J. 336, and cases collected in *Shelford R. P. Acts*, 279-281; *Sugd. R. P. Acts*, 149. [Dickinson v. Teasdale, 1 De G., J. & S. 52; *Coope v. Cresswell*, L. R. 2 Ch. App. 112.] In regard to the plea of *Usury*, see *New Orleans, G. L. & B. Co. v. Dudley*, 8 Paige, 452; *Dyer v. Lincoln*, 11 Vt. 300; *Lane v. Ellzey*, 4 Hen. & M. 504; S. C. 6 Rand. 661; *Chambers v. Chambers*, 4 Gill & J. 420; *Shed v. Garfield*, 5 Vt. 39; *Vroom v. Ditmas*, 4 Paige, 526; *New Jersey Patent Tanning Co. v. Turner*, 1 McCarter (N. J.), 226, 229; *Curtis v. Master*, 11 Paige, 15; *Rowe v. Phillips*, 2 Sandf. Ch. 14.

¹ G. Coop. 34, 38; see also *Wall v. Stubbs*,

2 V. & B. 354, 357. For form of plea under this statute, see *Beames on Pleas*, 333.

² Repealed by 6 Geo. IV. c. 16; see now 12 & 13 Vic. c. 106; 24 & 25 Vic. c. 134.

³ *De Tastet v. Sharpe*, 3 Mad. 51, 60. For form of plea of Bankruptcy, see 2 Van Hey. 96; and as to such a plea, see *ante*, p. 631.

⁴ 13 Ed. I. c. 5.

⁵ *Gardiner v. Griffith*, 2 P. Wms. 405; cited *Atk.* 559.

⁶ *Brown v. Hamond*, 2 Cha. Ca. 249.

⁷ *Nabob of Arcot v. East India Company*, 3 Bro. C. C. 292, 308; *Nabob of the Carnatic v. East India Company*, 1 Ves. J. 371, 393; *Bailey v. Birkenhead Railway Company*, 12 Beav. 433, 443; 14 Jur. 119; see 13 & 14 Vic. c. 21.

⁸ *Wall v. Stubbs*, 2 V. & B. 354, 357; 1 Smith, Ch. Pr. (2d Am. ed.) 232.

consist of matters recorded, or as of record in the Court itself, or some other Court of Equity, or in some Court not a Court of Equity.⁹

*A decree or order of the Court, by which the rights of the parties have been determined, or another bill for the same matter dismissed, may be pleaded to a new bill for the same matter; ¹ and this, even if the party bringing the new bill were an infant at the time of the former decree: for a decree enrolled can only be altered upon a bill of review.²

By the original practice of the Court, a decree or order dismissing a former bill for the same matter could only be pleaded in bar to a new bill, where the dismissal had been upon the hearing: ³ for a dismissal was a bar only, where the Court had determined that the plaintiff had no title to the relief sought by his bill. It was not, however, necessary, in order to entitle a defendant to plead a former suit and decree of dismissal, that the decree should have been made upon discussion of the merits: if the dismissal had been merely for want of evidence, the decree would have been equally a bar to another suit.⁴ Under the present practice, if the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application, or if the cause is called on to be heard in Court, and the plaintiff makes default, and by reason thereof the bill is dismissed, such dismissal, unless the Court otherwise orders, is equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.⁵ Under the old practice, an order dismissing a bill upon an election by the plaintiff to proceed at Law,⁶ or for want of prosecution,⁷ was not a bar to another bill: and it does not seem that, in these cases, the Order above stated has affected the practice.

⁹ *Ld. Red.* 236, 237. If a former decree is relied upon, it must be duly pleaded. *Galloway v. Hamilton*, 1 Dana, 575; *Ferguson v. Miller*, 5 Ohio, 459. Or it may be set up in the answer. *White v. Bank of U. States*, 6 Ohio, 528; *S. P. Strader v. Byrd*, 7 Ohio, 184.

¹ *Barker v. Belknap*, 39 Vt. 168. A bill regularly dismissed upon the merits, where the matter has been passed upon, and the dismissal is not without prejudice, may be pleaded in bar of a new bill for the same matter. *Perine v. Dunn*, 4 John. Ch. 142; see *Neafe v. Neafe*, 7 John. Ch. 1; *Story Eq. Pl.* § 793; *Wilcox v. Badger*, 6 Ohio, 406; *French v. French*, 8 Ohio, 214; *Jenkins v. Eldredge*, 3 Story, 299; *Davis v. Hall*, 4 Jones Eq. (N. C.) 301; *Mickles v. Thayer*, 14 Allen, 121, 122; *Foot v. Gibbs*, 1 Gray, 412; *post*, "General nature of decrees and orders." [And such a dismissal on the merits may be taken advantage of on demurrer, if the fact appear on the face of the bill. *Knight v. Atkisson*, 2 Tenn. Ch. 384.] Such a decree is conclusive against a new bill, though rendered in another State. *Low v. Mussey*, 41 Vt. 393; see *Brown v. Lexington and Danville R.R. Co.*, 2 Beasley (N. J.), 191. For

how far the dismissal of a bill, by a plaintiff suing on behalf of himself and others, is a bar to another suit by persons having the same interest, see *Banker v. Walters*, 8 Beav. 92, 97; 9 Jur. 73; and *ante*, pp. 239, 240. One assignee of a bankrupt may plead the allowance of a demurrer by one of his co-assignees to the same bill. *Tarleton v. Hornby*, 1 Y. & C. Ex. 333, 336. [A decree in favor of the validity of a conveyance, made in a suit between the grantor and grantee, will not bind the assignee in bankruptcy of the grantor, upon a bill filed by him to set aside the conveyance for fraud. *Humes v. Scruggs*, 94 U. S. 22.]

² *Ld. Red.* 237.

³ *Ib.* 238.

⁴ *Jones v. Nixon, Younge*, 359; *ante*, p. 632.

⁵ Order XXIII. 13. See *Cummins v. Bennett*, 8 Paige, 79; *Sears v. Jackson*, 3 Stockt. (N. J.) 45; *Burnblyce v. Stimson*, 24 Ala. 712.

⁶ *Countess of Plymouth v. Bladen*, 2 Vern. 32; *ante*, p. 633; *post*, Chap. XIX. § 4, *Election*.

⁷ *Ld. Red.* 238; *Brandlyn v. Ord*, 1 Atk. 571.

A decree cannot be pleaded in bar of a new bill, unless it is for the same matter as the bill to which it is pleaded; ⁸ therefore, a decree in a former suit, for an account of tithes, could not have been pleaded *660 to a bill for the tithes of any subsequent year.⁹ It * must also be conclusive of the rights of the plaintiffs in the bill to which it is pleaded, or of those under whom they claim; therefore, a decree against a mortgagor and order of foreclosure enrolled, will not be deemed a bar to a bill by intervening incumbrancers to redeem, although the mortgagee had no notice of their incumbrances.¹ It must also be as beneficial to the plaintiff as that which might be obtained in the second suit.²

The decree must also be in its nature final, or afterwards made so by order, or it will not be a bar;³ therefore, a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a bill to redeem, unless there has been a final order of foreclosure.⁴

A plea of a decree founded on a particular deed, which it is the object of the second suit to set aside, on the ground of fraud discovered since the decree made, would not be good.⁵ If, however, a bill is brought to impeach a decree, on the ground of fraud used in obtaining it (which may be done without the previous leave of the Court), the decree may be pleaded in bar of the suit, with averments, negating the charges of fraud, and (if interrogated) supported by an answer fully denying them.⁶ It is presumed also, that, even in the case last put, of a bill to impeach the deed upon which a decree has been founded, a plea of the decree, supported by similar averments and answers, would be good.

A decree must be signed and enrolled, or it cannot be taken advantage of by plea:⁷ though it may be insisted upon by way of answer.⁸ Although a decree not signed and enrolled cannot be pleaded directly in bar of the suit, it seems that it may be pleaded to show that the bill has been exhibited contrary to the usual course of the Court, and ought

⁸ See *Neafie v. Neafie*, 7 John. Ch. 1; *Lyon v. Tallmadge*, 14 John. 501; *Menude v. Delaire*, 3 Desaus. 44.

⁹ Minor Canons of St. Paul's v. Crickett, Wrightw. 30. [So where the suit was upon a similar, but not the same demand, the first suit being on coupons of county bonds, and the second upon different coupons of the same bonds. *Cromwell v. County of Sac*, 94 U. S. 351. And see *Russell v. Place*, 94 U. S. 606; *Stark v. Starr*, 94 U. S. 645; *Boyd v. Alabama*, 94 U. S. 645.]

¹ *Morret v. Western*, 2 Vern. 663; see *ante*, p. 277; *Ld. Red. 238*; and see *Attorney-General v. Sidney Sussex College, Cambridge*, 34 Beav. 654; [*Davis v. Angel*, 4 De G., F. & J. 531.]

² *Pickford v. Hunter*, 5 Sim. 122, 129; *Rattenbury v. Fenton*, C. P. Coop. t. Brough. 60.

³ *Ld. Red. 237*; see *Neafie v. Neafie*, 7 John. Ch. 1; *Story Eq. Pl. § 791*.

⁴ *Senhouse v. Earl*, 2 Ves. S. 450.

⁵ *Wing v. Wing*, 2 Eq. Ca. Ab. 71, pl. 13.

⁶ *Ld. Red. 239*; *Story Eq. Pl. § 794*.

⁷ *Anon.*, 3 Atk. 809; *Kinsey v. Kinsey*, 2 Ves. S. 577; but see *Pearse v. Dobinson*, L. R. 1 Eq. 241, V. C. K.; [*L. R. 3 Ch. App. 1.*]

⁸ *Ibid.*; *Charles v. Rowley*, 2 Bro. P. C. ed. Toml. 485; *Story Eq. Pl. § 790*; *Davous v. Fanning*, 4 John. Ch. 199. It will not be allowed on the hearing unless set up in the answer, or (if enrolled) pleaded. *Lyon v. Tallmadge*, 14 John. 501. A prayer in the answer that the *pleadings and proofs*, in a former suit, may be made a part of the cause, does not present the *decree*; and although it be copied in the transcript, it will not be regarded. *Galloway v. Hamilton*, 1 Dana, 576.

not, therefore, to be proceeded upon;⁹ for, if the decree had appeared upon the face of the bill, the defendant might have demurred:¹⁰ a decree not signed and enrolled being to be altered only upon rehearing, as a decree signed and enrolled can be altered only upon a bill of review.¹¹

* As a plea of this kind proceeds upon the ground that the same matter was in issue in the former suit, and as every plea that is set up as a bar must be *ad idem*,¹ the plea should set forth so much of the former bill and answer as will suffice to show that the same point was then in issue, and should aver that the allegations as to the title to relief were the same in the second bill as in the first;² and, therefore, where the defendant pleaded only that a bill was brought for an account and a decree made, Lord Hardwicke considered the plea as defective.³ Where the bill seeks to impeach the decree on the ground of fraud, the alleged fraud must, as we have seen, be negatived by averments in the plea, supported by an answer fully denying the circumstances of fraud as to which the defendant is interrogated.⁴ But as the averments negativing the charges of fraud are used merely to put the fact of fraud, as alleged by the bill, in issue by the plea, they may be expressed in the most general terms, provided such terms are sufficient to put the allegations of the bill fully in issue. The answer, however, must be so full as to leave no doubt on the mind of the Court that, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established.⁵

In the case of a plea of a former decree, the plaintiff should obtain an order, on motion or petition of course, for an inquiry as to the truth thereof;⁶ and if the fact is certified to be true, the bill will be dismissed, unless the Court should otherwise order.⁷ The plaintiff may, however, apply to vary the certificate, and thus bring on the matter to be argued before the Court.⁸ He may also, if he conceives the plea to be defective in point of form or otherwise, independently of the mere truth of the fact pleaded, set the plea down to be argued, as in the case of pleas in general.⁹

As the ground of defence by plea of a decree signed and enrolled is, that the matter has been already decided, a decree of any Court of

⁹ *Ld. Red. 239; Kinsey v. Kinsey*, 2 Ves. S. 577, n.

¹⁰ *Wortley v. Birkhead*, 3 Atk. 809; 2 Ves. S. 571; *Lady Granville v. Ramsden*, Bunb. 56.

¹¹ *Ld. Red. 239.*

¹ Per Lord Hardwicke, in *Child v. Gibson*, 2 Atk. 603; and see *Moss v. Anglo-Egyptian Nav. Co.*, L. R. 1 Ch. Ap. 108; 12 Jur. N. S. 13, L. C.

² *Lady Londonderry v. Baker*, 3 Giff. 128; 7 Jur. N. S. 652; *afid. ib.* 811; 9 W. R. 763.

³ *Child v. Gibson*, *ubi sup.*; *Bank of Michigan v. Williams*, Harring. Ch. 219; *Cates v. Loftus*, 4 Monroe, 439.

⁴ *Ld. Red. 239.*

⁵ *Ld. Red. 239; see ante*, p. 660. Where a bill charged misrepresentation, coercion, and fraud in procuring the release of a debt, and a defendant put in a plea and answer, and in his plea insisted on the release in bar, without noticing the allegation of fraud, though in the answer it was fully met and denied, it was held that the plea was bad. *Allen v. Randolph*, 4 John. Ch. 633.

⁶ Ord. XIV. 6. For forms of motion and petition, see Vol. III.

⁷ *Ld. Red. 305; and see Jones v. Seguierra*, 1 Phil. 82, 84; 6 Jur. 184; *Tarleton v. Barnes*, 2 Keen, 632, 635; *Morgan v. Morgan*, 1 Atk. 53.

⁸ *Ld. Red. 305.*

⁹ *Ibid.* [See *ante*, 637, n. 5.]

Equity, in its nature final, or made so by subsequent order, may be pleaded in bar of a new suit.¹⁰

*662 * A plea in bar of matters of record, or matters in the nature of matters of record in some Court, not being a Court of Equity, may be: (1.) Fine; (2.) Recovery; (3.) Judgment at Law, or Sentence of some other Court.

(1.) A fine is a record of the Court in which it has been levied, and, if levied on or before the 31st of December, 1833,¹ is equally good as a bar in Equity as it is at Common Law, provided it be pleaded with proper averments.² In a plea in Equity of a fine and non-claim, the same strictness is required as at Law; therefore, where a defendant, instead of averring positively that the party levying the fine was actually seised, averred that he was seised, or pretended to be seised, the plea was held to be bad.³ A plea of a fine and non-claim can now only be made use of where the fine has been levied on or before the 31st of December, 1833: the 3 & 4 Will. IV. c. 74, having abolished that species of assurance from that date, and substituted, in its stead, a more simple form, by deed enrolled in the High Court of Chancery, within six months from the date thereof; and such deed and enrolment may now be pleaded, instead of a fine.

(2.) A common recovery duly suffered, like a fine, is a record of the Court in which it has been suffered; and if it has been suffered on or previously to the 31st of December, 1833, such recovery may be pleaded in Equity, as well as at Law, if the estate limited to the plaintiff, or under which he claims, is thereby barred.⁴ Since the statute 3 & 4 Will. IV. c. 74, common recoveries can be no longer suffered; but where an estate tail has been barred, by the execution of a deed enrolled in the Court of Chancery, according to the provisions of that Act, such deed and enrolment may be shown to the Court by plea, instead of a recovery. The form of a plea of a recovery appears to be nearly the same in Equity as at Law. In *Attorney-General v. Sutton*,⁵ the suffering of the recovery appears to have been averred in the following form: "That Thomas Sutton, the testator's nephew, being tenant in tail by the will, had suffered a common recovery, and thereby barred the charities."

(3.) The judgment of a Court of ordinary jurisdiction, is also a matter of record, which may, in general, be pleaded in bar to a suit in Chancery, provided such judgment has finally determined the rights

¹⁰ *Ld. Red.* 245; *Fitzgerald v. Fitzgerald*, 5 Bro. P. C. ed. Toml. 567; see also *Jones v. Nixon*, *Younge*, 359; and see *Ord. XIV.* 7, and *ante*, p. 632, as to plea of pending suit in another Court of Equity. See *Ferguson v. Miller*, 5 Ham. 460; *Hughes v. Blake*, 6 Wheat. 453.

¹ See 3 & 4 Will. IV. c. 74, § 2.

² *Ld. Red.* 271; *Thynne v. Cary*, W. Jones, 416; *Salisbury v. Baggot*, 1 Ch. Ca. 278; 2 Swanst. 604, 610; *Watkins v. Stone*,

2 S. & S. 560, 573; *Story v. Lord Windsor*, 2 Atk. 630, 632; see *Story Eq. Pl.* § 771, *et seq.* For form of such plea, see 2 Van Hey. 100.

³ *Story v. Lord Windsor*, 2 Atk. 630, 632; *Dobson v. Leadbeater*, 13 Ves. 233.

⁴ *Ld. Red.* 253; *Attorney-General v. Sutton*, 1 P. Wms. 753.

⁵ 1 P. Wms. 754; 3 Bro. P. C. ed. Toml. 75; *Plunkett v. Cavendish*, 1 R. & M. 713, 718.

of the parties.⁶ Thus, a judgment of a Court of Common * Pleas *665 in a writ of right,¹ or a verdict and judgment entered thereon in a Court of Common Law, have been held to be a good bar in a Court of Equity for the same matter.² So it seems, that a plea of a nonsuit, in an action of trover, has been allowed as a good plea.³

In *Behrens v. Pauli*,⁴ a plea, that a verdict and judgment in the Lord Mayor's Court had been obtained by the defendant against the plaintiff, on the same matter in respect of which relief was sought by the bill, was allowed by Lord Langdale M. R. on the ground that the Lord Mayor's Court was a Court of competent jurisdiction to decide the case; and, although the decision of the Master of the Rolls was afterwards overruled by Lord Cottenham, in *Behrens v. Siveking*,⁵ it was merely upon the ground of an informality in the plea, in not showing that the subject-matter of the suit, in the Lord Mayor's Court, was the same, and that the proceedings were taken for the same purpose.

It is not necessary that the Court, the judgment of which is pleaded, should be a Court of Common Law; the sentence of any Court may be a proper defence by way of plea. Thus, it seems that a sentence of a Court of Admiralty will, if properly pleaded, be a good plea.⁶ And so may a sentence of a Court of Probate; therefore, a will and probate, even in the common form, may be pleaded to a bill by persons claiming as next of kin to a person supposed to have died intestate.⁷ If fraud in obtaining the will is alleged, that is not a sufficient equitable ground to impeach a probate: for the parties may resort to the Court of Probate, which is competent to determine the question of fraud,⁸ unless indeed the case be one in which the fraud has not gone to the whole will, but only to some particular clause, or in which it has been practised to obtain the consent of the next of kin to the probate: in which * cases the Court has laid hold of these circumstances to declare *664 the executor a trustee for the next of kin.¹ Where there are no

⁶ *Ld. Red.* 253; see *Cammann v. Trap-hagan*, 1 *Saxton* (N. J.), 28; *Story Eq. Pl.* § 778, and note; *Standish v. Parker*, 2 *Pick.* (2d ed.) 22, and notes, 1, 2, 3, and cases cited; *Van Wych v. Seward*, 1 *Edw.* 327. A judgment on the merits, which will bar any other suit at Law on the same cause of action, will also bar a suit in Chancery on the same cause of action. *Hunt v. Terril*, 7 *J. J. Marsh.* 68, 70. A judgment on either a special verdict or on demurrer to evidence has this effect. *Ibid.* [See *ante*, 659, n. 9.]

¹ *Sidney v. Perry*, cited *Ld. Red.* 254.

² *Wilcox v. Sturt*, 1 *Vern.* 77; *Bluck v. Elliot*, *Rep. t. Finch.* 13; *Pitt v. Hill*, *ib.* 70; *Temple v. Lady Baltinglass*, *ib.* 275; *Williams v. Lee*, 3 *Atk.* 223; and for the plea in that case, see *Beames on Pleas*, 337. For the effect of a judgment at Law, when given in evidence in a suit in Equity, see *Pearce v. Gray*, 2 *Y. & C. C. C.* 322, 326; *Protheroe v. Forman*, 2 *Swanst.* 227, 231; *Harrison v. Nettleship*, 2 *M. & K.* 423, 425.

³ *Wilcox v. Sturt*, 1 *Vern.* 77.

⁴ 1 *Keen*, 456, 463.

⁵ 2 *M. & C.* 602, 603.

⁶ *Parkinson v. Lecras*, cited *Ld. Red.* 257.

⁷ *Jauncy v. Sealey*, 1 *Vern.* 397; *Ld. Red.* 257; see also *Penvill v. Luscombe*, 2 *J. & W.* 201, 203; *Barrs v. Jackson*, 1 *Phil.* 582; 9 *Jur.* 609; 1 *Y. & C. C. C.* 585, 596; 7 *Jur.* 54.

⁸ *Ld. Red.* 257; *Archer v. Mosse*, 2 *Vern.*

8; *Nelson v. Oldfield*, *ib.* 76; *Attorney-General v. Ryder*, 2 *Cha. Ca.* 178; *Plume v. Beale*, 1 *F. Wms.* 388; *Stephenson v. Gardiner*, 2 *P. Wms.* 286; *Bennet v. Wade*, 2 *Atk.* 324; *Kerrick v. Bransby*, 7 *Bro. P. C. ed. Toml.* 437; *Meadows v. Duchess of Kingston*, *Amb.* 756, 761; *Griffiths v. Hamilton*, 12 *Ves.* 298, 307; *Story Eq. Pl.* § 782.

¹ *Ld. Red.* 257; *Barnesly v. Powel*, 1 *Ves.* S. 284, 287; *Marriot v. Marriot*, 4 *Stam.* 666; *Meadows v. Duchess of Kingston*, *Amb.* 762, 763; *Allen v. M'Pherson*, 1 *Phil.* 133, 143; *Gingell v. Horne*, 9 *Sim.* 539, 548; *Hudson v. Weatherell*, 5 *De G., M. & G.* 304; 1 *Sim. & G.* 604; *Dimes v. Steinberg*, 2 *Sim. & G.* 75.

such circumstances in the case, the probate of the will is a clear bar to a demand of personal estate.² And where a testator died in a foreign country, and left no goods in any other country, probate of his will, according to the law of that country, was determined to be a sufficient defence against an administrator appointed in England: ³ but such foreign probate will not do, if there are any goods in England: for in that case the will must be proved here. So also a decree of the Court of Chancery in Ireland, after a verdict upon an issue *devisavit vel non*, does not determine the validity or invalidity of the will, so far as it relates to lands in England, and cannot be pleaded in bar to a suit here.⁴ It is not, indeed, necessary in every case, that the Court whose sentence is pleaded should be an English Court: the sentence of a foreign Court may be a proper defence by way of plea; but the plea must show that the Court pronouncing the sentence had full jurisdiction to determine the rights of the parties; ⁵ that the subjects in question, and the issue, were the same: that the cause was decided on the merits, and that the sentence pleaded was final, and not an interlocutory proceeding.⁶

Although a final judgment of a Court of competent jurisdiction, whether in this or any other country, will, as we have seen, operate as a bar to a claim for the same matter in a Court of Equity, yet if, from any circumstance, such as fraud, mistake, or surprise, it is against conscience that the defendant should avail himself of such a bar, a Court of Equity will interfere to set it aside.⁷ Where, however, a bill for that purpose is filed, the defendant may plead the judgment in bar, negating by averments, and (if interrogated as to them) denying by answer, the equitable circumstances alleged in the bill, upon which the judgment is sought to be impeached.

It is to be observed, that where a bill itself states a sentence of another Court, without alleging any equitable matter to avoid it,

*665 * a plea of that sentence will not hold: because it brings forward no new matter, and the defendant ought to have demurred.¹

Where a bill was filed by an executor, who had assented to a specific

² *Ld. Red.* 258.

³ *Jauncy v. Sealey*, 1 *Vern.* 397.

⁴ *Boysse v. Colclough*, 1 *K. & J.* 124.

⁵ *Ld. Red.* 255; *Newland v. Horseman*, 1 *Vern.* 21; 2 *Ch. Ca.* 74; *Burrows v. Jemineau*, *Sol. Ca.* in *Cha.* 69; 1 *Dick.* 48; *Gage v. Bulkeley*, 3 *Atk.* 215; *White v. Hall*, 12 *Ves.* 321, 324; see also *Henderson v. Henderson*, 3 *Hare*, 100, 115; *Farquharson v. Seton*, 5 *Russ.* 45, 63; *Marquis of Breadalbane v. Chandos*, 2 *M. & C.* 711, 732; *Story Conf. Laws*, 584-618.

⁶ *Garcias v. Ricardo*, 14 *Sim.* 265, 271; 8 *Jur.* 1037; *S. C.* on appeal, *nom.* *Ricardo v. Garcias*, 12 *Cl. & Fin.* 368; 9 *Jur.* 1019; *Samuda v. Furtado*, 3 *Bro. C. C.* 70, 72; *Ostrell v. Lepage*, 2 *De G., M. & G.* 892, 895; 5 *De G. & S.* 95; 16 *Jur.* 404; *Hunter v. Stewart*, 8 *Jur. N. S.* 317; 10 *W. R.* 176, *L. C.*; see also *Reimers v. Druce*, 23 *Beav.* 145; 3 *Jur. N. S.* 147.

⁷ As to the circumstances which will be

sufficient to impeach a verdict and judgment in Equity, see *Williams v. Lee*, 3 *Atk.* 223; *Samuda v. Furtado*, *ubi sup.* [In *Ochsenbein v. Papelier*, *L. R.* 8 *Ch.* App. 695, it was held that fraud was a good defence to a suit at Law on a foreign judgment, and, therefore, Equity would not interfere by injunction with the suit. In *Davis v. Headley*, 7 *C. E. Green*, 115, the decree of another State, sought to be enforced, was held void for fraud. See also *Winchester v. Jackson*, *Cooke*, 420; *S. C.* 3 *Hayw.* 305. And see, as to the extent to which judgments of foreign Courts can be examined or enforced in England, *Reimers v. Druce*, 23 *Beav.* 145; *Cammell v. Sewell*, 2 *H. & N.* 617; 5 *H. & N.* 728; *Simpson v. Fogo*, 1 *J. & H.* 18; 1 *H. & M.* 195; *Castrique v. Imri*, 8 *C. B. N. S.* 1, 405; *Griffin v. Brady*, 18 *W. R.* 130.]

¹ *Ld. Red.* 255; [*Knight v. Atkisson*, 2 *Tenn. Ch.* 384.]

bequest, to set aside a verdict and judgment in trover, obtained by the specific legatee, on the ground that trover would not lie for a legacy, and that the damages given by the jury were excessive, and the defendant pleaded the verdict and judgment in bar, the plea was allowed;² but it may be doubted whether the defence ought not to have been by demurrer, as there was no allegation in the bill requiring averment in support of the plea.³ Upon this principle, where the probate of a will is impeached on the ground of fraud used in obtaining it, the defence should be by demurrer: because fraud not being a sufficient equitable ground to impeach the probate,⁴ the mere setting up of a probate, which appears upon the bill is not a sufficient averment of a new fact to support a plea.

3. Pleas in bar of matter *in pais* only are, principally: (1.) A stated account; (2.) A release; (3.) An award; (4.) An agreement; (5.) A title founded, either on adverse possession, or on a will, or conveyance, or other instrument affecting the right of the parties; (6.) A purchase for valuable consideration, without notice of the plaintiff's title.

(1.) A plea of a stated account is a good bar to a bill for an account;⁵ for there is no rule more strictly adhered to in this Court than that, when a defendant sets forth a stated account, he shall not be obliged to go upon a general one.⁶

In order to support a plea of a stated account, it must be shown to have been final; it is not sufficient to allege that there has been a dividend made between the parties, which implied a settlement; for a dividend may be made upon a supposition that the estate will amount to so much, but may be still subject to an account being stated afterwards.⁷ A plea of a stated account must show that it was in writing, and likewise the balance in writing, or at least set forth what the balance was.⁸ It does not, however, seem to be necessary to aver, that the account was settled between the * parties upon a minute *666 investigation of items: a general agreement or composition will be sufficient;¹ nor will the circumstance of the account appearing to have been settled, errors excepted, be a sufficient ground to open a settled account, unless specific errors are pointed out in the bill.²

A stated account will not operate as a bar to discovery, where the plaintiff is entitled to such discovery, not for the purpose of any pro-

² Williams v. Lee, 3 Atk. 223.

³ Ld. Red. 255.

⁴ Ante, p. 612.

⁵ Ld. Red. 259; Dawson v. Dawson, 1 Atk. 1; Chappedelaine v. Dechenaux, 4 Cranch, 306; see the form of a plea of a stated account, Willis, 550. What will constitute a stated account in the sense of a Court of Equity, is in some measure dependent on the circumstances of the case. 1 Story Eq. Jur. § 526. A stated account properly exists only where the accounts have been examined, and the balance admitted as the true balance between the parties, without having been paid. When the balance thus admitted is paid, the

account is deemed a settled account. Endo v. Calahan, 1 Younge, 306; Capon v. Miles, 13 Price, 767; Weed v. Small, 7 Paige, 573; 1 Story Eq. Pl. § 798.

⁶ Sumner v. Thorpe, 2 Atk. 1; Coop. Eq. Pl. 277; see also Carmichael v. Carmichael, 2 Phil. 101, 104; 10 Jur. 908; 1 Story Eq. Jur. § 527.

⁷ Dawson v. Dawson, 1 Atk. 1.

⁸ Burk v. Brown, 2 Atk. 399.

¹ Sewell v. Bridge, 1 Ves. S. 297; [Greene v. Harris, 11 R. I. 5.]

² Taylor v. Haylin, 2 Bro. C. C. 310; 1 Cox, 435; Johnson v. Curtis, 3 Bro. C. C. 266; [Ready v. Munday, 1 Tenn. Ch. 458.]

ceeding between him and the defendant, but to enable him to protect himself from claims by other people.³ A general release of all demands, not under seal, may be pleaded as a stated account.⁴

It is not essential, in order to the validity of a stated account as a bar, that it should have been signed by the parties;⁵ it will be sufficient if an account has been delivered and acquiesced in for a considerable length of time;⁶ thus, where there have been mutual dealings between a merchant in England and a merchant beyond sea, and an account is transmitted by one to the other: if the person to whom it is sent keeps it by him for a length of time without making any objection it will bind him, and prevent him opening the account afterwards.⁷ The mere delivery of an account, however, will not constitute a stated account, without some evidence of acquiescence which may afford sufficient legal presumption of a settlement.⁸ It has been said that, among merchants, it is looked upon as an allowance of an account current, if the merchant who receives it does not object to it in a second or a third post;⁹ but in *Tickel v. Short*,¹⁰ Lord Hardwicke said, that if one merchant sends an account to another in a different country, on which a balance is made due to himself, and the other keeps it by him about two years without objection, the rule of this Court, as well as of merchants, is, that it is considered as a stated account.

A defendant, pleading a stated account, must, whether error or fraud be charged or not, aver that the stated account is just and true, to the best of his knowledge and belief;¹¹ but it is not necessary that the account should be annexed by way of schedule: for the plea is sufficient, in case it be a fair account between the parties.¹ * Where, however, a bill impeaches the account, and alleges that the plaintiff has no counterpart of it, and it is required to be set forth, the defendant must annex a copy of the account to his answer by way of schedule, so that, if there are errors upon the face of it the plaintiff may have an opportunity of pointing them out.²

The delivery up of vouchers is an affirmation that the account between the parties was a stated one; and where such a transaction has taken place, it should be averred in the plea.³

It has been before stated, that the effect of pleading a stated account

³ *Clarke v. Earl of Ormonde*, Jac. 116.

⁴ *Gillb. For. Rom.* 57.

⁵ *Story Eq. Jur.* § 526.

⁶ *Murray v. Toland*, 3 John. Ch. 569; *Freeland v. Heron*, 7 Cranch, 147; 1 *Story Eq. Jur.* § 526; *Consequa v. Fanning*, 3 John. Ch. 587; *Wilde v. Jenkins*, 4 Paige, 481. In regard to acquiescence in stated accounts, although it amounts to an admission, or presumption of their correctness, it by no means establishes the fact of their having been settled, even though the acquiescence has been for a considerable time. There must be other ingredients in the case to justify the conclusion of a settlement. 1 *Story Eq. Jur.* § 528; *Ld. Clancarty v. Latouche*, 1 B. & Beat. 428; *Irving v. Young*, 1 S. & S. 333.

⁷ *Willis v. Jernegan*, 2 Atk. 252; [*Powell v. Pacific R. R.*, 65 Mo. 658.]

⁸ *Irvine v. Young*, 1 S. & S. 333.

⁹ *Sherman v. Sherman*, 2 Vern. 276.

¹⁰ 2 Ves. 239.

¹¹ *Anon.*, 3 Atk. 70; *Daniels v. Taggart*, 1 Gill & J. 311; *Schwarz v. Wendell*, *Harring. Ch.* 395.

¹ *Hankey v. Simpson*, 3 Atk. 303. [See *Green v. Harris*, 11 R. I. 5.]

² *Hankey v. Simpson*, 3 Atk. 303.

³ *Willis v. Jernegan*, 2 Atk. 252; *Clarke v. Earl of Ormonde*, Jac. 116. But the delivering up of vouchers on a settlement of accounts, is not necessary. *Meeker v. Marsh*, 1 Saxton (N. J.), 198.

to a mere bill for an account, is to compel the plaintiff to amend his bill, and to charge either fraud or particular errors;⁴ it remains only to observe, that if specific errors or frauds are charged in the bill, for the purpose of impeaching the account, they must be denied by averments in the plea, as well as by the answer in support of the plea, if the defendant is interrogated as to them.⁵

It may be observed here, that when fraud is proved to have taken place in a settlement of account, it will be a sufficient ground to open the whole account,⁶ and this has been done by the Court, though the account had been settled for twenty-three years, and the party who was guilty of the fraud was dead.⁷

Upon the same principle, where an account has been settled between an attorney and his client, and it appears upon the face of the account that the attorney has not given that credit, and produced to his client that state of his affairs which he was entitled to have, the Court will not permit such an account to stand.⁸ The same rule will apply to cases of accounts settled between principal and agent,⁹ guardian and ward,¹⁰ and trustee and *cestui que trust*.¹¹ *The case, however, *668 is different, where errors or mistakes only are shown to exist in the account: for there the account will not be opened, but the party will be permitted merely to surcharge and falsify it.¹ This is an important distinction: because, where an account is opened, the whole of

⁴ *Ante*, p. 371; *Weed v. Smull*, 7 Paige, 573; *Brown v. Van Dyke*, 4 Halst. Ch. (N. J.) 795.

⁵ *Phelps v. Sproule*, 1 M. & K. 231, 236; *Parker v. Alcock*, 1 Y. & J. 432; *Chadwick v. Broadwood*, 3 Beav. 530, 540; [*Green v. Harris*, 4 R. I. 401; S. C. 11 R. I. 5, where the authorities are fully considered.]

⁶ [Where accounts are impeached, and it is shown that they contain errors of considerable extent, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify; and upon less proof in the case of fiduciary relation between the parties. *Williamson v. Barbour*, 9 Ch. Div. 529. Where one error was established in a long settled account, leave was given to surcharge and falsify. *Gething v. Keighley*, 9 Ch. Div. 547.] See *Barrow v. Rhinelander*, 1 John. Ch. 550; *Baker v. Biddle*, 1 Bald. 394; *Bainbridge v. Wilcocks*, *ib.* 536, 540. A running account closed by a bond may be opened by a Court of Equity on the ground of fraud. *Gray v. Washington*, Cook, 321. If in a bill of Equity to open a settled account, the facts alleged and proved should show fraud actual or constructive, in the settlement, the plaintiff will be entitled to relief, notwithstanding the bill contains no direct averment of fraud. *Farnam v. Brooks*, 9 Pick. 212; [*Bankhead v. Alloway*, 6 Coldw. 56.]

⁷ *Vernon v. Vaudry*, 2 Atk. 119; [*Botifleur v. Weyman*, 1 M'Cord Ch. 161.]

⁸ *Matthews v. Wallwyn*, 4 Ves. 118, 125;

Middleditch v. Sharland, 5 Sumner's Ves. 87, Perkins's note (a), and cases cited; *Hickson v. Aylward*, 3 Moll. 1; *Farnam v. Brooks*, 9 Pick. 212; 1 Story Eq. Jur. § 462, and notes; *Pickering v. Pickering*, 2 Beav. 31; *Graham v. Davidson*, 2 Dev. & Bat. Eq. 155; *De Montmorency v. Devereux*, Dru. & W. 119.

⁹ *Beaumont v. Boltbee*, 5 Ves. 485, 494; 7 Ves. 599, 601; 11 Ves. 358; *Clarke v. Tipping*, 9 Beav. 284, 287, where the fact appeared from admissions in the answer.

¹⁰ *Allfrey v. Allfrey*, 10 Beav. 353, 357; 11 Jur. 981; 1 M'N. & G. 87, 93; 13 Jur. 269; *Coleman v. Mellersh*, 2 M'N. & G. 309, 315; and see *Brownell v. Brownell*, 2 Bro. C. C. 62.

¹¹ *Clarke v. Earl of Ormonde*, Jac. 116. As between trustee and *cestui que trust*, the trustee cannot protect himself from discovery of the vouchers, S. C.

¹ *Vernon v. Vaudry*, 2 Atk. 119; *Brown v. Van Dyke*, 4 Halst. Ch. (N. J.) 795. The burden of showing errors is on him who receives an account without objection. *Baker v. Biddle*, 1 Bald. 394; *Bainbridge v. Wilcocks*, *ib.* 536, 540; *Lock v. Armstrong*, 2 Dev. & Bat. Eq. 147; *Wilde v. Jenkins*, 4 Paige, 481; *Murray v. Toland*, 3 John. Ch. 569; *Honore v. Colmesnel*, 1 J. J. Marsh. 417; *Troup v. Haight*, 1 Hopk. 239. In the case of transactions between trustee and *cestui que trust*, or guardian and ward (*Brownell v. Brownell*, 2 Bro. C. C. 62), or between solicitor and client (*Matthews v. Wallwyn*, 4 Ves. 125), the Court allows a greater latitude.

it may be unravelled, and the parties will not be bound by deductions agreed upon between them on taking the former account; ² but where a party has liberty to surcharge and falsify, the *onus probandi* is always on the party having the liberty: for the Court takes it as a stated account and establishes it; but if the party can show an omission for which there ought to be credit, it will be added (which is a surcharge), or if any wrong charge is inserted it will be deducted (which is a falsification).³ This, however, must be done by proof on his side.⁴ In some cases, where the circumstances would justify opening the account, the Court will only give leave to surcharge and falsify, if it is satisfied that it will in that manner best do justice between the parties.⁵

It is to be noticed here, that although a party seeking to open a settled account, must specify the errors he insists upon,⁶ it is not necessary that he should, at the hearing, prove all the errors specified in his bill.⁷ If he proves some of them, he entitles himself to a decree, giving him liberty to surcharge and falsify.⁸ Where parties are at liberty to surcharge and falsify, they are not confined to mere errors of fact, but they may take advantage of errors in Law; ⁹ and where one party is allowed to surcharge and falsify, the other may do so too.¹⁰

*669 * It is to be remarked, however, that although an admission by the defendant in the answer accompanying his plea, of an error in the stated account, may be sufficient evidence to induce the Court to open the account, the mere circumstance that the defendant, after the account was settled, confessed that there was an error in the account, and before suit corrected it and paid over the amount, is not a ground upon which the Court will make such a decree.¹

(2.) If the plaintiff, or a person under whom he claims, has released the subject of his demands, the defendant may plead the release in bar of the bill,² whether executed before or after the filing of the bill; ³ and

² *Osborne v. Williams*, 18 Ves. 379, 382.

³ *Pit v. Cholmondeley*, 2 Ves. S. 565; *Heighington v. Grant*, 1 Phil. 600. For an explanation of the terms *surcharge* and *falsify*, see 1 Story Eq. Jur. § 525.

⁴ *Ibid.*

⁵ *Allfrey v. Allfrey*, 1 M'N. & G. 87, 94; 13 Jur. 269.

⁶ *Ante*, p. 371. A general charge is not sufficient, specific errors must be pointed out. *Calvit v. Markham*, 3 How. (Miss.) 343; *Mebane v. Mebane*, 1 Ired. Eq. 403; *De Montmorency v. Devereux*, 1 Dru. & W. 119; *Leaycraft v. Dempsey*, 15 Wend. 83; *Baker v. Biddle*, 1 Bald. 394, 418; *Bainbridge v. Wilcox*, *ib.* 536, 540; *Consequa v. Fanning*, 3 John. Ch. 587; S. C. 17 John. 511; *Weed v. Small*, 7 Paige, 573; *Hobart v. Andrews*, 21 Pick. 576; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Phillips v. Belden*, 2 Edw. Ch. 1; *Stoughton v. Lynch*, 2 John. Ch. 509.

[Where no fiduciary relation exists between the parties, nor any great inequality in their mental or business capacity, formal

settlements closed by receipt or note will not be opened except for fraud, or errors clearly established, especially after the destruction of vouchers by consent. *Patton v. Cone*, 1 Lea, 14; S. C. 2 Tenn. Leg. Rep. 171. An action to open a settlement cannot be maintained if it appear that the plaintiff was aware, at the time he made the settlement, of the facts on which he bases his claim to relief. *Quinlan v. Keiser*, 66 Mo. 603. And see *Gage v. Parmele*, 87 Ill. 329.]

⁷ *Anon.*, 2 Freem. 62; *Chambers v. Goldwin*, 5 Ves. 834, 837; *Dawson v. Dawson*, 1 Atk. 1; *Drew v. Power*, 1 Sch. & Lef. 192.

⁸ *Twogood v. Swanston*, 6 Ves. 485.

⁹ *Roberts v. Kuffin*, 2 Atk. 112.

¹⁰ 1 Mad. Ch. 144.

¹ *Davis v. Spurling*, 1 R. & M. 64, 67.

² *Ld. Red.* 261; *Bower v. Swadlin*, 1 Atk. 294; *Taunton v. Pepler*, 6 Mad. 166; *Clarke v. Earl of Ormonde*, Jac. 116; *Roche v. Morgell*, 2 Sch. & Lef. 721.

³ *Sergrove v. Mayhew*, 2 M'N. & G. 97, 99; 14 Jur. 158.

this will apply to a bill praying that the release may be set aside;⁴ in which case, the defendant must deny the equitable circumstances charged for the purpose of impeaching the release, by averments in the plea, and also by the answer in support of the plea, if interrogated as to them.⁵

A release, however, to be an effectual bar to an account, must be under seal: otherwise it ought to be pleaded as a stated account only.⁶ But although it is necessary that a release, when insisted upon as such, should have been sealed and delivered,⁷ there is no authority for saying that it must have been signed.⁸ It seems, that where a person taken in execution on a judgment has been discharged by his creditor's express order, such discharge, being a release of the debt, may be pleaded in bar to a bill to have satisfaction of the judgment.⁹

In a plea of release, the defendant must set out the consideration upon which it was made; for every release must be founded on some consideration: otherwise fraud will be presumed.¹⁰ A plea of a release, therefore, cannot extend to the discovery of the consideration; and if that is impeached by the bill, the plea must be assisted by averments, covering the ground upon which the consideration is so impeached;¹¹ therefore, where there was a bill for *an account and *670 a discovery of dealings between the parties, to which a release was pleaded, and it appeared that the release was founded on an account of those dealings made up, Lord Hardwicke held it to be bad: because it extended to a discovery of those dealings, and of the account so made up.¹

In the case of *Brown v. Perkins*,² to a bill, by the executors of a deceased partner, for an account of the dealings and transactions of a partnership, the defendant pleaded a parol agreement between himself and the testator, to the effect that all accounts between them should be waived. Sir James Wigram V. C. seemed to be of opinion, that such a plea might be a good defence to a bill for an account; but he was of opinion, upon the construction of the agreement in the case before him, that it must be understood as importing that the defendant took

⁴ Ld. Red. 261.

⁵ *Lloyd v. Smith*, 1 Anst. 258; *Freeland v. Johnson*, *ib.* 276; *Walter v. Glanville*, 5 Bro. P. C. ed. Toml. 555; *Roche v. Morgell*, 2 Sch. & Lef. 727; *Sanders v. King*, 6 Mad. 61, 64, cited 2 S. & S. 277; see also *Parker v. Alcock*, 1 Y. & J. 432. [See *McClane v. Shepherd*, 6 C. E. Green, 76.]

⁶ Ld. Red. 263.

⁷ The plea should state that the release was under seal; but this does not seem to be indispensable. *Phelps v. Sproule*, 1 M. & K. 231, 236.

⁸ *Taunton v. Pepler*, 6 Mad. 166.

⁹ *Beames on Pleas*, 221; *Beatniff v. Gardiner*, 2 Eq. Ca. Ab. 73, Pl. 20. [But not to a bill to enforce a mortgage made to secure the debt. *Davis v. Battine*, 4 Russ. & M. 76.]

¹⁰ *Roche v. Morgell*, *ubi sup.* A plea of release to a bill for an account is insufficient, unless it sets out by way of averment the accounts which form its consideration. *Brooks v. Sutton*, L. R. 5 Eq. 361.

¹¹ Ld. Red. 261, 262. *Story Eq. Pl.* §§ 796, 797. Where the consideration for a release is the general settlement of accounts, and such settlement is impeached in the bill, this must be met by a plea, and be supported by an answer denying the imputations charged in the bill. *Parker v. Alcock*, 1 Y. & J. 432; *Fish v. Miller*, 5 Paige, 26; *Allen v. Randolph*, 4 John. Ch. 693; *Bolton v. Gardner*, 3 Paige, 273; *Peck v. Burgess*, Walk. Ch. 485.

¹ *Salkeld v. Science*, 2 Ves. S. 107, 108; *Roche v. Morgell*, *ubi sup.*

² 1 Hare, 564, 569; 6 Jur. 727.

upon himself the liabilities of the partnership; and he held the plea bad: because it was not supported by negative averments, showing that the plaintiff's testator's estate was discharged from all liability in respect of the partnership.

(3.) An award may be pleaded in bar to a bill, which seeks to disturb the matter submitted to arbitration.³ It may likewise be pleaded to a bill to set aside the award and open the account; and it is not only a good defence to the merits of the case, but likewise to the discovery sought by the bill.⁴

It seems doubtful whether an award, made under an agreement, entered into after the bill has been filed, to refer the matter of the suit to arbitration, can be set up in bar to the bill by a plea, in the nature of a plea *puis durrein continuance* at Law; the object in view can, however, be much more effectually obtained by an application to stay proceedings in the cause.⁵

Although an award duly made will be a good plea in bar to a bill, for the matters concluded by it, a covenant or agreement to refer disputes to arbitration, as it cannot be made the subject of a bill for a *671 specific performance,⁶ cannot be pleaded in bar to a bill *brought in consequence of such differences;¹ and where a bill is filed in respect of matters agreed to be referred to arbitration, the proper

³ *Tittenson v. Peat*, 3 Atk. 529; *Farrington v. Chute*, 1 Vern. 72. As to the jurisdiction of the Court over awards, see *Harding v. Wickham*, 2 J. & H. 676; *Smith v. Whitmore*, 10 Jur. N. S. 65; 12 W. R. 244, V. C. W.; 10 Jur. N. S. 1190; 13 W. R. 2, L. J.; 2 De G., J. & S. 297; *Wakefield v. Llanelly Railway & Dock Co.*, 3 De G., J. & S. 11; 11 Jur. N. S. 456; [*Borneo v. Robinson*, W. N. (1868) 26; *Parrott v. Shellard*, 16 W. R. 928;] *ante*, p. 605. An award constitutes no valid defence unless it clearly appears that the subject-matter of the suit was within the award. *Davidson v. Johnson*, 1 C. E. Green (N. J.), 112.

⁴ *Ld. Red. 260*; *Tittenson v. Peat*, *ubi sup.*

⁵ *Rowe v. Wood*, 1 J. & W. 315, 334, 337; 2 Bligh, 505; see also *Dryden v. Robinson*, 2 S. & S. 524, the marginal note of which case is incorrect.

⁶ *Price v. Williams*, cited 6 Ves. 818; *Ager v. Macklew*, 2 S. & S. 418; *Earl of Mexborough v. Bower*, 7 Beav. 127; *Tatterton v. Groot*, 2 B. & P. 131; *Copper v. Wells*, *Saxton* (N. J.), 19; *Darby v. Whitaker*, 4 Drew. 134; *March v. Eastern Railroad*, 40 N. H. 571; *Smith v. Boston*, C. & M. R. R., 56 N. H. 487; *King v. Howard*, 27 Miss. 21. No mere agreement to refer a controversy to arbitration can oust the proper Courts of justice of their jurisdiction of the case. *Cantow v. Dawson*, 2 Bland, 264; see also *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408; *Randall v. Chesapeake, &c., Canal Co.*, 1 Harring. 234; *Gray v. Wilson*, 4 Watts, 39; *Miles v. Stanley*, 1 Miles, 418; *Stone v. Dennis*, 3 Porter, 231; *Tobey v. County of Bristol*, 3

Story, 800. [See *Milnes v. Gery*, 14 Ves. 400; *Greason v. Keteltas*, 17 N. Y. 491; *Hopkins v. Gilman*, 22 Wis. 476; *Dawson v. Fitzgerald*, L. R. 9 Ex. 7; *Tscheider v. Biddle*, 4 Dill. 55, and Judge Dillon's learned note at the end of the case, p. 64. See also, under the Common Law Procedure Act, *Cooke v. Cooke*, L. R. 4 Eq. 77; *Willesford v. Watson*, L. R. 8 Ch. Ap. 473; *Law v. Garrett*, 8 Ch. Div. 26.]

¹ *Ld. Red. 264*; *Wellington v. Mackintosh*, 2 Atk. 569, 570; *Michell v. Harris*, 4 Bro. C. C. 311, 315; 2 Ves. J. 129, 136; *Satterley v. Robinson*, cited 4 Bro. C. C. 316, n.; *Street v. Rigby*, 6 Ves. 815, 817, overruling *Halfhide v. Fenning*, 2 Bro. C. C. 336; and see *Ranger v. Great Western Railway Company*, 5 H. L. Ca. 72; 18 Jur. 795; *Scott v. Avery*, 5 H. L. Ca. 843; 2 Jur. N. S. 815; *Scott v. Corporation of Liverpool*, 1 Giff. 215; 4 Jur. N. S. 402; 2 De G. & J. 324; 5 Jur. N. S. 105; *Roper v. Lendon*, 1 E. & E. 825; 5 Jur. N. S. 491; *Horton v. Sayer*, 4 H. & N. 643; 5 Jur. N. S. 939; *Cooke v. Cooke*, L. R. 4 Eq. 87; *Henrick v. Blair*, 1 John. Ch. 101; *Shepard v. Merrill*, 2 John. Ch. 276; *Underhill v. Van Cortlandt*, 2 John. Ch. 339; *Bouck v. Wilber*, 4 John. Ch. 405; *Tappin v. Heath*, 1 Paige, 293; *Campbell v. Western*, 3 *id.* 124; *Fitzpatrick v. Smith*, 1 Desaus. 245; *Atwyn v. Perkins*, 3 Desaus. 297; *Sherman v. Beale*, 1 Wash. 11; *Pleasants v. Ross*, 1 Wash. 156; *Morris v. Ross*, 2 Hen. & M. 171, 408; *Mitchell v. Harris*, 2 Sumner's Ves. 129, notes (c) and (d), and cases cited; *Tobey v. County of Bristol*, 3 *Story*, 800, 819 *et seq.*

course is for the defendant, after appearance, but before plea or answer, to apply to the Court to stay the proceedings in the suit.²

If the bill impeach the award upon grounds of fraud, corruption, or mistake, or for any other reason, such statements must be denied by averments in the plea, and (if interrogated to) by answer in support of it.³

We have already had occasion to observe, that arbitrators may be made parties to a bill, to set aside an award which is impeached on the ground of gross misconduct on their parts.⁴ In such a case, they may plead the award in bar of all that part of the bill which seeks a discovery of their motives in making the award; but, they must, if charged with corruption or partiality, support the plea by averments, denying such charges, and showing themselves incorrupt and impartial, and (if interrogated) they must also deny them by answer.⁵

(4.) It has been stated above, that an agreement or covenant to refer matters in dispute to arbitrators cannot be pleaded in bar to a bill, unless there has been an arbitration and award consequent upon it. The reason of this is, that such an agreement is executory: and an executory agreement is a cause of action only, and cannot be pleaded in bar to another cause of action.⁶ Where an agreement is final, and settles the whole matter, the case is different; therefore, where an administratrix, who was a defendant in a bill for an account and distribution, pleaded an inventory duly * taken and approved, and *672 an agreement founded thereon, the plea was allowed.¹ It is to be observed, that an agreement to put an end to a suit must not be final only as between the parties to the bill to which it is pleaded, but it must be final as to all the parties to the suit compromised by it. If, therefore, an agreement be made subsequent to the filing of a bill, between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and for other purposes, it cannot be pleaded in bar to the bill by one of the parties only: at all events, if it is so pleaded, it must contain averments that all the conditions of the agreement have been performed, or from circumstances could not be performed, and that the other parties not joining in the plea are ready to perform the agreement; indeed, all the circumstances by which such an agreement is affected, should be noticed in the averments. And where an agreement of this sort, which has been entered into for the purpose of putting an end to a suit, contains a great many stipulations and clauses which are executory, it can scarcely be considered a fit subject for a plea.²

² Common Law Procedure Act, 1854 (17 & 18 Vic. 125), § 11, *post*, Chap. XLV. *Statutory Jurisdiction*. For form of notice of motion, see Vol. III.

³ *Id.* Red. 261; Coop. Eq. Pl. 280; and *see ante*, p. 614.

⁴ *Ante*, p. 297; Padley v. Lincoln Water-

works Company, 2 M'N. & G. 68, 71; Ponsford v. Swaine, 1 J. & H. 433.

⁵ *Ante*, p. 297.

⁶ Rowe v. Wood, 1 J. & W. 315, 344; Wood v. Rowe, 2 Bligh, 595.

¹ Cocking v. Pratt, 1 Ves. S. 400; *see* Belt's Sup. to Ves. 187.

² Wood v. Rowe, Rowe v. Wood, *ubi sup.*

(5.) If the defendant's title be paramount to the plaintiff's, he may plead it in bar.³ A plea of this nature is called a plea of title; and a title so pleaded will, generally speaking, be founded either on a long peaceable possession by the defendant, and those under whom he claims; on a will; or on a conveyance.⁴

As, at Law, length of time raises a presumption against claims otherwise most clearly made out, so, in Equity, a long and peaceable possession may be pleaded in bar to the relief; thus, an undisturbed possession of sixty years or more, was long ago held to be a good subject of plea.⁵ It appears to be settled, that where there has been adverse possession, not accounted for by some disability, such as coverture, or infancy, a Court of Equity will not interfere; and when a title is so stated in a bill, that there appears to have been a possession adverse to it of about twenty years, without any allegation of disability, the defendant may demur; but, where the title is not so stated, the defendant must plead the facts necessary to show the existence of the adverse possession.⁶ A mere general allegation in the bill, that there have been disabilities arising from infancy or coverture, will not, however, be sufficient to invalidate such a plea.⁷

In a plea of adverse possession, if the possession is derivative, *673 *and has not, during the whole time covered by the plea, been in the defendant himself, the plea must show in whom the possession was, at the time when the plea sets it up, and how the defendant deduces his possession from such person; and if the adverse possession is to be inferred from circumstances which do not appear upon the bill, the defendant must state clearly, upon the face of his plea, the circumstances on which he means to rely as constituting the adverse possession.¹

A will may also be pleaded in bar to a bill brought, on a ground of equity, by an heir-at-law against a devisee, to turn the devisee out of possession.² Thus, where a bill was brought to set aside a will on account of fraud, on a suggestion that the testator was rendered incapable of making it, by being perpetually in liquor, and particularly when he executed the will, and likewise for a receiver to be appointed, and the defendant pleaded the will, and that it was duly executed:³ Lord Hardwicke allowed the plea, so far as it applied to that part of the bill which sought to set the will aside: because "you cannot, in this Court, set aside a will for fraud;" but he would not allow it as to the receiver: for he would not tie up the hands of the Court, in case it should be necessary, in the progress of the suit at Law, to have a receiver appointed.⁴ A will, however, cannot be pleaded to a bill by an heir-at-

³ Wyatt's P. R. 328; Story Eq. Pl. § 811.

⁴ Beames on Pleas, 247; Story Eq. Pl. § 811.

⁵ Wyatt's P. R. 328.

⁶ Lord Cholmondeley v. Lord Clinton, T. & R. 107, 118.

⁷ Blewit v. Thomas, 2 Ves. J. 669, 671; Story Eq. Pl. §§ 814, 815.

¹ Hardman v. Ellames, 2 M. & K. 732, 739, 744; C. P. Coop. t. Brough. 351, 354; see Jerard v. Sanders, 2 Ves. J. 187.

² Id. Red. 263.

³ Story Eq. Pl. § 812. For form of such a plea, see Vol. III. Willis, 559.

⁴ Anon., 3 Atk. 17.

law, praying for production of documents, and an injunction to restrain the defendants from setting up legal impediments, in an action of ejectment commenced by him against them.⁵

In like manner, upon a bill filed by an heir against the person claiming under a conveyance from the ancestor, the defendant may plead the conveyance, in bar of the suit;⁶ and so, where a bill was filed by persons claiming under a will, to set aside a conveyance made by the testator, on the ground of fraud, and the defendant pleaded a conveyance by the testator, before the date of his will, of the estate which the plaintiffs claimed, the plea was allowed.⁷

In all pleas of title, whether derived under a will or a deed, if the defendant is not the person taking immediately under the will or deed, but derives his title through others, the title of the defendant must be deduced from the person immediately taking, by proper averments in the plea. And in all cases it is necessary, whether the title be derived from adverse possession, or from a will or conveyance, to show that it had a commencement anterior to *that of the plaintiff's *674 title, as shown by the bill: a title posterior to that of the plaintiff will not avail as a plea, unless it be some way connected with the plaintiff's title. Thus, where a bill was filed by one claiming, either as heir *ex parte maternâ* of the person last seised, or as a remainder-man under the limitations of a prior settlement, charging that the person last seised had only a life-interest in the property, and that it would so appear if the contents of a certain deed, executed in 1730, and within the power of the defendant, were set forth; and the defendant pleaded that, in the year 1766, the person last seised, being tenant in tail in possession, had duly suffered a recovery of the estates in question, to the use of himself in fee, and had subsequently devised them to the defendant, the plea was overruled: because the defendant, relying upon a subsequent title which he had not connected in any way with the ground of the title upon which the plaintiff stood, had not denied that title, or any substantial part of it, or the possession or existence of the deed of 1730.¹

(6.) From what has been above stated it is obvious, that where a conveyance is insisted upon by plea, as an adverse title, it must bear a date anterior to the commencement of the plaintiff's title, as shown by the bill: though there are cases in which a conveyance may be insisted upon, posterior, in point of date, to the plaintiff's title.² In such cases, however, it is necessary to the validity of the plea, that the conveyance should have been for a valuable consideration; and that, at the time it was perfected, the defendant, or the person to whom it was made, should not have had notice of the plaintiff's right.³ A plea

⁵ *Rumbold v. Forteath*, 2 Jur. N. S. 636, V. C. W.

⁶ *Ld. Red.* 263.

⁷ *Howe v. Duppa*, 1 V. & B. 511, 513; *Story Eq. Pl.* § 812.

¹ *Hungate v. Gascoigne*, 1 R. & M. 698; see also *Jackson v. Rowe*, 4 Russ. 514, 523.

² For an elaborate review of the cases in

which this defence can be raised, see the judgment of Lord Westbury L. C. in *Phillips v. Phillips*, 8 Jur. N. S. 145; 10 W. R. 236.

³ If the defendant has not used reasonable diligence in the investigation of the title, the plea is no defence. *Jackson v. Rowe*, 2 S. & S. 472, 475.

of this sort is called "a plea of purchase for a valuable consideration, without notice;" and it is founded on this principle of equity, namely, that where the defendant has an equal claim to the protection of a Court of Equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, the Court will not interpose on either side.⁴

A purchaser with notice from a purchaser without notice, may *675 shelter himself under the first purchaser;⁵ but notice to an agent* is notice to the principal;¹ and where a person having notice, purchased in the name of another who had no notice, and knew nothing of the purchase, but afterwards approved it, and without notice paid the purchase-money and procured a conveyance, the person first contracting was considered, from the beginning, as the agent of the actual purchaser, who was therefore held affected with notice.²

A settlement, in consideration of marriage, is equivalent to a purchase for a valuable consideration, and may be pleaded in the same manner.³ If a settlement is made after marriage, in pursuance of an agreement before marriage, the agreement as well as the settlement must be shown.⁴ A widow, defendant to a suit brought by any person claiming under her husband, to discover her title to lands of which she is in possession as her jointure, may plead her settlement in bar to any discovery, unless the plaintiff offers, and is able to confirm her jointure; but a plea of this nature must set forth the settlement, and the lands comprised in it, with sufficient certainty.⁵

⁴ Ld. Red. 274. Upon this principle it has been held, that a purchase for valuable consideration, though a good defence, is not good as a ground for filing a cross-bill; *Patterson v. Slaughter*, Amb. 293; *High v. Batte*, 10 Yerger, 335; *Donnell v. King*, 7 Leigh, 393; *Story Eq. Pl. § 805*; *Jewett v. Palmer*, 7 John. Ch. 65; *Gallatien v. Cunningham*, 8 Cowen, 361; *Souzer v. De Meyer*, 2 Paige, 574; see the remarks of Lord Chancellor Lifford upon this plea, in *Lord Drogheda v. Malone*, Finlay's Dig. 449, cited in *Mitford Eq. Pl. (5th Am. ed.) 277*, note (1). This defence must be raised on the pleadings. *Phillips v. Phillips*, 3 Giff. 200; 7 Jur. N. S. 1094; 8 *id.* 145; 10 W. R. 236, L. C.

⁵ Ld. Red. 278; *Brandlyn v. Ord*, 1 Atk. 571; *Lowther v. Carlton*, 2 Atk. 139, 242; *Ca. t. Talbot*, 187; *Sweet v. Southcote*, 2 Bro. C. C. 66; *M'Queen v. Farquhar*, 11 Ves. 478; *Hiern v. Mill*, 13 Ves. 120; and see *Harrison v. Forth*, Prec. in Chan. 51; *Story Eq. Pl. § 808*; *Varick v. Briggs*, 6 Paige, 329; *Bennett v. Walker*, West, 130; *Jackson v. McChesney*, 7 Cowen, 360; *Bumpus v. Platner*, 1 John. Ch. 213; *Demarest v. Wynkoop*, 3 John. Ch. 147; *Jackson v. Henry*, 10 John. 185; *Jackson v. Given*, 8 John. 573; *Alexander v. Pendleton*, 8 Cranch, 462; 1 *Story Eq. Jur. §§ 409, 410*, and notes; *Hagthorpe v. Hook*, 1 Gill & J. 263; *Curtis v. Lunn*, 6 Munf. 42; *Griffith v. Griffith*, 1 Hoff. Ch. 163; *Lacy v. Wilson*, 4 Munf. 317; *Lindsay v. Rankin*, 4 Bibb, 482; *McNitt v. Logan*, Litt. Sel. Ca. 69. But if he would avail himself of the want of notice

in his vendor, he must expressly aver that ignorance in pleading. *Gallatien v. Erwin*, 1 Hopk. 58; S. C. on appeal, 8 Cowen, 361; *Griffith v. Griffith*, 1 Hoff. Ch. 163; *Cummings v. Coleman*, 7 Rich. Eq. S. C. 509. A purchaser without notice from one who has fraudulently purchased, is not affected by the fraud. *Bumpus v. Platner*, 1 John. Ch. 213; *Jackson v. Henry*, 10 John. 185.

¹ Ld. Red. 278; *Brotherton v. Hatt*, 2 Vern. 574; *Le Neve v. Le Neve*, 3 Atk. 646, 655; *Maddox v. Maddox*, 1 Ves. S. 62; *Ashley v. Baillie*, 2 Ves. S. 370; *Hiern v. Mill*, *ubi sup.*; *Mountford v. Scott*, 3 Mad. 34, 39; *Kennedy v. Green*, 3 M. & K. 699; *Atterbury v. Wallis*, 8 De G., M. & G. 454; 2 Jur. N. S. 343; *Espin v. Pemberton*, 3 De G. & J. 547; 5 Jur. N. S. 157; 4 Drew. 333; 5 Jur. N. S. 55; *Lloyd v. Atwood*, 3 De G. & J. 614; 5 Jur. N. S. 1322; *Story Eq. Pl. § 808*; *Griffith v. Griffith*, 1 Hoff. Ch. 153.

² Ld. Red. 278; *Jennings v. Moore*, 2 Vern. 609; *Blenkarne v. Jennings*, 2 Bro. P. C. ed. Toml. 278; see *Molony v. Kernan*, 2 Dr. & War. 31.

³ Ld. Red. 278; *Harding v. Hardrett*, Rep. t. Finch, 9; *Jackson v. Rowe*, *ubi sup.* [Even to the extent of the husband's whole estate. *Herring v. Wickham*, 29 Gratt. 628.]

⁴ Ld. Red. 279; *Lord Keeper v. Wyld*, 1 Vern. 139.

⁵ Ld. Red. 279; *Petre v. Petre*, 3 Atk. 511; *Pyncent v. Pyncent*, *ib.* 571; *Senhouse v. Earl*, 2 Ves. S. 450; *Leech v. Trollop*, *ib.* 662.

Some doubt was entertained, whether a plea of purchase for valuable consideration will avail against a legal title. The point has been fully discussed by Lord St. Leonards, in his "Treatise of the Law of Vendors and Purchasers,"⁶ and it seems now to be settled that there are cases in which this defence may be so pleaded.⁷

*The rules for the guidance of a pleader in framing pleas of this *676 description have been so clearly and succinctly laid down by the learned author of the treatise last referred to, that it appears to be the best course, on the present occasion, to call the reader's attention to the following extracts from that valuable work,¹ namely: "—

"The plea must state the deeds of purchase: setting forth the dates, parties, and contents, briefly, and the time of their execution:² for that is the peremptory matter in bar.⁴

"It must aver that the vendor was seised, or pretended to be seised, at the time he executed the conveyance.⁵ In *Carter v. Pritchard*⁶ it was held, that the plea of a purchase without notice must aver the defendant's belief, that the person from whom he purchased was seised in fee. If it be charged in the bill that the vendor was only tenant for

⁶ (11th Eng. ed.) pp. 1067–1072; (7th Am. ed.) vol. 2, 572–578.

⁷ See Judgment of Lord Westbury, L. C., in *Phillips v. Phillips*, 8 Jur. N. S. 145; 10 W. R. 236; Lord St. Leonards, V. & P. 791, 796, where this case is reviewed; *Bowen v. Evans*, 1 Jo. & Lat. 178, 263; *Joyce v. De Moleyns*, 2 Jo. & Lat. 374; *Penny v. Watts*, 1 M. & G. 150; 2 De G. & S. 501; *Attorney-General v. Wilkins*, 17 Beav. 285; 17 Jur. 385; *Lane v. Jackson*, 20 Beav. 535; *Colyer v. Finch*, 5 H. L. C. 920; 3 Jur. N. S. 25; *S. C. nom. Finch v. Shaw*, 19 Beav. 500, 507; 18 Jur. 935; *Greenslade v. Dare*, 17 Beav. 502; 20 Beav. 284; 1 Jur. N. S. 294; *Stackhouse v. Countess Jersey*, 1 J. & H. 721; 7 Jur. N. S. 359; *Wood v. Mann*, 2 Sumner, 507. "The point of doubt," says Mr. Justice Story, "has been, whether the defence ought to apply to a case, where the plaintiff founds his bill upon a legal title, seeking to support it by a discovery, and the defendant relies solely on an equitable title to protect himself from the discovery. Upon this point the authorities are at variance; but upon principle, it would seem difficult to resist the reasoning by which the doctrine, that the purchaser is, in such a case, entitled to protection, is supported." Story Eq. Pl. § 604 a; see 3 Sugden V. & P. (7th Am. ed.) 1067 *et seq.* *Snelgrove v. Snelgrove*, 4 Desaus. 288, where this point is fully examined, and the Chancellor (Desaussure) remarks: "It should be remembered, that the plea protects, by the Court refusing to aid the plaintiff in setting up a title. Now, when the title attempted to be set up is an equitable one, it seems very reasonable that the Court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the plaintiff comes with a legal title, I do not see how he

can be refused the aid of the Court." See also *Larrowe v. Beame*, 10 Ohio, 498.

¹ This subject is fully discussed in *Snelgrove v. Snelgrove*, 4 Desaus. 286; *Cardwell v. Cheatham*, 2 Head (Tenn.), 14. The same explicitness has been held not to be necessary in setting up the defence of *bona fide* purchase for a valuable consideration, without notice, when made in an answer as in a plea. *Servis v. Beatty*, 32 Miss. 52. [*Aliter*, in *Tennessee*, *Rhea v. Allison*, 3 Head, 177.]
² V. & P. 788–790 (7th Am. ed.), 1067 *et seq.*

³ *Quære* this, as the plaintiff might thereby be enabled to proceed against the defendant at Law; see *Anon.*, 2 Cha. Ca. 161; in *Day v. Arundel*, *Hardres*, 510, it was expressly held, that the time of the purchase need not be stated in the plea.

⁴ See *Gilb. For. Rom.* 58; *Aston v. Aston*, 3 Atk. 302; *Salkeld v. Science*, 2 Ves. S. 107; *Harrison v. Southcott*, *ib.* 389, 396; and see *Walwyn v. Lee*, 9 Ves. 24, and the plea in that case. *Beames on Pleas*, 341. It seems, that the practice formerly was to extend the plea to the discovery even of the purchase deeds; and in *Watkins v. Hatchet*, 1 Eq. Ca. Ab. 36, pl. 3, although the purchaser improvidently offered to produce his purchase deeds, yet the Court would not bind him to do so.

⁵ *Story v. Lord Windsor*, 2 Atk. 630; *Head v. Egerton*, 3 P. Wms. 279, 281; and see *Attorney-General v. Backhouse*, 17 Ves. 290; *Jackson v. Rowe*, 4 Russ. 514, 523; *Beames on Pleas*, 342; *Craig v. Leiper*, 2 Yerges, 193; *Lanesborough v. Kilmaine*, 2 Moll. 403; *Snelgrove v. Snelgrove*, 4 Desaus. 287.

⁶ *Michaclmas Term*, 12 Geo. II. 1739, 2 *Vivian's MS. Rep.* 90, in *Lincoln's Inn Library*; see *Jackson v. Rowe*, 4 Russ. 514, 519.

life or tenant in tail, and a discovery of the title he prayed, such a discovery cannot be covered, unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an entail if the vendor was tenant in tail: for if a

*677 purchase by lease and release should be set forth, which would pass no more from * the tenant in tail than it lawfully may pass, and that is only an estate for the life of the tenant in tail,¹ then there is no bar against the issue.² Where, however, a fine was pleaded, the plea must have averred an actual seisin of a freehold in the vendor, and not that he was seised or pretended to be seised.³

“If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance.⁴ And, if it be of a particular estate and not in possession, it must set out how the vendor became entitled to the reversion.⁵ But, although a bill be brought by an heir, the plea need not, on that account, aver the purchase to be from the plaintiff’s ancestor.⁶

“The plea must also distinctly aver, that the consideration money mentioned in the deed was *bonâ fide* and truly paid,⁷ independently of the recital of the purchase deed:⁸ for if the money be not paid, the plea will be overruled,⁹ as the purchaser is entitled to relief against payment of it. The particular consideration must, it should seem, be stated,¹⁰ although this point has been decided otherwise.¹¹ There can, however, be no objection to state the consideration: as, if it be valuable, the plea will not be invalidated by mere inadequacy.¹² The question is, not whether the consideration is adequate, but whether it is valuable: for if it be such a consideration as will not be deemed fraudulent within the statute 27th Elizabeth, or is not merely nominal,¹³ or the purchase is such a one as would hinder a *puisne* purchaser from overturning it, it ought not to be impeached in Equity.

¹ This is the doctrine of Littleton, with which, it seems, Gilbert agreed; but since Littleton’s time it has been held, that the releasee has a base fee, determinable by the entry or action of the issue; see Butler’s n. 1, to Co. Litt. 331 a, and the authorities there referred to. But now estates tail may be barred by deed. 3 & 4 Will. IV. c. 74

² Gilb. For. Rom. 57.

³ Story v. Lord Windsor, 2 Atk. 630; and see Page v. Lever, 2 Ves. J. 450; Dobson v. Leadbeater, 13 Ves. 230, 233.

⁴ Trevanian v. Mosse, 1 Vern. 246; Strode v. Blackburne, 3 Ves. 222, 226; Wallwyn v. Lee, 9 Ves. 32; Beames on Pleas, 342; see also Jackson v. Rowe, 4 Russ. 514, 519; Lady Lanesborough v. Lord Kilmaine, 2 Moll. 403; Ogilvie v. Jeaffreson, 2 Giff. 353; 6 Jur. N. S. 970.

⁵ Hughes v. Garth, Amb. 421.

⁶ Seymour v. Nosworthy, Freem. 128; 3 Cha. Rep. 40; Nels. Rep. 135.

⁷ Moore v. Mayhow, 1 Cha. Ca. 34;

Brereton v. Gamul, 2 Atk. 241; Molony v. Kernan, 2 Dr. & War. 31; Beames on Pleas, 344; Story Eq. Pl. § 805; Jewett v. Palmer, 7 John. Ch. 65; High v. Batte, 10 Yerger, 335; Donnell v. King, 7 Leigh, 393; Snelgrove v. Snelgrove, 4 Desaus. 286.

⁸ Maitland v. Wilson, 3 Atk. 814; 2 Sugden V. & P. (7th Am. ed.) 1069.

⁹ Hardingham v. Nichols, 3 Atk. 304; as to necessity of proof, see Molony v. Kernan, *ubi sup.*

¹⁰ Millard’s case, Freem. 43; Snag’s case, cited *ibid.*; and see Wagstaff v. Read, 2 Cha. Ca. 156; High v. Batte, 10 Yerger, 335; Donnell v. King, 7 Leigh, 393.

¹¹ Moore v. Mayhow, *ubi sup.*; Day v. Arundel, Hardres, 510.

¹² Basset v. Nosworthy, Rep. t. Finch, 102, cited Amb. 766; Mildmay v. Mildmay, cited *ibid.*; Bullock v. Sadlier, *ib.* 763, 767.

¹³ See Moore v. Mayhow, 2 Cha. Ca. 34; Wagstaff v. Read, 2 Cha. Ca. 156.

"The plea must also deny notice of the plaintiff's title or claim,¹⁴ previously to the execution of the deed and payment of the * purchase-money; ¹ for, till then, the transaction is not com- *678 plete; and, therefore, if the purchaser have notice previously to that time, he will be bound by it. And the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who would claim under that title.² But a denial of notice, at the time of making the purchase and paying the purchase-money, is good; ³ and notice before the purchase need not be denied: because notice before is notice at the time of the purchase; ⁴ and the party will, in such case, on its being made to appear that he had notice before, be liable to be convicted of perjury.⁵

"The notice must be positively, and not evasively, denied,⁶ and must be denied whether it be or be not charged by the bill.⁷ If particular instances of notice, or circumstances of fraud, are charged, the facts from which they are inferred must be denied as specially and particularly as charged.⁸ So, if the bill charges that the purchaser has in his possession certain papers and documents, whence it will appear that his was not a purchase without notice, the defendant is bound to support his plea by an answer to that charge.⁹

"But he need only by his plea deny notice generally, unless where facts are specially charged in the bill as evidence of notice.¹⁰

"Notice must also be denied by answer;¹⁰ for that is matter of

¹⁴ *Lady Bodmin v. Vandenbendy*, 1 Vern. 179; *Anon.*, 2 Ventr. 361, No. 2; *Cummings v. Coleman*, 7 Rich. Eq. (S. C.) 599.

¹ *Moore v. Mayhow*, *ubi sup.*; *Story v. Lord Windsor*, 2 Atk. 630; *Attorney-General v. Gower*, 2 Eq. Ca. Ab. 685, pl. 11; *Beames on Pleas*, 544; *Aiken v. Smith*, 1 Sneed (Tenn.), 304; *Wilson v. Hillyer*, 1 Saxton (N. J.), 63; *Story Eq. Pl.* § 806; *Jewett v. Palmer*, 7 John. Ch. 65; *Gordon v. Rockafellow*, Halst. Dig. 169; *Pillow v. Shannon*, 3 Yerger, 508; *Murray v. Ballou*, 1 John. Ch. 566; *Heatley v. Finster*, 2 John. Ch. 158; *Murray v. Finster*, 2 John. Ch. 155; *M'Gahee v. Sneed*, 1 Dev. & Bat. 333; *Frost v. Beekman*, 1 John. Ch. 288; *De Mott v. Starkey*, 3 Barb. Ch. 403; *Boone v. Chiles*, 10 Peters, 177, 211, 212; *Williams v. Hollingsworth*, 1 Strohn. Eq. 103; *Ellis v. Woods*, 9 Rich. Eq. (S. C.) 19.

² *Kelsall v. Bennet*, 1 Atk. 522, which has overruled *Brampton v. Barker*, cited 2 Vern. 159.

³ See *Snelgrove v. Snelgrove*, 4 Desaus. 287; *Murray v. Finster*, 2 John. Ch. 155, 157.

⁴ To make the plea of *bonâ fide* purchaser without notice available, the notice before the whole of the purchase-money was paid and conveyance received, must be denied. *Natz v. M'Pherson*, 7 Monroe, 599; *Frost v. Beekman*, 1 John. Ch. 298, 303; *Jewett v.*

Palmer, 7 John. Ch. 65; *High v. Batte*, 10 Yerger, 385.

⁵ *Jones v. Thomas*, 3 P. Wms. 243.

⁶ *Cason v. Round. Proc.* in Cha. 226; and see 2 Eq. Ca. Ab. 682 (D.), n. (b).

⁷ *Aston v. Curzon*, and *Weston v. Berkeley*, 3 P. Wms. 244, n. (F); and see the 6th resolution in *Brace v. Duchess of Marlborough*, 2 P. Wms. 495; *Hughes v. Garner*, 2 Y. & C. Ex. 328, 335; *Lowry v. Tew*, 3 Barb. Ch. 407.

⁸ *Meder v. Birt*, Gilb. Eq. Rep. 185; *Radford v. Wilson*, 3 Atk. 815; and see *Jerard v. Sanders*, 2 Ves. J. 187; 4 Bro. C. C. 322, 325; 6 Dow, 230; *Foley v. Hill*, 3 M. & C. 475, 481; 2 Jur. 440; *Wilson v. Hillyer*, 1 Saxton (N. J.), 63; *Denning v. Smith*, 3 John. Ch. 345; *Balcolm v. N. Y. Life Ins. and Trust Co.*, 11 Paige, 454; *Lowry v. Tew*, 3 Barb. Ch. 407; *Manhattan Co. v. Everston*, 6 Paige, 457; *Galatian v. Erwin*, 1 Hopk. 48; *Pillow v. Shannon*, 3 Yerger, 508.

⁹ *Hardman v. Ellames*, 5 Sim. 640, 650; 2 M. & K. 732; C. P. Coop. t. Brough. 351; and see *Gordon v. Shaw*, 14 Sim. 393.

¹⁰ *Pennington v. Beechey*, 2 S. & S. 282; *Thring v. Edgar*, *ib.* 274, 281; *Beames on Pleas*, 348; *Griffith v. Griffith*, 1 Hoff. Ch. 163. This rule will not, however, apply to an answer in support of a plea, unless the plea is negative; and now, the defendant need only answer those facts to which he is interrogated; see *ante*, pp. 534, 615.

fraud and cannot be covered by the plea;¹¹ because the plaintiff
 *679 * must have an opportunity to except to its sufficiency if he think
 fit;¹ but it must also be denied by the plea: because, otherwise,
 there is not a complete plea in Court on which the plaintiff may take
 issue.² Although a purchaser omit to deny notice by answer, he will be
 allowed to put in the point of notice by way of answer,³ and the omis-
 sion will not invalidate his plea, if it is denied by that.⁴ If notice is
 omitted to be denied by the plea, and the plaintiff reply to it, the de-
 fendant has then only to prove his purchase; and it is not material if
 the plaintiff do prove notice, as he has waived setting down the plea for
 argument: in which case it would have been overruled.⁵ If, however,
 a bill is exhibited against a purchaser, and he plead his purchase, and
 the bill is therefore dismissed, a new bill will lie charging notice, if the
 point of notice was not charged in the former bill, or examined to; and
 the former proceedings cannot be pleaded in bar.⁶ But if notice is
 neither alleged by the bill nor proved, and the defendant by his answer
 deny notice, an inquiry will not be granted for the purpose of affecting
 him with notice.⁷

“A plea of a purchase for valuable consideration without notice,
 will not be allowed where the purchaser might, by due diligence, have
 ascertained the real state of the title.”⁸

“If a purchaser’s plea of valuable consideration without notice, be
 falsified by a verdict at Law, and thereupon a decree is made against
 the purchaser, and he then carries an appeal to the House of Lords, it
 will be dismissed, and the decree affirmed, without further inquiry.”⁹

A plea of purchase for a valuable consideration without notice pro-
 tects a defendant from meeting the title set up by the plaintiff; but a
 plea of bare title only, without setting forth a consideration, is not suf-
 ficient for that purpose.¹⁰ It will also protect a defendant from

*680 the discovery of deeds and writings, except of the purchase * deed

¹¹ Care must be taken in case of a plea of a purchase for a valuable consideration without notice, not to make an answer to any statements in the bill actually and properly covered by the plea: for notwithstanding some doubts formerly entertained, it seems now established, that, in such a case if the defendant answer at all to the matters covered by the plea, he must answer fully; and if he puts in a general answer, he cannot protect himself by such a defence in his answer from answering fully. Story Eq. Pl. § 606, and note, and cases cited, § 810, note. The 39th Equity Rule of the United States Courts gives to such a person the right to protect himself by answer, as he might by plea. Story Eq. Pl. § 847, note, § 846, note.

¹ Anon., 2 Cha. Ca. 161; Price v. Price, 1 Vern. 185; Foley v. Hill, 3 M. & C. 475, 481; 2 Jur. 440; now the defendant need only support his plea by answer, if interrogatories are filed; see *ante*, p. 615.

² Harris v. Ingledew, 3 P. Wms. 91, 94; Meadows v. Duchess of Kingston, Id. Red. 376, n. (s.); Amb. 766; Jones v. Jones, 3 Mer. 161, 171.

³ Anon., 2 Cha. Ca. 161.

⁴ Coke v. Wilcocks, Mos. 73.

⁵ Harris v. Ingledew, *ubi sup.*; Eyre v. Dolphin, 2 Ball & B. 302.

⁶ Williams v. Williams, 1 Cha. Ca. 252.

⁷ Hardy v. Reeves, 5 Ves. 424, 432.

⁸ Jackson v. Rowe, 2 S. & S. 472, 475; 4 Russ. 514, 523; Hamilton v. Lyster, 7 Ir. E. R. 560. If a party means to defend himself, on the ground, that he was a *bonâ fide* purchaser for a valuable consideration without notice, he must deny the fact of notice, and of every circumstance from which it can be inferred. Murray v. Ballou, 1 John. Ch. 575; Balcoln v. N. Y. Life Ins. & Trust Co., 11 Paige, 454.

⁹ Lewis v. Fielding, Colles’ P. C. 361.

¹⁰ Brereton v. Gamul, 2 Atk. 241.

which is pleaded.¹ If the defendant has the opportunity of raising this defence by his answer, and does not do so, he cannot plead it orally at the hearing.²

There are also certain cases in which defects in the form of the bill may be taken advantage of by plea: such as a misdescription of the plaintiff's residence,³ or of his name.⁴ In these cases, as we have seen,⁵ the present practice is to move that the plaintiff may give security for costs; and the Court will not encourage pleas of this nature.⁶

All the grounds of pleas above enumerated go to the relief prayed by the bill; and, as we have seen, if they are sufficient to protect the defendant from the relief prayed, they will also serve to protect him from the discovery sought, except so far as such discovery is material to enable the plaintiff to avoid the effect of the matter pleaded. There are, however, as has been already stated, certain cases in which, though the plaintiff may be entitled to relief, the defendant will be protected from making, either the whole, or some part of the discovery sought by the bill: because, the situation in which he is placed renders it improper for a Court of Equity to compel discovery, either because the discovery may subject him to pains and penalties, or to forfeiture, or something in the nature of a forfeiture;⁷ or because it would betray the confidence reposed in him as a legal adviser, or as an arbitrator. The cases in which these exemptions from discovery can be insisted upon have been before pointed out, and the principles upon which they rest discussed, in treating of demurrers;⁸ all that need, therefore, be now said in addition is, that if the facts upon which the defendant rests his claim to exemption from the discovery sought do not appear upon the bill, they may be presented to the Court by plea. The same principles apply in the case of bills for discovery only.⁹

It has been already stated, that a defendant may not only answer an amended bill, but may also defend himself from the effect of the amendments by a demurrer or plea.¹⁰ Pleas to amended bills may be put in upon the same grounds as pleas to original bills; but it is to be observed that, if a defendant has answered the original bill, his answer may be read to counterplead his plea to the amended bill; and that if, upon so reading it, it should appear * that the facts stated upon *681 the answer to the original bill would operate to avoid the defence made by the plea to the amended bill, the plea will be overruled.¹ If

¹ *Salkeld v. Science*, 2 Ves. S. 107; *Story Eq. Pl.* § 809; see 1 *Story Eq. Jur.* § 410, and note; *Lubé Eq. Pl.* 245, 246.

² *Phillips v. Phillips*, 8 Jur. N. S. 145; 10 W. R. 236, L. C.; 3 Giff. 200; 7 Jur. N. S. 1094.

³ *Rowley v. Eccles*, 1 S. & S. 511; *Smith v. Smith*, Kay Ap. 22; *Bainbrigge v. Orton*, 20 Beav. 28.

⁴ *Cust v. Southee*, 13 Beav. 435.

⁵ *Ante*, p. 358.

⁶ *Bainbrigge v. Orton*, *ubi sup.*

⁷ *United States of America v. M'Rae*, L. R. 4 Eq. 327; S. C. L. R. 3 Ch. Ap. 79.

⁸ *Ante*, pp. 562, 570.

⁹ *Balls v. Margrave*, 3 Beav. 448. For form of plea that discovery would subject defendant to penalty, see *Beames on Pleas*, 339.

¹⁰ *Ante*, p. 582.

¹ *Ld. Red.* 299; *Hyliard v. White*, *ibid.*; *Noel v. Ward*, 1 Mad. 322, 330; *Hillyard v. Cressy*, 3 Atk. 303. As to form of pleas to amended bills, see *Haynes v. Barton*, 13 Jur. 480, V. C. E.

the defendant answer the original bill, and the amendments do not vary the case made by it, he cannot plead to the amended bill.² The mere fact, however, that the answer comprises matters retained in the amended bill does not prevent the defendant from pleading to the latter;³ and where the objection for want of parties arose again, in consequence of an amendment of the bill, a second plea on that ground has been allowed.⁴

SECTION III. — *Form of Pleas.*

A plea is intituled in the cause, and is headed as follows: "The plea of the above-named defendant (or, of A. B., one of the above-named defendants) to the bill of complaint of the above-named plaintiff (or, plaintiffs)." When put in by more than one defendant, the heading runs as follows: "The joint and several plea of the above-named defendants (or, of A. B. and C. D., two of the above-named defendants)," &c., &c.⁵ Where it is the plea of a man and his wife, the words "and several" should not be inserted; but where an objection was taken to a plea by husband and wife, on the ground that those words were inserted, Sir John Leach V. C. considered the term "several" as meaning nothing, and that, being mere surplusage, it did not vitiate the plea.⁶ It may be observed, that where a plea was prepared as a joint plea of a husband and wife, but the wife refused to swear to it, whereupon the husband put in the plea, and applied that it should stand for himself, it was so ordered.⁷ The title of the plea must agree with that of the cause at the time when the bill is filed.

A defendant is not allowed to correct or alter the name of a plaintiff, or a co-defendant; and if his own name is misspelt in the bill, the title of his plea must, nevertheless, agree with that of the bill. The correction should be made in the heading, thus: "The plea of the above-named defendant, John Jones (in the bill by mistake called William Jones)." ⁸ If a female defendant marries subsequently to the *682 filing of the bill, but before pleading, the plea *should (unless she has obtained an order to defend the suit by herself) be headed thus: "The plea of A. B. and C. his wife, lately, and in the bill called C. D., spinster (or, widow, as the case may be), to the bill of complaint of the above-named plaintiff." ¹

Where a plea is accompanied by an answer, it must be headed "The plea and answer," or, "The joint plea and answer," or "The joint and several plea and answer," according to the circumstances.

² Esdaile v. Molineux, 2 Coll. 636, 639; 10 Jur. 852.

³ Wyllie v. Ellice, 6 Hare, 505, 515; Ellice v. Roupell (No. 1), 32 Beav. 299; 9 Jur. N. S. 530, 533.

⁴ Henley v. Stone, 4 Beav. 389, 391.

⁵ Braithwaite's Pr. 61. For forms of pleas, see Vol. III.

⁶ Fitch v. Chapman, 2 S. & S. 31.

⁷ Pain v. —, 1 Ch. Ca. 296; S. C. *nom.* Pavie v. Acourt, 1 Dick. 13; see *ante*, pp. 180, 499.

⁸ Braithwaite's Pr. 44, 62.

¹ Braithwaite's Pr. 46, 62.

A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the bill.²

The extent of the plea, that is, whether it is intended to cover the whole bill or a part of it only, and what part in particular, is usually stated in the next place; and this, as before observed, must be clearly and distinctly shown.³ Formerly, a plea, like a demurrer, was liable to be overruled, if the answer accompanying it extended to any part of the bill covered by the plea; and the same, if not a greater degree of accuracy, was required of the pleader in applying this rule. Now, as we have seen,⁴ this strict practice is so far modified, that a plea is no longer liable to be overruled only because it does not cover so much of the bill as it might by law have extended to, or only because the answer of the defendant extends to some part of the same matter as is covered by the plea.⁵

The matter relied upon as an objection to the suit or bill generally follows,⁶ accompanied by such averments as are necessary to support it;⁷ and where a plea is of matter which shows an imperfection in the frame of the suit, it should point out in what that imperfection consists. Where, for instance, a plea is for want of parties, it must not only show that there is a deficiency of parties, but should point out who the parties are that are required. Thus, in *Merrewether v. Mellish*,⁸ where a defendant pleaded a settlement, for the purpose of showing that there were certain parties not before the Court who were interested in the suit, but did not aver * that there was a deficiency of parties, or that the persons appearing by the settlement to be interested were necessary parties, the plea was held to be informal, and leave was given to amend it. A plea, denying a negative allegation in a bill, has also been held to be informal.¹ *683

The general requisites of a plea have already been discussed at considerable length; it is unnecessary, therefore, now to allude to them further than to remind the reader, that the plea must be founded upon matter not apparent upon the face of the bill:² must reduce the case to a single point,³ except where leave has been obtained to plead double:⁴ and must be supported by proper averments.⁵

² Ld. Red. 300. The reasons for the introduction of this form have been before alluded to, *ante*, p. 581. At Common Law, protestation in pleading is now unnecessary. Protestations in pleas are not allowed in New Hampshire. Rule 6 of Ch. Pr. 38 N. H. 606.

³ Ld. Red. 294, 300; Mitford Eq. Pl. by Jeremy (5th Am. ed.) 300, note (1), in which the editor has given the opinion of Chancellor Walworth upon this point, as pronounced in *Leecraft v. Dempsey*, 4 Paige, 124. If an answer commences as an answer to the whole bill, it overrules a plea and demurrer to any particular part of the bill, although such part is not in fact answered. *Id.*; *Summers v. Murray*, 2 Edw. Ch. 205. A defendant may plead, answer, and demur to the same bill; but these several defences must each refer to, and in terms be put in as a defence to, a sepa-

rate and distinct part of the bill. *Leecraft v. Dempsey*, 4 Paige, 124; *ante*, pp. 610, 616.

⁴ *Ante*, p. 617.

⁵ Ord. XIV. 8, 9; see *ante*, p. 540, note.

⁶ The particular facts on which the defendant intends to rely must be clearly stated, so that the plaintiff may know what case he has to meet. *Hardman v. Ellames*, 2 M. & K. 732, 739; *Coop. t. Brough*, 351, 355; [*Whitthorne v. St. Louis Mut. Life Ins. Co.*, 3 Tenn. Ch. 147.]

⁷ Ld. Red. 300; *Story Eq. Pl.* § 694.

⁸ 13 Ves. 435, 438.

¹ *Lakeman v. Agua Fria Gold Mining Company*, 22 Beav. 76.

² *Ante*, p. 603.

³ *Ante*, pp. 603, 607.

⁴ *Ante*, pp. 608, 609.

⁵ *Ante*, p. 611.

In addition to the above requisites it may be added, that a plea must be certain: it must tender issuable matter, the truth or falsehood of which may be replied to or put in issue; and that, not in the form of general propositions, but specifically and distinctly.⁶ Therefore, where a plea was put in by the East India Company, to a bill filed by the Nabob of Arcot, in which they stated, that by charters, confirmed by Acts of Parliament, they had certain powers under which particular acts were done, the plea was overruled, because it did not set forth the contents of those charters and Acts of Parliament.⁷

A plea must also cover the whole case made by the bill, or by that part of it which the plea affects to cover: otherwise it will be overruled.⁸ Thus, where a bill was filed for a foreclosure of a messuage and forty acres of land, and the defendant pleaded an absolute title in himself to certain property mentioned in the deeds by which he deduced his title, consisting of a messuage and tenement, averring that they were the same which were meant by the bill, the Court of Exchequer thought the plea could not be considered as relating to the forty acres of land mentioned in the bill, and overruled it.⁹ And so, where, to a bill praying a reconveyance of four estates, the defendant put in a plea of a fine and non-claim as to one, averring that the estate comprised in the fine was the only part of the estates comprised in the bill to which he had or claimed a right, the plea was, in like manner, overruled.¹⁰ So, also, where a bill prayed an account of rents and profits, and that the defendant might be restrained from setting up outstanding *684 ing * terms, and the defendant pleaded that there were no outstanding terms, Sir John Leach V. C. held the plea to be bad, because it left part of the case untouched.¹

With respect to the language of pleas, the reader's attention is recalled to the observations made in another part of this work: ² in which, in the framing even of bills, the propriety of adhering to the known technical language of the Courts, in all cases where such language is applicable to the case, has been discussed. It only remains to add, that if such an adherence to the ancient recognized forms of pleading is desirable in the case of bills, it is still more so in the case of pleas, in which, as has been before stated, there must, in general, be the same strictness, at least in matters of substance, as in pleas at Law.³ It

⁶ *Ld. Red.* 297, 298. [A plea of former adjudication in Chancery should specify the issue and the equities decreed upon, and not aver a mere legal conclusion. *Riley v. Lyons*, 11 *Heisk.* 246.]

⁷ *Nabob of Arcot v. East India Company*, 3 *Bro. C. C.* 292, 308.

⁸ *Ld. Red.* 234; *Story Eq. Pl.* § 693. If there is any matter of equity in the bill to which the plea does not set up a bar, and which is not denied by way of answer, the plea must be set aside. *Piatt v. Oliver*, 1 *McCann*, 303. If the plea is to the whole bill, but does not extend to or cover the whole,

the plea is bad. *Bell v. Woodward*, 42 *N. H.* 192, 193.

⁹ *Wedlake v. Hutton*, 3 *Anst.* 633.

¹⁰ *Watkins v. Stone*, 2 *Sim.* 49, 52.

¹ *Barker v. Ray*, 5 *Mad.* 64; see also *Hook v. Dorman*, 1 *S. & S.* 227, 230; *Hoare v. Parker*, 1 *Cox*, 224, 228; 1 *Bro. C. C.* 578, 580; *Ld. Red.* 277, n. (s).

² *Ante*, p. 362.

³ See *Marselis v. Morris Canal, &c.*, 1 *Saxton (N. J.)*, 31; *Story Eq. Pl.* § 658. In pleading matters of substance the same strictness is required in Equity as at Law. *Burditt v. Grew*, 8 *Pick.* 108.

may, however, be repeated here, that although the use in pleadings in Equity of such technical expressions as have been adopted in pleadings at Common Law is desirable, it is not absolutely necessary; and that the same thing may be expressed in any terms which the pleader may select as proper to convey his meaning, provided they are adequate to the purpose.⁴

All the facts, however, which are necessary to render the plea a complete equitable bar to the case made by the bill, so far as the plea extends, must be clearly and distinctly averred, in order that the plaintiff may take issue upon it;⁵ and averments in general ought to be positive.⁶ In some cases, indeed, a defendant has been permitted to aver according to the best of his knowledge and belief: as that an account is just and true;⁷ and in all cases of negative averments, and of averments of facts not within the immediate knowledge of the defendant, it may seem improper to require a positive assertion.⁸ It is, however, the opinion of Lord Redesdale, that unless the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it; and that, in all cases, therefore, averments should be positive, as the conscience of the defendant is saved by the nature of the oath * administered: which is, that so much *685 of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true.¹

The plea having stated the facts upon which it is founded, commonly concludes with a repetition, that the matters so offered are relied upon as an objection or bar to the suit, or to so much of it as the plea extends to; and then prays the judgment of the Court whether the defendant ought to be compelled further to answer the bill, or such part as is pleaded to.² It does not appear that any particular form of conclusion is necessary, in pleas in Equity. Some of the old forms of pleas to the jurisdiction conclude by praying the judgment of the Court, "whether it will hold plea upon, and enforce the defendant to answer the bill, for the cause aforesaid;" whilst other precedents, with less precision, demand judgment of the Court, "whether the defendant shall be compelled to make further or other answer."³ The forms of pleas in Equity to the person are tolerably uniform in concluding, by praying judgment

⁴ *Ante*, pp. 362, 363.

⁵ *Ld. Red.* 298; see *Newman v. Hutton*, 3 *Beav.* 114, 117; *Overton v. Banister*, 4 *Beav.* 205, 208. The plea should state so distinctly to what part of the bill it is intended to apply, that the court can determine, on examination of the bill, what parts are covered by it. *Davison v. Schermerhorn*, 1 *Barb. Ch.* 480. Where the plea does not go to the whole bill, it must clearly point to the part of discovery or relief intended to be covered by it, but, if overruled for a defect in this particular, the defendant will not thereby be precluded from insisting upon the same matter in his answer as a de-

fence *pro tanto*. *Jarvis v. Palmer*, 11 *Paige*, 650.

⁶ *Foster v. Vassall*, 3 *Atk.* 587; *Story Eq. Pl.* § 662.

⁷ *Anon.*, 3 *Atk.* 70.

⁸ *Drew v. Drew*, 2 *V. & B.* 159, 162; *Kirkman v. Andrews*, 4 *Beav.* 554, 557; 6 *Jur.* 139; see also *Small v. Attwood*, 1 *Y. & C. Ex.* 39.

¹ *Ld. Red.* 298; *Story Eq. Pl.* §§ 662, 664; *Bolton v. Gardner*, 3 *Paige*, 273; *Heartt v. Corning*, 3 *Paige*, 566; see form in *Vol. III.*

² *Ld. Red.* 300.

³ *Beames on Pleas*, 49.

of the Court, whether the defendant shall be compelled to make any further answer during the existence of the disability pleaded.⁴ The precedents of pleas in bar, generally, conclude with pleading the matter set up, in bar of the discovery and relief, or of the discovery (as the case may be), and demand judgment of the Court, whether the defendant shall be compelled to make further or other answer to the bill, praying to be dismissed with costs: a prayer that is sometimes added and sometimes omitted. They do not, however, always state, that the matter is pleaded in bar.⁵

Where a plea is accompanied by an answer, the answer must follow the conclusion of the plea. If the answer is merely to support the plea, it is stated to be made for that purpose, "not waiving the plea."⁶ If the plea is to part of the bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not before pleaded to, and is preceded by the same protestation against waiver of the plea.⁷

A plea must be signed by counsel;⁸ and no counsel is to sign any plea, unless he has drawn, or at least perused the same: and he is to take care that documents be not unnecessarily set out therein in *686 *hæc verba*; and that no scandalous matter be inserted * therein.¹

The signature of counsel is usually attached to the draft of the plea, and copied by the solicitor on to the engrossment. If a plea has been inadvertently filed without counsel's name, it is conceived that, as in the case of an answer, an order of course may be obtained to add the same to the engrossment.²

If the plea contain any impertinent matter,³ or is of an improper or unnecessary length, the defendant putting it in may be ordered to pay the costs occasioned thereby.⁴ The application for the costs of such impertinent matter is to be made at the time when the Court disposes of the costs of the cause, and not at any other time.⁵

If the plea contain any scandalous matter,⁶ exceptions should be taken to such matter. The practice on such exceptions is the same as in the case of exceptions to a bill for scandal, and has been already described.⁷

Where the matter of the plea appears, upon record, the plea is put in without oath; but where the matter of the plea does not so appear it must be upon oath.⁸

⁴ Beames on Pleas, 49.

⁵ *Ibid.*

⁶ Ld. Red. 300. A question not raised by the plea cannot be raised by an answer in support of the plea. Such an answer forms no part of the defence; but is that evidence which the plaintiff has a right to require, and to use to invalidate the defence made by the plea. Such answer can be used only to support or disprove the plea. *Andrews v. Brown*, 3 Cush. 133; Ld. Red. 199.

⁷ Ld. Red. 300; Story Eq. Pl. § 695.

⁸ Ord. VIII. 1.

¹ Ord. VIII. 2; *ante*, p. 313.

² Braithwaite's Pr. 48; *post*, p. 677.

³ As to impertinence, see *ante*, p. 349.

⁴ 15 & 16 Vic. c. 86, § 17; Ord. XL. 9.

⁵ Ord. XL. 11. For the old practice, in case of impertinence in a plea, see *Dixon v. Olmuis*, 1 Cox, 412.

⁶ As to scandal, see *ante*, p. 347.

⁷ Ord. XVI. 2, 3, 10; *ante*, pp. 349-354.

⁸ Ord. XIV. 2. In the Courts of the United States, no plea shall be allowed to be filed to a bill, unless upon a certificate of counsel, that in his opinion it is well founded

In consequence of this rule, if the matter pleaded is purely matter of record, or, in other words, which may be proved by the record, the oath of the party is not necessary; but if any fact *in pais* is introduced, which would require to be proved at the hearing, the plea must be upon oath. Thus, where a defendant pleaded the statute 32 Henry VIII. c. 9, against selling pretended titles, with the necessary averments of want of possession, &c., and did not put the plea in upon oath, it was ordered to be taken off the file, because the plea, although it set out a statute, was, in substance, matter *in pais*.⁹ For the same reason, pleas of a Statute of Limitations, or of any other statute which requires averments to bring the defendant's case within its operation, must be upon oath. It seems, however, that a mere averment of identity will * not render it necessary that a plea of matter of record should *687 be put in upon oath; therefore, where a plea of the plaintiff's conviction for forgery was put in without oath, Lord Eldon held it sufficient, although there was an averment of the identity of the plaintiff;¹ and so, the circumstances of a plea of outlawry, containing such an averment, will not render it necessary that it should be upon oath.²

To entitle a defendant to plead any matter without oath, because it is matter of record, it must have been properly enrolled, or made a complete record in the Court out of which it comes. Records are complete for this purpose as soon as they are delivered into the Court, and there fixed as the rolls of the Court; but before they are so fixed, and do not constitute a perfect record, they are said to be as of record; and although they may be sufficient in the Courts themselves to which they belong, as ground for ulterior proceedings, they have not assumed that permanent form which gives them the character of records.³ Thus, a judgment at Law, signed by the proper officer of the Court by which it is made, is a sufficient foundation for the issue of execution by the same Court; but as it is merely the instruction for a future judgment, and the judgment is no record until it is actually made up, it is not a complete record, and is not admissible as evidence in another Court.⁴ So, also, in the Court of Chancery, a bill or other pleading, which has been duly filed, or even a decree, though passed and entered, is not a

in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay, and that it is true in point of fact. United States Equity Rule, 31; see *Wild v. Gladstone*, 3 De Gex & Sm. 740. The rule is inflexible in Chancery proceedings, that a plea of matters *in pais*, and pleas in bar of matters *in pais*, must be filed on oath. *Dunn v. Keezin*, 3 Scam. 297. A plea must be verified by oath, although the plaintiff has expressly waived an answer from the defendant on oath. *Heartt v. Corning*, 3 Paige, 566; *Bassett v. Company*, 43 N. H. 251. A plea is not evidence in behalf of the defendant, as to the facts stated in it, so as to require the testimony of more than one witness to contradict it; even where it negatives a

material averment in the bill. *Heartt v. Corning*, 3 Paige, 569; see *Sadler v. Glover*, 1 B. Mon. 53; *Story Eq. Pl. § 696*; 1 *Smith Ch. Pr.* (2d Am. ed.) 231, 232; *Carroll v. Waring*, 3 Gill & J. 491; *Bassett v. Company*, 43 N. H. 251; *Story Eq. Pl. § 696*. A plea, if not on oath, will be set aside on motion. *Bassett v. Company*, 43 N. H. 249.

⁹ *Wall v. Stubbs*, 2 V. & B. 354, 357.

¹ — *v. Davies*, 19 Ves. 81, 83.

² *Ante*, p. 56; and see *Prat v. Taylor*, 1 Cha. Ca. 237, as to plea of privilege of defendant, as scholar of the University of Oxford.

³ 2 *Phillips on Evid.* 2; *Taylor on Evid.* §§ 1378-1391, 1407-1409.

⁴ *Taylor on Evid.* § 1407.

record of the Court, of which a copy can be admissible as evidence in another Court. A proceeding or decree does not become a record till it has been signed and enrolled. When, therefore, it is said, that pleas of matters of record may be put in without oath, it must be understood as confined to those matters which are of record, strictly so speaking, and which require no other evidence to prove them than what the Courts are in the habit of recognizing upon inspection;⁵ such as exemplifications under the Great Seal of the Court of Chancery, or of the Court out of which it comes. Upon this principle it is, that a decree of dismissal, signed and enrolled, may be pleaded without oath. Upon the same principle, a plea of outlawry, or of excommunication, may be put in without oath; and so may a plea of conviction of felony.⁶

Matters not so recorded may be capable of proof *aliunde*; but if pleaded, the plea must be accompanied by the oath of the party: unless, indeed, they consist of transactions in the Court itself, which,
*688 * although they have not been solemnly and formally enrolled, are *quasi* of record. Pleas of such matters, as well as matters of record, may be put in without oath: for, as the Court is in the habit of noticing its own proceedings, they are capable of proof without any other evidence than the production of the proceeding itself, or an office copy of it, signed by the proper officer. Upon this principle it is, that, when a plea of a suit already depending in the Court of Chancery is put in, the Court does not require that it should be upon oath, but immediately directs an inquiry into the existence of such a suit.¹

In the case of a plea of outlawry, the record must be pleaded *sub pede sigilli*; ² and it was formerly usual, as well at Law as in Equity, to annex to the plea a copy of the whole record of outlawry, duly authenticated by the seal of the Court from which it issued, in order that the Court might judge immediately of the truth of the plea;³ but it was afterwards the practice to annex the *capias utlagatum* only, under the seal of the Court,⁴ or of the proper office, which is, in fact, the seal of the Court. And where, instead of a copy of the *capias utlagatum*, duly authenticated, the defendant annexed a certificate, under the seal of the Clerk of the Outlawries, the plea was held bad.⁵ But it seems that since the 14 & 15 Vic. c. 99, a copy, certified by the proper officer, of the sheriff's return to the writ of *exigi facias*, is sufficient evidence of the outlawry.⁶

In all cases where a plea is accompanied by an answer, it must be put in upon oath.⁷ A plea by a peer, or a person having privilege

⁵ See *Wall v. Stubbs*, 2 V. & B. 354, 357.

⁶ — *v. Davies*, 19 Ves. 81, 83.

¹ Ord. XIV. 6, 7; *Umlin v. Hudson*, 1 Vern. 332, *ante*, p. 661.

² Ord. XIV. 4.

³ Co. Litt. 128 b.

⁴ 6 Bac. Ab. 67; and see *Fox v. Yates*, 24 Beav. 271.

⁵ *Waters v. Mayhew*, 1 S. & S. 220.

Leave was, however, given to amend the plea, as the defect arose from the mistake of the Clerk of the Outlawries, and not of the defendant.

⁶ *Anstruther v. Roberts*, 4 W. R. 349, V. C. K.; and see *Winthrop v. Elderton*, 15 Jur. 1028, V. C. K.; *ante*, p. 55. As to outlawries, see *Chitty's Arch.* 1295-1305.

⁷ *Jefferson v. Dawson*, 2 Cha. Ca. 208.

of peerage, must, in those cases where an oath would be required from persons not enjoying the privilege, be put in upon attestation of honor. In the case of a corporation aggregate, it must be under the common seal; and it is advisable, though not indispensable, that the affixing of the seal should be attested by some officer of the corporation.⁸

Where a plea which ought to be upon oath, is put in without one, the irregularity is not one which can be waived by the plaintiff's taking any proceeding upon it;⁹ and in such a case, the plaintiff should move, upon notice, that the plea may be taken off the file.¹⁰ Where, however, a joint and several plea had been * sworn to by all the *689 defendants, except one who had died, the Court refused to order it to be taken off the file.¹

SECTION IV. — *Swearing, Filing, Setting Down, and Arguing Pleas.*

A plea, being drawn or perused and settled by counsel, must be written upon paper of the same description and size as that on which bills are printed;² and the Record and Writ Clerks may refuse to file any plea in which there is any knife erasure, or which is so blotted as to obliterate any word, or is improperly written, or so altered as to cause any material disfigurement; or in which there is any interlineation: unless the person before whom the same was sworn duly authenticate such interlineation with his initials, in such manner as to show that such interlineation was made before the plea was sworn, and so as to mark the extent of such interlineation.³ A joint plea and answer must be printed in the same manner as answers are printed.⁴

Where a defendant puts in a plea on oath, or attestation of honor, it must be signed by him, and the signature be affixed or acknowledged in the presence of the person before whom the plea is sworn.⁵ Pleas are sworn and taken in the same manner as answers.⁶

A plea which does not require to be put in on oath, need only be signed by counsel;⁷ and in other cases, if the plaintiff will consent, an order may be obtained as of course, on petition at the Rolls, to file the plea without oath or signature, or without oath only.⁸ If the order dispenses with the oath only, the defendant must sign the plea, and his signature must be attested by some person competent to be a witness. The order must be produced at the time of filing the plea.⁹

⁸ Braithwaite's Pr. 53. For form of attestation, see Vol. III.

⁹ Wall v. Stubbs, 2 V. & B. 354, 358.

¹⁰ Wild v. Gladstone, 3 De G. & S. 740; 15 Jur. 713. If a plea is not verified by the oath of the defendant, the plaintiff may apply for an order to set it aside, or to have it taken off the files of the Court; but he cannot make the objection upon the argument of the plea. Heartt v. Corning, 3 Paige, 566; Bassett v. Company, 43 N. H. 251; 1 New Ch. P. 117. For form of notice of motion, see Vol. III.

¹ Attorney-General v. Cradock, 8 Sim.

466; 1 Jur. 495; see also Cope v. Parry, 1 Mad. 83; Cooke v. Westall, *ib.* 265; Done v. Read, 2 V. & B. 310.

² Ord. 16 March, 1860, r. 16; Ord. IX. 3; *ante*, p. 396.

³ Ord. I. 36.

⁴ See *post*, pp. 755, 756.

⁵ Ord. XIV. 3.

⁶ See *post*, pp. 743, *et seq.*

⁷ Ord. VIII. 1; XIV. 3.

⁸ For form of petition, see Vol. III.

⁹ Braithwaite's Pr. 62, 63.

The plea must be indorsed with the name, place of business or residence, and address for service, if any, of the solicitor or party filing it, in the same manner as other pleadings;¹⁰ and it is filed in the Record and Writ Clerks' Office,¹¹ without any other formality than that required for filing an affidavit.¹² Notice of the filing thereof *690 should be given to the solicitor for the plaintiff, or to the * plaintiff himself if he sues in person, before seven o'clock in the evening of the day on which the plea is filed, or, if filed on a Saturday, before two o'clock in the afternoon of that day.¹ Neglect to give the notice in due time will not render the plea inoperative; but the time allowed to the plaintiff for taking the next step in the cause will be extended, so as to give him the benefit of the time he would otherwise lose by the delay in the service.²

A defendant is allowed the same time for pleading as for answering; and any extension of the time must be applied for in the same manner as in the case of answers; and, generally, the rules regulating the swearing, and the reception and filing of Pleas at the Record and Writ Clerks' Office, are the same as those which regulate the swearing, reception, and filing of answers.³

Some doubt at one time existed whether, when the order allowing further time, in terms gave the defendant further time to answer only, he was entitled to plead; and in the case of *Brooks v. Purton*,⁴ where the defendant's application to the Master and the affidavits in support of it had reference only to answering, Sir J. L. Knight Bruce V. C. was of opinion that an order giving leave to answer, *plead, or demur, not demurring alone*, was irregular, and he ordered the words in italics to be struck out from the order; whereupon his Honor directed the plea to be taken off the file; afterwards, the defendant filed a plea under the order so altered: but he stated that his judgment proceeded entirely on the circumstances of the individual case. There have, however, been several cases in which it has been decided, that a plea was an answer within the meaning of an order for time to answer;⁵ and in the

¹⁰ Ord. III. 2, 5; *ante*, pp. 453, 454.

¹¹ Ord. I. 35; VIII. 3.

¹² 15 & 16 Vic. c. 86, § 21.

¹ Ord. III. 9; XXXVII. 2; *ante*, pp. 454, 455. For form of notice, see Vol. III.

² *Wright v. Angle*, 6 Hare, 107, 109; *Lowe v. Williams*, 12 Beav. 482; *Jones v. Jones*, 1 Jur. N. S. 863, V. C. S.; *Lloyd v. Solicitors and General Life Assurance Company*, 3 W. R. 640; 24 L. J. Ch. 704, V. C. W.; see, however, *Matthews v. Chichester*, 5 Hare, 207, overruled on appeal, *ib.* 210; 11 Jur. 49.

³ See *post*, Chap. XVII. § 3, *Answers*. In Massachusetts, "the defendant may, at any time before the bill is taken for confessed, or afterwards, by leave of the Court, demur, plead, or answer to the bill." Rule 10 of the Rules for Practice in Chancery.

⁴ 1 Y. & C. C. C. 278; see also *Taylor v.*

Milner, 10 Ves. 444; *Newman v. White*, 16 Beav. 4.

⁵ *Kay v. Marshall*, 1 Keen, 190; *Anon.*, 2 P. Wms. 464; *Jones v. Earl of Strafford*, 3 P. Wms. 79, 81; *Roberts v. Hartley*, 1 Bro. C. C. 56; *De Minckwitz v. Udney*, 16 Ves. 355; *Philips v. Gibbons*, 1 V. & B. 184; *Newman v. White*, 16 Beav. 4; *Heatt v. Corning*, 3 Paige, 566. The filing either an answer, plea, or demurrer, is said to be a compliance with the rule to answer, in *Bracken v. Kennedy*, 3 Scam. 564. If further time is given to answer, it is improper to file a demurrer without leave of the Court. *Ibid.* Demurrer to part is not a compliance with an order to answer. *Kenrick v. Clayton*, 2 Bro. C. C. (Perkins's ed.) 214, and notes; *S. C.* 2 Dick 685; *Lansdown v. Elderton*, 8 Sumner's Ves. 526, note (1), and cases cited. Plea under an order for time to answer is regular. 8 Sumner's Ves. 256, note (1).

case of *Hunter v. Nockolds*, Lord Cottenham decided that if it is intended to limit the defendant to an answer, the order must expressly declare that intention.⁶

* If the defendant does not obtain an order for further time, *691 but allows an attachment to issue, there does not seem to be any objection to his filing a plea; further than that he must, as in the case of an answer, first tender the costs of the contempt.¹ If, however, the defendant is in contempt for want of an answer, and an order has issued for the Sergeant-at-Arms, it is considered irregular to file a plea.² After service of a traversing note, a defendant cannot plead to the bill, without the special leave of the Court.³

An office copy of the plea is taken by the plaintiff;⁴ and, as a general rule, he can take no step in the cause until the plea has been disposed of. Thus, except under very special circumstances, there can be no motion for an injunction till the plea has been argued. The Court will, however, at the instance of the plaintiff, in such a case, expedite the hearing of the plea; and will give the plaintiff leave to move on the same day that it comes on, if the plea should be overruled upon argument, that an injunction may issue.⁵

So, also, if a defendant pleads to part, and answers to the residue of the bill, the plaintiff cannot except to the answer till the plea has been argued:⁶ unless in cases where the plea is confined to the relief prayed, and the defendant professes to answer as to the whole discovery required; in such cases, it seems the Court will not require the plaintiff to set down the plea before he excepts to the answer for insufficiency.⁷

The rule which requires a plea to be disposed of upon argument, before any further proceedings are had in the cause, applies to cases where the defendant, as well as to cases where the plaintiff, seeks to move in the cause. Thus, if a defendant plead in bar, he cannot obtain an order for the plaintiff to make his election, till the plea has been argued: for the plea, by insisting that the plaintiff is not entitled to sue in Equity, denies that he has an election;⁸ and an order for the plaintiff to make his election, made under such circumstances, will, on motion, be discharged;⁹ as will also be an order to elect, made where the defendant has pleaded to part, and answered to the remainder of the bill.¹⁰

⁶ 2 Phil. 540, 544; 12 Jur. 149, reversing S. C., 6 Hare, 12; 11 Jur. 1006; see also *Newman v. White*, 16 Beav. 4.

¹ *Waters v. Chambers*, 1 S. & S. 225; *Sanders v. Murney*, *ibid.*; *Hamilton v. Hibbert*, 2 S. & S. 225; *Mellor v. Hall*, *ib.* 321, 322; *Foulkes v. Jones*, 2 Beav. 274.

² *Braithwaite's Pr.* 63.

³ *Ord. XIII.* 7; *ante*, p. 515.

⁴ *Braithwaite's Pr.* 491.

⁵ *Humpnreys v. Humpnreys*, 3 P. Wms. 395, 397; *Thompson v. Selby*, 12 Sim. 100.

⁶ *Darnell v. Reyny*, 1 Vern. 344; *Braithwaite's Pr.* 127, 128. Where the plaintiff

excepts to the answer accompanying a plea, before the argument of the plea, the truth of the plea is admitted. *Brownell v. Curtis*, 10 Paige, 210; and see *Buchanan v. Hodgson*, 11 Beav. 368, as to moving for production of documents, after joint plea and answer.

⁷ *Pigot v. Stace*, 2 Dick. 496; *Sidney v. Perry*, *ib.* 602.

⁸ *Anon.*, Mos. 304; and see *post*, Chap. XIX. § 4, *Election*.

⁹ *Vaughan v. Welsh*, Mos. 210.

¹⁰ *Fisher v. Mee*, 3 Mer. 45, 47.

The plaintiff may, within three weeks after the filing of the *692 *plea,¹ obtain on motion or petition as of course,² an order to amend his bill. The petition and order should state whether the plea has or has not been set down for argument:³ in the former case, the order is made on payment of the taxed costs, and in the latter, of 20s. costs.⁴ This course should, however, only be adopted when the plaintiff considers the plea to be good: for such an amendment of the bill is as much an admission of the validity of the plea, as if the same had been allowed on argument.⁵

If the plaintiff dispute the validity of the plea, he should set it down for argument. There are, however, certain pleas which are not usually set down for argument; these are: 1. Pleas of Outlawry; 2. Of a former Suit depending; 3. Of a Decree signed or enrolled. The first are pleaded *sub sigillo*,⁶ so that the truth of the fact is ascertained by the form of pleading; and the suit is consequently delayed until the disability is removed: and when removed, the defendant must, on receiving his costs, answer the bill as if the outlawry had not existed.⁷ Where, however, the plaintiff conceives such a plea, through mispleading or otherwise, to be insufficient, he may set it down for argument.⁸ In the case of the two latter kinds of pleas, an inquiry will, on motion or petition of course, be directed into the truth of them.⁹ The order for this inquiry ought to be obtained by the plaintiff:¹⁰ unless he conceives the plea to be deficient in form, in which case he may set it down for argument.¹¹

Formerly, after the filing of a plea, it was necessary to enter it with the Registrar; but now this need not be done; and upon the filing thereof, either party is at liberty to set the same down for argument immediately;¹² and it is irregular to set the same down after three weeks from the date of the filing thereof; but the times of vacation are not to be reckoned.¹³

¹ Ord. XIV. 17. The vacations are not reckoned, Ord. XXXVII. 13 (3); *ante*, p. 641.

² [*Ante*, 480.] For forms of motion paper and petition, see Vol. III. But after the plea is set down, the application to amend must be by special summons. See *ante*, p. 593, n. For a form, see Vol. III. [Any irregularity in the order to amend will be waived by moving to dismiss for want of prosecution. *Kettlewell v. Barstow*, L. R. 10 Eq. 210.]

³ *Jennings v. Pearce*, 1 Ves. J. 448; *Thorn v. Germand*, 4 John. Ch. 363; *Brown v. Ricketts*, 2 John. Ch. 425.

⁴ *Jones v. Wattier*, 4 Sim. 128; *Parker v. Alcock*, 1 Y. & J. 195.

⁵ See *Spencer v. Bryan*, 9 Ves. 231.

⁶ Ord. XIV. 4; *ante*, p. 688.

⁷ Ord. XIV. 5.

⁸ Ord. XIV. 5; Ld. Red. 305; see also *Hunter v. Ayre*, 23 Beav. 15; *Hunter v.*

Nockolds, 6 Hare, 459, 462; *Fox v. Yates*, 24 Beav. 271; and see *ante*, p. 56.

⁹ *Ante*, pp. 637, 661. For form of order, see Seton, 1259, No. 16; and for forms of motion paper and petition, see Vol. III.

¹⁰ Ord. XIV. 6; *ante*, pp. 637, 661.

¹¹ *Ante*, p. 637, n. 6; Ld. Red. 305; *Thomas v. Brasher*, 4 Monroe, 67. [The sufficiency of a plea is not tested by exceptions: *Raymond v. Simonson*, 4 Blackf. 70; nor by demurrer: *Travers v. Ross*, 1 McCarter, 254; *Stone v. Moore*, 26 Ill. 165. See *ante*, 542, n. 1. But a demurrer to a plea, where no objection has been made, will be treated as a mode of setting the plea for hearing in its sufficiency. *Witt v. Ellis*, 2 Cold. 40; *Klepper v. Powell*, 6 Heisk. 506. In one instance, a demurrer to a plea was held to reach a defect in the bill. *Beard v. Bowler*, 2 Bond. 13.]

¹² Ord. XIV. 11.

¹³ *Neck v. Gains*, 1 De G. & S. 223, 11 Jur. 763; Ord. XXXVII. 13 (3).

* The party wishing to set a plea down for argument must, *693 where the cause is attached to one of the Vice-Chancellors' Courts, present a petition to the Lord Chancellor, or, where it is attached to the Rolls' Court, to the Master of the Rolls, praying that the plea may be set down.¹ The petition which, if the cause is attached to one of the Vice-Chancellors' Courts, does not require any fiat from the Lord Chancellor, nor any stamp,² is left with the Registrar, or the Secretary of the Master of the Rolls, as the case may be;³ and must state the name of the Judge to whose Court the cause is attached,⁴ the day when the plea was filed, and whether it is to the whole or part of the bill, and must be subscribed by the solicitor, and state for what party he acts, and be dated the day it is left.⁵ The order for hearing the plea, which is as of course, is drawn up by the Registrar, or by the Secretary at the Rolls, as the case may be.⁶ The order should then be taken to the Registrar's Clerk at the order of course seat, and he will set the plea down at once;⁷ and a copy of the order should also be served, as soon as possible, on the solicitor of the opposite party.⁸

Unless specially directed by the Lord Chancellor, or the Lords Justices, the plea must be set down before, and heard by the Judge to whose Court the cause is attached.⁹ Previously to the hearing, two copies of the bill and a copy of the plea must be left with the under secretary or the train bearer at the Rolls, or with the train bearer of the Vice-Chancellor, as the case may be, for the use of the Court.¹⁰ If the cause is attached to the Rolls' Court, the plea will not be put in the paper until two clear days: if to one of the Vice-Chancellors' Courts, until six clear days after it has been set down.

If the defendant does not think he will be able to maintain his plea on argument, he should, before it comes on for hearing, obtain an order for leave to withdraw it.¹¹ The order will be granted on payment of the costs occasioned by the plea.

The parties should be provided with office copies of the affidavits of service of, and of being served with, the order to set down the plea. If the plea has been set down by the plaintiff, and the defendant makes default at the hearing, the plea will be overruled, *if the *694 plaintiff can produce an affidavit of service on the defendant of the order to set down the plea;¹ if he cannot produce such an affidavit, it will be struck out of the paper. If the plaintiff himself makes default, the plea will be allowed, if the defendant can produce an affidavit of

¹ Ord. XXI. 9.

² Reg. Regul. 15 March, 1860, r. 3.

³ Ord. XXI. 9. For form of order, see Seton, 1257, No. 10; and for form of petition, see Vol. III.

⁴ Ord. XIV. 10.

⁵ Reg. Regul. 15 March, 1860, r. 3.

⁶ Ord. XXI. 9.

⁷ Reg. Regul. 15 March, 1860, r. 1.

⁸ Braithwaite's Pr. 65.

⁹ Ord. VI. 4.

¹⁰ If these directions as to papers are neg-

lected, and in consequence thereof the plea cannot be heard, the solicitor may be ordered to pay such costs as the Court thinks fit. Ord. XXI. 12. The M. R. requires the papers to be left two clear days, at least, before the plea comes on for hearing.

¹¹ For form of order to withdraw a plea, see Seton, 1259, No. 15; and for form of petition for that purpose, see Vol. III.

¹ For form of order in such case, see Seton, 1258, No. 13; and for form of affidavit, see Vol. III.

having been served with the order; or will be struck out of the paper, if he cannot.² Similar rules, *mutatis mutandis*, apply to the case of pleas set down by the defendant.³

On the argument of the plea, where all parties appear, counsel for the defendant are first heard; then the counsel for the plaintiff; and lastly, the leading counsel for the defendant is entitled to reply.⁴

If, when the plea is called on for hearing, the plaintiff declines arguing it, and applies for leave to amend, he will, in general, be allowed to do so, on payment of the costs.⁵

A plea, when set down, will not be allowed to stand over for an indefinite period.⁶

It may be observed here, that on the argument of a plea, the allegations in the bill may be taken less strongly against the plaintiff than they would be on a demurrer.⁷

If a plea is supported by an answer, upon the argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled, or ordered to stand for an answer only.⁸ Where a defendant had answered to an original bill, which was afterwards amended, whereupon the defendant put in a plea to the amended bill, the plaintiff was permitted to read the answer to the original bill, to counterprove the plea to the amended bill.⁹

Upon the argument of a plea, every fact stated in the bill, and not denied by the averments in the plea and by the answer in support of the plea, must be taken as true.¹⁰ If a plea be set down for argument by the plaintiff, without replying to it, the matter contained in it must be considered as true.¹¹

*695 * A plea upon argument may be either allowed simply, or with leave to amend, or the benefit of it may be saved to the hearing, or it may be ordered to stand for an answer, or it may be overruled.¹ The consequence of each of such judgments will be considered in the ensuing sections.

If the plaintiff conceives the plea to be good, though not true, he should reply thereto, and take issue upon it, as in the case of an an-

² Where, in either case, the plea is struck out, a fresh order must be obtained for setting it down, as in the case of a demurrer; see *ante*, p. 596.

³ *Mazarredo v. Maitland*, 2 Mad. 38.

⁴ Counsel's brief consists of copies of the bill and plea.

⁵ See *Jones v. Wattier*, 4 Sim. 128; see also *ante*, p. 420.

⁶ Ord. XXI. 13.

⁷ *Rumbold v. Forteath*, 2 Jur. N. S. 686, V. C. W.

⁸ *Ld. Red.* 303; see *Kirby v. Taylor*, 6 John. Ch. 242; *Souzer v. De Meyer*, 2 Paige, 574; *Bogardus v. Trinity Church*, 4 Paige, 178; *Kuypers v. Dutch Ref. Church*, 6 Paige, 570; *Leaycraft v. Dempsey*, 4 Paige,

124, 126; *Story Eq. Pl.* § 699. If a plea accompanied by an answer, is allowed, the answer may be read at the hearing of the cause to counterprove the plea. *Souzer v. De Meyer*, 2 Paige, 574; *Bogardus v. Trinity Church*, 4 Paige, 178; *Story Eq. Pl.* §§ 690, 699.

⁹ *Hildyard v. Cressy*, 3 Atk. 303; *ante*, p. 680.

¹⁰ *Bogardus v. Trinity Church*, 4 Paige, 178; *Lawrence v. Pool*, 2 Sandf. S. C. 540.

¹¹ *Gallagher v. Roberts*, 1 Wash. C. C. 320; *Rowley v. Williams*, 5 Wis. 151; *Davison v. Johnson*, 1 C. E. Green (N. J.), 112.

¹ *Ld. Red.* 301. For forms of orders in such cases, see *Seton*, 1258, Nos. 12, 14.

swer.² He should not, however, reply to a plea of the dependency of a former suit for the same matter.³

If the plaintiff reply to the plea, he thereby makes as full an admission of its validity as if it had been allowed upon argument; so that, if the defendant, at the hearing, proves his plea to be true, the bill must be dismissed.⁴ Therefore, where a defendant, in a plea of purchase for a valuable consideration, omitted to deny notice, and the plaintiff replied to it, and the defendant, at the hearing, proved the purchase for valuable consideration, it was held that the bill ought to be dismissed: for it was the plaintiff's own fault that he had not set the plea down for argument, when it would have been overruled.⁵ And it seems that in such case it will make no difference if the plaintiff should prove notice: for all that is required of a defendant, in such a case, is to prove his plea, which he does by proving the purchase, and the payment of the consideration.⁶

If a plea to the whole or part of a bill is not set down for argument within three weeks after the filing thereof (exclusive of vacations), and the plaintiff does not within such three weeks serve an order for leave to amend the bill, or by notice in writing *undertake to *696 reply to the plea, the plea is to be held good to the same extent, and for the same purposes, as in the case of a plea to the whole or part of a bill allowed upon argument;¹ and the defendant may obtain an order as of course for the plaintiff to pay the costs of the plea, and, if the plea is to the whole bill, the costs of the suit.

Where the plea is to the whole bill, the defendant by whom it was filed, may at any time after the expiration of the three weeks obtain, as of course, an order to dismiss the bill.¹ A plea to the whole of the relief,

² *Ld. Red. 301*. In *New Jersey*, Chancellor Green, in *Davison v. Johnson*, 1 C. E. Green (N. J.), 112, 113, remarked that, when the cause is heard upon a plea, "the question is not strictly whether the plea is in proper form, but whether in the language of the statute, the plea be good; that is, whether upon the face of the plea it presents, if true, a valid defence to the action. The inquiry, when the cause is heard upon the plea, is substantially as if the plaintiff had demurred to the plea. The question is not, whether the plea is true, but whether, if true, it is a good defence. This is the obvious meaning of the statute. If the plaintiff deems the plea bad, the case goes to hearing upon the plea. If he conceives the plea to be good, though not true, he takes issue upon it, and proceeds, as in case of an answer." "The subject of inquiry, is not the mere technical form of the plea, but the sufficiency of its averments to sustain the defence; whether it is good both in form and in substance; whether, viz., assuming all the facts properly set out in the plea to be true, it presents a valid defence." See *McEwen v. Broadhead*, 3 Stockt. 129.

³ *Jones v. Segueira*, 1 Phil. 82, 84; 6 Jur. 183; *Ord. XIV. 6, 7*; *ante*, pp. 637, 692.

⁴ *Daniels v. Taggart*, 1 Gill & J. 311; *Meeker v. Marsh*, 1 Saxton (N. J.), 198; *Dows v. McMichael*, [2 Paige, 345;] 6 Paige, 139. Upon a replication to a plea, nothing is in issue except what is distinctly averred in the plea; and if that is established at the hearing, the plea is a bar to so much of the bill as it professes to cover. *Fish v. Miller*, 5 Paige, 26; *Cook v. Mancius*, 4 John. Ch. 166. The replication is an admission of the sufficiency of the facts pleaded, as a bar, if true. *Hughes v. Blake*, 6 Wheat. 472; *Bogardus v. Trinity Church*, 4 Paige, 178; *Gernon v. Bocaline*, 2 Wash. C. C. 199; *Fish v. Miller*, 5 Paige, 26; *Rhode Island v. Massachusetts*, 14 Peters, 210, 257; *Gallagher v. Roberts*, 1 Wash. C. C. 320. [And this without reference to any Equity arising from other facts stated in the bill. *Myers v. Dorr*, 13 Blatchf. 22; *Moore v. Holt*, 3 Tenn. Ch. 141.]

⁵ *Harris v. Ingledew*, 3 P. Wms. 94.

¹ *Ord. XIV. 17*. As to an irregular amendment after the above time, see *Campbell v. Joyce*, L. R. 2 Eq. 377, V. C. W. By the 38th Equity Rule of the United States Courts, if the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or on the next succeeding rule day, he

but only to a part of the discovery, is not a plea to the whole bill within the meaning of this rule.²

If the plaintiff undertakes to reply to a plea to the whole bill, he is not, without the special leave of the Court, to take any proceeding against the defendant by whom the plea was filed till after replication;³ and if he does not file his replication within four weeks after the date of his undertaking, the defendant may move, upon notice, to dismiss the bill for want of prosecution.⁴

The times of vacation are not reckoned in the computation of the time for setting down pleas:⁵ and if the time expires on a day on which the offices are closed, the plea may be set down on the day on which they next open.⁶

SECTION V. — *Allowing Pleas.*

If a plea is allowed simply, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true.⁷ If, therefore, a plea is allowed upon argument, or the plaintiff without argument thinks it, though good in form and substance, not true in point of fact, he may take issue upon

it, and proceed to disprove the facts upon which it is endeav-
*697 ored to be supported.⁸ This he does *by filing a replication, in the same manner that he would do if the defendant had simply put in an answer to the bill, in the usual way.¹

Where the defendant pleads the pendency of another suit, the plaintiff ought not to reply to the plea, even if he disputes the fact, but he should, on motion or petition of course, obtain an order for an inquiry into the truth thereof.² This order, and a certificate in pursuance thereof, should be obtained within one month from the filing of the plea: otherwise, the defendant may obtain, on motion or petition of course, an order to dismiss the bill with costs.³

When the plaintiff has replied to a plea, its validity can never be questioned, but only its truth:⁴ in fact, nothing but the matters con-

shall be deemed to admit the truth and sufficiency thereof and his bill shall be dismissed as of course, unless a judge of the Court shall allow further time for the purpose.

Roberts v. Jones, 7 Beav. 57. In Massachusetts, "the plaintiff may set down the plea to be argued, or take issue on the plea, within fifteen days from the time when the same is filed; and if he fail to do so, a decree, dismissing the bill, with costs, may be entered upon motion, unless good cause appear to the contrary." Rule 11 of the Rules for Practice in Chancery.

² Neck v. Gains, 1 De G. & S. 223; 11 Jur. 763. For forms of motion paper and petition, see Vol. III.

³ Ord. XIV. 13.

⁴ Ord. XXXIII. 10 (2). For form of notice of motion, see Vol. III.

⁵ Ord. XXXVII 13 (3).

⁶ Ord. XXXVII. 12.

⁷ Story Eq. Pl. § 697; Bassett v. Company, 43 N. H. 253. A plea may be good in part and bad in part. Lord Chelmsford in United States of America v. McKee, L. R. 3 Ch. Ap. 79, 91; ante, p. 611 and cases in note.

⁸ Ld. Red. 301; Bassett v. Company, 43 N. H. 253.

¹ See post, Chap. XXI., *Replication*.

² For forms of motion paper and petition see Vol. III. [But see p. 637, note.]

³ Ord. XIV. 6, 7; ante, pp. 637, 692, Baker v. Bird, 2 Ves. J. 672; Jones v. Segueira, 1 Phil. 82; 6 Jur. 183; Leigh v. Turner, 14 W. R. 361, M. R. For forms of motion paper and petition, see Vol. III.

⁴ Parker v. Blythmore, Prec. in Ch. 58; 2 Eq. Ca. Ab. 70. Pl. 6; Dunsany v. Shaw, 5 Bro. P. C. ed. Toml. 262, 267; McEwen v. Broadhead, 3 Stockt. (N. J.), 131.

tained in the plea, as to so much of the bill as the plea covers, is in issue between the parties.⁵ If, therefore, issue is thus taken upon the plea, the defendant must prove the facts which it suggests: ⁶ if he fails in this proof, so that, at the hearing, the plea is held to be no bar, and the plea extends to the discovery sought by the bill, the plaintiff is not to lose the benefit of that discovery, but the Court will order the defendant to answer the interrogatories; ⁷ but, if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred even though the plea is not good, either in point of form or substance.⁸

Although, when a plea has been replied to, the matter in issue is the truth of the plea only, which must be proved by the defendant, this will not prevent the plaintiff, if he chooses, from entering into evidence to prove the whole case made by his bill.⁹ It can scarcely, however, be imagined, that a case should ever arise, in which such a course of proceeding, on the part of the plaintiff, would be advisable, especially as this Court will not, as we have seen, in the event of the plea being found false, deprive the * plaintiff of any advantage which *698 he might have had from a discovery by the defendant, if an answer had been originally put in.

The plaintiff may, however, if he pleases, go into evidence to disprove the plea; and if he has, in his bill, alleged any matter which, if true, may have the effect of avoiding the plea, such as notice of fraud, he may, after replying to the plea, enter into evidence in support of his allegation. And where the plea introduces matter of a negative nature, such as denial of notice, or fraud, it will be necessary for him, in case sufficient to show the existence of the notice or fraud, is not admitted by the answer in support of the plea, to go into evidence in support of the affirmative of the proposition.¹

When a plea is allowed, it is considered as a full answer; and an injunction obtained till answer will be dissolved, upon application, as a matter of course.²

Where a plea to the whole or part of a bill is allowed, upon argument, the plaintiff, unless he undertakes to reply to the plea, or the Court otherwise directs, is to pay to the party by whom the plea is filed the costs of the plea, and, if the plea is to the whole bill, the costs of

⁵ Ld. Red. 302; *Fish v. Miller*, 5 Paige, 26.

⁶ Where a plea contains several distinct averments or allegations of fact, all the allegations must be supported by the proofs, or the plea will be overruled as false. *Dows v. McMichael*, 6 Paige, 139. Upon the hearing on the defendant's plea evidence previously taken by the defendant cannot be considered by the Court. *Hancock v. Carlton*, 6 Gray, 39.

⁷ Ld. Red. 302; *Brownsword v. Edwards*, 2 Ves. S. 247; *Wood v. Strickland*, 2 V. & B. 158.

⁸ Ld. Red. 302; *Harris v. Ingledew*, 3 P. Wms. 94; *Daniels v. Taggart*, Gill & J. 311; *Fish v. Miller*, 5 Paige, 26; *Bogardus v. Trinity Church*, 4 Paige, 178; *Peay v. Duncan*, 20 Ark. 85; *Flagg v. Bonnel*, 2 Stockt. (N. J.), 82; *Dows v. McMichael*, 6 Paige, 144. [*Ante*, 695, n. 4.]

⁹ *Ord v. Huddleston*, 2 Dick. 510, 512.

¹ *Eyre v. Dolphin*, 2 Ball & B. 303; *Saunders v. Leslie*, *ib.* 515.

² *Phillips v. Langhorn*, 1 Dick. 148. [But the allowance of the plea does not *ipso facto* operate as a dissolution of the injunction. *Ferrand v. Hamer*, 4 M. & C. 143.]

the suit also; and in such last-mentioned case the order allowing the plea is to direct the dismissal of the bill.³ Formerly, upon the allowance of a plea to the whole bill, if the plaintiff undertook to reply to it, he had to pay the costs of the plea, but the other costs of the suit were reserved;⁴ now, it would appear that, in the same circumstances, both the costs of the plea and the costs of the suit will be reserved, unless the Court makes a special order.⁵

A solicitor will not be allowed to act oppressively, by putting in two pleas of the same nature for two defendants; and, where a solicitor set down two pleas for want of parties, on behalf of different defendants, he was allowed the costs of one only.⁶

If a plea is allowed, it is not uncommon to give leave to the plaintiff to amend his bill; especially in the case of a plea for want of parties.⁷ It must not be understood that this is a matter of course;⁸ it will, however, probably be done more frequently now than formerly: because, under the present practice, a plaintiff may introduce facts or circumstances which have occurred after the institution of the suit, by way of amendment, into his bill, if the cause is otherwise in such a state as to allow of amendment being made therein.¹ After the allowance of a plea, an order for leave to amend the bill is special; and on the application for it, the plaintiff must specify the amendments he intends to make.²

Where the plea went to the plaintiff's right to sue, and was allowed, leave to amend the bill was given, on payment of the costs of the plea;³ but where it was for want of parties, the costs were reserved to the hearing of the cause.⁴

SECTION VI. — *Saving the Benefit of a Plea to the Hearing.*

It sometimes happens that, upon the argument of a plea, the Court considers that although, as far as then appears, it may be a good defence, yet there may be matter disclosed in evidence which, supposing the matter pleaded to be strictly true, would avoid it; in such case, the Court, in order that it may not preclude the question by allowing the plea, directs that the benefit of it shall be saved to the defendant at the hearing.⁵ The effect of such an order is to give the plaintiff an opportunity of replying, and going into evidence, without overruling the

³ Ord. XIV. 16. Plea allowed without costs, and with liberty to amend bill. *Jones v. Binns*, 33 Beav. 362; 10 Jur. N. S. 119; [*Metropolitan Bank v. Offord*, L. R. 10 Eq. 398.]

⁴ *Fry v. Richardson*, 10 Sim. 475.

⁵ *Young v. White*, 17 Beav. 532; 18 Jur. 277.

⁶ *Tarback v. Woodcock*, 3 Beav. 289.

⁷ Ld. Red. 281. For form of order in such case, see *Seton*, 1258, No. 12.

⁸ *Ante*, pp. 230, 419.

¹ 15 & 16 Vic. c. 86, § 53; see *Tudway v. Jones*, 1 K. & J. 691, where such an order was made.

² *Taylor v. Shaw*, 2 S. & S. 12; *Neck v. Gains*, 1 De G. & S. 223; 11 Jur. 763; *post*, p. 730.

³ *Tudway v. Jones*, *ubi sup.*

⁴ *Doyle v. Muntz*, 5 Hare, 509, 518; 10 Jur. 914.

⁵ Ld. Red. 303. Thus in *Heartt v. Corning*, 3 Paige, 572, a plea of settled partnership account was held to be well pleaded; but as

plea.⁶ When the benefit of the plea is reserved to the hearing the interrogatories to such part of the bill as is covered by the plea need not be answered.⁷

Unless any thing is said in the order in such cases with respect to the costs of the plea, they must abide the result of the hearing: the order saving the benefit of the plea to the hearing being, in fact, nothing more than an order for the adjournment of the discussion. Lord Chief Baron Gilbert, with reference to this subject, observes: "But if the words are to save the benefit of the plea till the hearing, no other use could ever be found by these words, but that in truth it saves the defendant paying costs for the overruling * his plea; and, there- *700 fore, though the Court often makes use of these words, yet, when the plea is very faulty, or naught, though the Court often saves the benefit thereof till the hearing, yet they declare it shall not avoid the payment of costs."¹

SECTION VII. — *Ordering a Plea to stand for an Answer.*

If, upon argument, the Court considers that the matter offered by way of plea may be a defence, or part of a defence, but that it has been informally pleaded, or is not properly supported by the answer, so that the truth is doubtful, it will, in such case, instead of overruling the plea, direct it to stand for an answer.²

If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless, by the order, liberty is given to the plaintiff to except;³ and where a defendant pleaded to the whole bill, and, on arguing the plea, it was ordered to

facts might be disclosed justifying a decree to surcharge and falsify, the benefit of it was saved until the hearing. To have allowed it, simply, would have made it a conclusive bar.

⁶ See *Cooth v. Jackson*, 6 Ves. 12, 18. When the plea covers the whole bill, the effect of the order, that the plea stand over till the hearing, saving to the defendant the benefit thereof, is, that the defendant shall not be deprived of the benefit of his plea; but that the plaintiff shall be at liberty to file a replication, and proceed to the proof of the facts in reply to the plea; and, on such hearing, the plea is to be taken, *prima facie*, a good bar to the suit; but as there may possibly be circumstances, which, in Equity, ought to preclude the defendant from relying upon such plea, the question is left open until such hearing. *Hancock v. Carlton*, 6 Gray, 54; *Astley v. Fountaine*, Cas. temp. Finch, 4; *Story Eq. Pl.* § 698; 1 Barb. Ch. Pr. 121, 122; *Bassett v. Company*, 43 N. H. 253, 254. Neither party recovers costs on the argument of a plea where the benefit of it is saved to the defendant until the hearing. *Heartt v. Corning*, 3 Paige, 566.

⁷ *Gilb. For. Rom.* 64.

¹ *Gilb. For. Rom.* 94.

² *Ld. Red.* 393; *Tempest v. Lord Camoys*, 1 W. N. 16; 14 W. R. 326, M. R.; *Pearse v. Dobinson*, L. R. 1 Eq. 241, V. C. K.; *Mills v. Bally*, 1 W. N. 348; 15 W. R. 86, V. C. W.; *Orcutt v. Orms*, 3 Paige, 461; *French v. Shotwell*, 5 John. Ch. 555; *Bell v. Woodward*, 42 N. H. 193, 196; *Jarvis v. Palmer*, 11 Paige, 650; *Souzer v. De Meyer*, 2 Paige, 574; *Leaycraft v. Dempsey*, 4 Paige, 123; *Brooks v. Sutton*, L. R. 5 Eq. 361; [*S. C.* 3 Ch. App. 1]. If the plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless by the order liberty is given to the plaintiff to except. *Kirby v. Taylor*, 6 John. Ch. 242; *Orcutt v. Orms*, 3 Paige, 459; *Goodrich v. Pendleton*, 3 John. Ch. 394; *Meeker v. Marsh*, 1 Saxton, 198. In *Orcutt v. Orms*, it was said, by Chancellor Walworth, that the answer will be considered as a full answer, though not necessarily a perfect defence.

³ *Id.* 304.

stand for an answer, without saying, one way or the other, whether the plaintiff might except, the plaintiff was not allowed to except: because, by the terms "for an answer," in the order, a sufficient answer is meant, an insufficient answer being no answer.⁴ It is to be observed, that if a plea is to part only of the bill, and is accompanied by an answer to the rest, an order that it may stand for an answer, without giving the plaintiff liberty to except, will not preclude the plaintiff from excepting to the answer to that part of the bill which is not covered by the plea.⁵

The order for the plea to stand for an answer is, however, frequently accompanied with a direction that the plaintiff shall be at liberty to except;⁶ but the liberty is sometimes qualified, so as to protect the defendant from any particular discovery which he ought not to be called upon to make.⁷

*701 * When a plea has been ordered to stand for an answer, with liberty to except, the plaintiff must, if the Court does not fix a time within which he is to except, file his exceptions within six weeks from the date of the order: otherwise the answer will be deemed sufficient.¹ The proceedings upon the exceptions are the same as those upon exceptions to answers in general.²

When a plea is ordered to stand for an answer, the question of costs ought to be decided at the time the order is made, and a subsequent application for them has been refused.³ It seems that, generally, the defendant is ordered to pay the costs of the plea:⁴ though they have been made costs in the cause.⁵

SECTION VIII. — *Overruling Pleas.*

If the Court, upon argument, is of opinion that the plea cannot, under any circumstances, be made use of as a defence, it is simply overruled, and the defendant is to pay to the plaintiff the taxed costs occasioned thereby, unless the Court otherwise directs.⁶ The plaintiff may also, if the plea has been to the whole bill, and the defendant's time for answer-

⁴ *Sellon v. Lewen*, 3 P. Wms. 239.

⁵ *Coke v. Wilcocks*, Mos. 73; Ld. Red. 304.

⁶ See *Glover v. Weedon*, 3 Jur. N. S. 903, V. C. S., where leave to amend was also given; and see *Seton*, 1258, No. 14.

[In *Dear v. Webster*, 15 W. R. 395, where the plaintiff did not desire to except, leave to put in a further answer was given to the defendant. And see *Brien v. Jordan*, 1 Tenn. Ch. 625, where leave was given to both parties to apply, the one to make further answer, the other to except.]

⁷ Ld. Red. 304; *Alarides v. Campbell*, Bunb. 265; *Brereton v. Gamul*, 2 Atk. 241; *Pusey v. Desbouvrie*, 3 P. Wms. 315, 322; *King v. Holcombe*, 4 Bro. C. C. 439, 440; *Bayley v. Adams*, 4 Ves. 586, 599; *Pearse*

v. Dobinson, L. R. 1 Eq. 241, V. C. K.; *Sellon v. Lewen*, 3 P. Wms. 239; *McCormick v. Chamberlin*, 11 Paige, 543; *Bassett v. Company*, 43 N. H. 254; *Bell v. Woodward*, 42 N. H. 195, 196.

¹ Ord. XVI. 6; see *Esdaile v. Molyneux*, 2 Coll. 641. A less time is frequently fixed; see *Mansell v. Feeney*, 2 J. & H. 313, where one week only was given.

² For the practice, see *post*, Chap. XVII. § 4, *Exceptions to Answers*.

³ *Yarnall v. Rose*, 2 Keen, 326.

⁴ *Howling v. Butler*, 2 Mad. 245; *Thompson v. Wild*, 5 Mad. 82, 83; *Mansell v. Feeney*, *ubi sup*.

⁵ *Hunt v. Penrice*, 17 Beav. 525; 18 Jur. 4.

⁶ Ord. XIV. 12.

ing the bill has expired, issue an attachment for want of an answer,⁷ unless the defendant has obtained, either from the Court at the hearing, or from the Judge at Chambers, an extension of time to answer; in which case, the attachment must not be issued till the extended time for answering has expired. The plaintiff may also, if he does not require an answer, immediately file a traversing note, unless the Court has given time to the defendant to answer: in which case if the defendant does not file his answer within the time allowed, the plaintiff may file the note at the expiration of the time.⁸

The effect of overruling a plea is to impose upon the defendant the necessity of making a new defence. This he may do, * either *702 by a new plea, or by an answer; and the proceedings upon the new defence will be the same as if it had been originally made.¹

It is said, in some of the books of practice, that after a plea has been overruled, a new defence may be made by demurrer; and, in *The East India Company v. Campbell*,² such a demurrer (which was upon the ground that the discovery would subject the defendant to pains and penalties) was permitted. It is to be recollected, however, that this occurred under the old practice, under which, provided a defendant was not in contempt, or had not obtained an order for time, he might have put in a demurrer at any time; but, under the present practice, this would be nearly impossible, unless by special leave of the Court: since twelve days only, from appearance, are allowed to a defendant to demur alone to any bill.³ A demurrer to part of the bill may, however, still be put in, in cases where the whole time allowed by the orders to plead, answer, or demur, not demurring alone,⁴ has not elapsed at the time of the plea being overruled; or where an order for additional time for the same purpose has been obtained. But under an order for time to answer alone, such a defence cannot, it is apprehended, be put in.⁵

We have seen before that, after a plea has been overruled, a defendant cannot demur *ore tenus*.⁶

The rule with regard to pleading again, must be understood with this qualification, namely, that the second plea must not be upon the same

⁷ Hinde, 224. As to overruling plea as frivolous, see *Bowman v. Marshall*, 9 Paige, 78; 1 Barb. Ch. Pr. 123. In Massachusetts, "if a plea is overruled, no other plea shall be received, but the defendant shall proceed to answer the plaintiff's bill; and if he shall fail to do so within one month, the plaintiff may enter an order that the same, or so much thereof as is covered by the plea, be taken for confessed; and the matter thereof may be decreed accordingly, unless good cause appear to the contrary." Rule 12 of the Rules for Practice in Chancery. Under Rule 13, it is provided, that "upon a plea being overruled, or adjudged good, the party prevailing upon the question shall recover full costs from the time of filing such plea, unless the Court shall otherwise specially order."

⁸ Ord. XIII. 4; *ante*, p. 515.

¹ On overruling a plea, leave was given to the defendant to plead *de novo*, and to plaintiff to amend his bill. *Chadwick v. Broadwood*, 3 Beav. 316.

[By the Code of Tennessee, § 4395, upon a plea or demurrer overruled, no other plea or demurrer shall be received, but the defendant shall answer the allegations of the bill.]

² 1 Ves. S. 246.

³ Ord. XXXVII. 3; *ante*, p. 591.

⁴ Ord. XXXVII. 4, 5.

⁵ *Brooks v. Purton*, 1 Y. & C. C. C. 278; *Hunter v. Nockolds*, 2 Phil. 540, 544; 12 Jur. 149; *ante*, p. 690.

⁶ *Ante*, p. 588.

ground as the first;⁷ therefore, it is held that only one plea to the jurisdiction can be allowed.⁸ And so, where, to a bill to set aside an agreement and release, stating circumstances of fraud and duress, the defendant pleaded the agreement and release to the whole bill, without denying the fraud and duress, and the plea was, upon that ground, overruled, whereupon the defendant put in another plea, insisting upon the same release as a bar to the relief, and also to so much of the
 *703 discovery as related to transactions *prior to the agreement, accompanied by an answer as to the circumstances of fraud and duress, this was held to be irregular.¹

SECTION IX. — *Amending Pleas, and Pleading de novo.*

It sometimes happens, that where there is a material ground of defence disclosed in the plea, but owing to some evident slip or mistake, the plea has not been correctly framed, the Court, in this respect following the Courts of Law, will exercise a discretion in allowing the plea to be amended.² Thus, where a plea, which in substance showed a defect of parties, instead of stating that additional parties were necessary and naming them, prayed judgment whether the defendant ought to be called upon for further answer, Lord Erskine, upon the argument, instead of overruling the plea, on the ground of informality, gave the defendant leave to amend it.³ And so, where an error in a plea of outlawry was occasioned by the Clerk of the Outlawries, who, instead of a copy of the record of the outlawry, or of the *capias utlagatum*, gave a certificate of the outlawry, which was annexed to the plea, the Court allowed the defendant to amend his plea, by annexing to it a copy of the *exigent*, or record of the outlawry.⁴ And so, where the Court of Exchequer thought that the negative averments in a plea were too

⁷ Where a plea has been overruled on the merits, the same matter cannot be set up in the answer, as a bar to the suit, without the special permission of the Court. *Townshend v. Townshend*, 3 Paige, 413; see *Goodrich v. Pendleton*, 4 John. Ch. 549; *Coster v. Murray*, 7 John. Ch. 167; *Bush v. Bush*, 1 Strobh. 377; *Piatt v. Oliver*, 1 McLean, 295; *Kinggold v. Stone*, 20 Ark. 526.

⁸ *Wyatt's P. R.* 325. It is said, in the same work, p. 330, that if outlawry or other matter be pleaded, and the plea is overruled, no other plea shall be after pleaded; but the defendant must answer. This, however, must be meant to apply to other pleas of the same matter; see *Rowley v. Eccles*, 1 S. & S. 511, 513, where Sir John Leach V. C. appears to have held, that after a plea is overruled, a defendant cannot put in a second plea without leave of the Court.

[“There is no rule more firmly settled than that a defendant having put in one plea, and that plea having been overruled, cannot put in another plea without special leave of

the Court.” Per *Malins V. C.*, who ordered a second plea coupled with an answer to be taken from the file, with costs. *McKewan v. Sanderson*, L. R. 16 Eq. 316.]

¹ *Freeland v. Johnson*, 1 Anst. 276; 2 Anst. 407.

² [*Clayton v. Meadows*, 2 Hare, 26; *Cooke v. Cooke*, L. R. 4 Eq. 77;] *Beames on Pleas*, 321; see *Meeker v. Marsh*, 1 Saxton (N. J.), 198; *Newl. Ch. Pr.* 121; *Leaycraft v. Dempsey*, 4 Paige, 126; *Bell v. Woodward*, 42 N. H. 181, 196; *Story Eq. Pl.* §§ 894-896; *Smith v. Babcock*, 3 Sumner, 583; *Newman v. Wallis*, 2 Bro. C. C. (Perkins's ed.) 147, note (c), and cases cited. Amendments are in the discretion of the Court. *Smith v. Babcock*, 3 Sumner, 583; but their discretion, in this respect, is regulated by rules known in the Courts; *Jefferson v. Cullis*, 4 Dana, 467.

³ *Merrewether v. Mellish*, 13 Ves. 435; *Sergrove v. Mayhew*, 2 M. & G. 97, 99.

⁴ *Waters v. Mayhew*, 1 S. & S. 220, 224; *ante*, p. 688.

special and precise, the same matter being also denied by the answer in support of the plea, they gave the defendant leave to amend his plea by striking out the special averments.⁵ It has, however, been held, that leave to amend a plea should not be given when it is supported by an answer.⁶ A short time is generally limited, within which the amendment must be made.

It has also happened, that where a plea has offered a substantial defence, but has been so informally pleaded that it would be difficult or impossible to amend it, the Court, instead of allowing the defendant to amend his plea, has given him leave to withdraw it altogether, and plead *de novo* within a given time.⁷

* Liberty to amend, or to plead *de novo*, however, will only be *704 granted in cases where there is an apparent good ground of defence disclosed by the plea, but owing to some accident or mistake, it has been informally pleaded: where a substantial ground of defence has been omitted, such permission will not be given. Thus, in *Free-land v. Johnson*,¹ where the bill sought to set aside an agreement and release, stating circumstances of imposition and equitable duress in obtaining them, and the defendant put in a plea of the agreement and release to the whole bill, without denying the fraud or duress, either by averments or by answer, the Court of Exchequer refused to give the defendant leave to amend.

Although, where the error is very palpable, the Court will give the defendant leave to amend at the argument of the plea, the most usual course is for the defendant to move subsequently for leave to amend his plea. This form of proceeding is rendered necessary by the circumstance, that the Court always requires to be told precisely what the amendment is to be, and how the slip happened, before it will allow the amendment to take place; and this must, in general, be done by affidavit in support of the motion.² In *The Nabob of Arcot v. The East India Company*,³ Lord Thurlow refused to entertain the question, whether the plea might be amended or not upon the argument, because no motion had been made on the subject; and he said that he should expect that, whenever such a motion should be made, the form of the plea intended to

⁵ Pope v. Bish, 1 Anst. 59.

⁶ Thompson v. Wild, 5 Mad. 82. [But see Greene v. Harris, 11 R. 1. 5, where the exact extent of the decision is stated, and several authorities are cited to show that the plea and answer, one or both, have frequently been allowed to be amended.]

⁷ Nobkissen v. Hastings, 2 Ves. J. 84, 87; 4 Bro. C. C. 253; Watkins v. Stone, 2 S. & S. 560, 573. On overruling a plea, leave was given to defendant to plead *de novo*, and plaintiff to amend his bill. Chadwick v. Broadwood, 3 Beav. 316. A defendant in a bill of revivor cannot plead to the original bill a plea which has been pleaded by the original defendant and overruled. Dows v. McMichael, 2 Paige, 245; Souzer v.

De Meyer, 2 Paige, 574; but if a plea has been put in, and the original defendant has died before argument, the defendant to a bill of revivor may plead the same matter *de novo*. 1 Barb. Ch. Pr. 125; 1 Hoff. Ch. Pr. 389; 1 Smith Ch. Pr. (2d Am. ed.) 229.

¹ 1 Anst. 276; 2 Anst. 407, 411; and see Hewitt v. Hewitt, 11 W. R. 849, V. C. K.

² Newman v. Wallis, 2 Bro. C. C. 143, 147; Wyatt's P. R. 340; Wood v. Strickland, 2 V. & B. 150, 157; Jackson v. Rowe, 4 Russ. 514, 524.

³ 3 Bro. C. C. 292, 300; S. C. nom. The Nabob of the Carnatic v. The East India Company, 1 Ves. J. 371, 388.

be put in should be laid before the Court: for amendments, when moved, ought to be stated, that the Court may see whether it is material that the cause should be delayed for the purpose of admitting them. It is to be remarked, that at a subsequent period, after the plea in the above case had been overruled, the defendants applied by motion for leave to amend the plea, or to plead anew, but that the Lord Chancellor refused the motion on the ground, as appears from the marginal note of one of the reporters, that the plea had been amended before.⁴

With respect to the costs to be paid by the plaintiff, upon the *705 * allowance of an amended plea, Sir James Wigram V. C. decided, in the case of *Clayton v. Meadows*,¹ that the defendant is not entitled to the costs of correcting his own mistake, but he is entitled to the costs which he would have had, if the plea which was allowed had been the plea which was first filed.

⁴ 1 Ves. J. 372, 393.

¹ 2 Hare, 26, 33.

DISCLAIMERS.

A **DISCLAIMER** is, where a defendant denies that he has or claims any right to the thing in demand by the plaintiff's bill, and disclaims, that is, renounces, all claim thereto.¹

It has been before stated, that where a person who has no interest in the subject-matter of the suit, and against whom no relief is prayed, is made a party, the proper course for him to adopt, if he wishes to avoid the discovery, is to demur, unless the bill states that he has or claims an interest: in which case, as a demurrer, which admits the allegations in the bill to be true, will not of course hold, he should, except in cases of partial discovery (to which, as will be presently shown, he may object by answer), avoid putting in a full answer, by plea or disclaimer.² Therefore, where, instead of disclaiming he supported the plaintiff's case, but was held not entitled to any part of the relief given to the plaintiff, he was left to bear his own costs.³

A disclaimer, however, cannot often be put in alone: for although, if a plaintiff, from a mistake, makes a person a party to a suit who is in no way interested in or liable to be sued touching the matters in question, a simple disclaimer by such person might be good, yet, as it is possible that the defendant may have had an interest which he may have parted with, the plaintiff has a right to require an answer, sufficient to ascertain whether that is the fact or not; and if a defendant has had an interest which he has parted with, an answer may also be necessary to enable the plaintiff to make the proper person a party, instead of the defendant.⁴

A defendant cannot shelter himself from answering, by alleging, that he has no interest in the matter of the suit, in cases where, though he may have no interest, others may have an interest in it * against *707 him: he cannot disclaim his liability; ¹ therefore, a party to an

¹ Wyatt's P. R. 175; Story Eq. Pl. § 838 *et seq.*; Bentley v. Cowman, 6 Gill & J. 152.

[A disclaimer can only extend to matters in issue in the suit; and where it was filed in a foreclosure suit, it was held that it did not operate so as to enlarge the estate of the plaintiff. Burrell v. Smith, L. R. 7 Eq. 399].

² *Ante*, p. 284. A defendant may also, in a suit, disclaim by his counsel at the bar. Teed v. Carruthers, 2 Y. & C. C. C. 31, 38; 6 Jur. 987. It seems doubtful whether he can by such a disclaimer, in the case of a petition

under the statutory jurisdiction, divest himself of an estate in lands: see *Re Ellison*, 2 Jur. N. S. 62, V. C. W.; *Foster v. Dawber*, 1 Dr. & Sm. 172.

³ *Rackham v. Siddall*, 1 M'N. & G. 607, 625.

⁴ Ld. Red. 318; *Oxenham v. Esdaile*, M'L. & Y. 540.

¹ A defendant cannot by disclaiming deprive the plaintiff of the right to require a full answer from him, unless it is evident that the defendant should not, after the disclaimer, be continued a party to the suit. *Ellsworth v. Curtis*, 10 Paige, 105.

account cannot, by disclaiming an interest in the account, protect himself, by such disclaimer, from setting out the account.² Nor, when the bill seeks to charge the defendant with the costs of the cause, can he, by disclaiming all interest in the subject of the suit, evade giving a discovery of those facts by which the plaintiff seeks to substantiate his charge.³ So, if fraud is charged against the defendant seeking to disclaim, and interrogatories have been filed, a disclaimer alone is insufficient, and an answer must be given to the imputed fraud;⁴ and it seems that, in such a case, although no personal decree can in general be made against a married woman, still she must answer fully: though it does not seem clear how far her answer can ultimately be used as evidence against her.⁵

It is to be observed also, that a disclaimer by one defendant cannot, in any case, be permitted to prejudice the plaintiff's right as against the others; and, therefore, where a bill was filed against the lessees of tithes, under a parol demise, for an account, and the lessor, who was made a defendant thereto, disclaimed, the disclaimer of the lessor was not permitted to prejudice the rights of the plaintiff against the lessees, and a decree was made against them: although the plaintiff had, upon the disclaimer coming in, himself dismissed the bill against the lessor with costs.⁶ Where a defendant claims any rights against his co-defendants, though not against the plaintiff, he should reserve such rights by his disclaimer: for if his disclaimer is absolute, the Court will only determine the rights and interests of the other parties; and will not consider any question which may arise between him and his co-defendants.⁷

Though a disclaimer is, in substance, distinct from an answer, yet it is, in point of form, an answer, containing simply an assertion that the defendant disclaims all right and title to the matter in demand; and in order to entitle the defendant to be dismissed with costs, the disclaimer should state that the defendant "does not and never did claim, and that he disclaims, all right and title in the subject-matter of the *708 suit."⁸ Lord Redesdale observes, * that in some instances, from the nature of the case, a simple disclaimer may perhaps be sufficient, but that the forms given in the books of practice are all of an answer and disclaimer.¹

² *Glassington v. Thwaites*, 2 Russ. 458, 462; *De Beauvoir v. Rhodes*, cited 3 M. & C. 643.

³ *Graham v. Coape*, 3 M. & C. 638, 643; 9 Sim. 93, 103.

⁴ *Bulkeley v. Dunbar*, 1 Anst. 37.

⁵ *Whiting v. Rush*, 2 Y. & C. Ex. 546, 552; *Pemberton v. McGill*, 1 Jur. N. S. 1045, V. C. W.; and see *Silcock v. Roynon*, 2 Y. & C. C. C. 376; 7 Jur. 548; and *ante*, p. 135.

⁶ *Williams v. Jones, Younge*, 252, 255.

⁷ *Jolly v. Arbuthnot*, 4 De G. & J. 224; 5

Jur. N. S. 689; 26 Beav. 283; 5 Jur. N. S. 80.

⁸ *Vale v. Merideth*, 18 Jur. 992, V. C. W. A defendant having the same interest as the plaintiff, should, if he disapprove of the suit, distinctly repudiate it: otherwise, the bill may be dismissed as against him, without costs, and with costs as against the other defendants. *Winthrop v. Murray*, 14 Jur. 302, V. C. Wigram.

¹ *Ld. Red.* 319; see forms in Vol. III. A disclaimer should be full and explicit in all respects. *Worthington v. Lee*, 2 Bland, 678.

A disclaimer may, by order, be filed without oath, but not without oath and signature. The order is obtained on motion or petition of course.² If the defendant applies by motion, the consent of counsel for the plaintiff is necessary, and if the defendant petitions, the written consent of the plaintiff must be subscribed thereto.³ Where the plaintiff applies, whether by motion or petition, no consent by the defendant is required.⁴ The application by a defendant is usually, if not invariably, made by petition. Where the disclaimer is put in without oath, the signature of the defendant must be attested by some person competent to be a witness.⁵

The disclaimer must be signed by counsel;⁶ and it must be sworn, filed, and printed, and an office copy taken in the same manner, and within the same time, as an answer.⁷

If a defendant puts in a disclaimer where he ought to answer, or accompanies his disclaimer by an answer which is considered insufficient, the plaintiff may take the opinion of the Court upon its sufficiency, by taking exceptions to it, in the same manner as to an answer.⁸ If, however, instead of applying in the first instance to the Court, by motion, to take the disclaimer off the file, the plaintiff delivers exceptions, he will be precluded from afterwards moving for that purpose.⁹

Where a defendant puts in a general disclaimer to the whole bill, the plaintiff ought not to reply to it:¹⁰ for then the defendant may go into evidence in support of it.¹¹ In a case where the plaintiff replied, the defendant was allowed to have his costs taxed against the plaintiff for vexation.¹² It is otherwise, however, where the disclaimer is to part, and there is an answer or plea to another part of the same bill: in such cases, there may be a replication to such plea or answer.¹³

* The course to be pursued by the plaintiff, after a disclaimer *709 to the whole bill has been filed, is either to dismiss the bill as against the party disclaiming with costs, or to amend it; or, if he thinks the defendant is not entitled to his costs, he may set the cause down upon the answer and disclaimer, and bring the defendant to a hearing.¹

Where a defendant had occasioned the suit, in consequence of a claim

² For form of order on motion, see *Pawson v. Smith*, cited *Seton*, 1254.

³ *Braithwaite's Pr.* 47, 57. For forms of motion paper and petition, see Vol. III.

⁴ *Braithwaite's Pr.* 47, 57.

⁵ *Ib.* 48. For form of attestation, see Vol. III.

⁶ Ord. VIII. 1.

⁷ See *post*, Chap. XVII. § 3, *Answers*; *Braithwaite's Pr.* 57, 491.

⁸ *Glassington v. Thwaites*, 2 Russ. 458, 463; *Bulkeley v. Dunbar*, 1 Anst. 37; *Graham v. Coape*, 3 M. & C. 638; 9 Sim. 96, 103. But it has been held that where a simple disclaimer is filed, a plaintiff who is entitled to an answer must move to take the disclaimer off the files, and he cannot except; but if the disclaimer is accompanied by an insufficient

answer, the plaintiff should except to the answer. *Ellsworth v. Curtis*, 10 Paige, 105.

⁹ *Glassington v. Thwaites*, *ubi supra*, 461.

¹⁰ *Spofford v. Manning*, 2 Edw. Ch. 350.

¹¹ See the observations of Sir John Romilly M. R. in *Ford v. Lord Chesterfield*, 16 Beav. 520.

¹² *Williams v. Longfellow*, 3 Atk. 582.

¹³ *Ibid.*

¹ *Cash v. Belcher*, 1 Hare, 310, 313; *Bailey v. Lambert*, 5 Hare, 178; 10 Jur. 109; *Wiggington v. Pateman*, 12 Jur. 89, V. C. E.; *Wyatt's P. R.*, 176; *Hinde*, 209. [Where the defendant disclaims all interest in the subject-matter of controversy, any statements made by him not responsive to the bill are irrelevant and impertinent. *Salmarsh v. Hockett*, 1 Lea, 215.]

to the fund set up by himself, which he refused to release or to verify, and afterwards put in a disclaimer, stating in his answer the facts upon which he had supposed himself to be entitled, as a ground for his not being ordered to pay the costs of the suit, which were prayed against him, in consequence of which the plaintiff examined a great number of witnesses to falsify such statement, but no witnesses were examined by the defendant: Sir Lancelot Shadwell V. C. ordered him to pay the whole costs of the suit, as well the plaintiff's costs as the costs which the plaintiff was ordered to pay to the co-defendants.²

It is to be remarked, that a defendant cannot, by answer, claim that to which, by his disclaimer, he admits he has no right; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant on the disclaimer.³

If a defendant puts in a disclaimer, and afterwards discovers that he had an interest, which he was not apprised of at the time he disclaimed, the Court will, upon the ground of ignorance or mistake, permit him to make his claim. It will not, however, allow a defendant to do so at the hearing of the cause: he must, in order to get rid of the effect of his disclaimer, make a distinct application, supported by affidavit, setting forth the facts in detail on which he founds his claim to such an indulgence;⁴ and it seems that the Court will expect a strong case to be made out, before it will grant the application.⁵

If the defendant takes no steps to get rid of the effect of the disclaimer, he will be for ever barred: because it is matter of record.⁶

Questions of some nicety arise in suits for foreclosure, and in other suits of a similar description, for establishing equitable claims or demands against real or personal estate, as to the right to costs of persons made defendants in consequence of rights or interests which they might have in the estate, subject to those of the plaintiff, so

*710 that his title cannot be complete without their co-operation, * but which rights or interests they absolutely disclaim. When a defendant states in his disclaimer that he never had, and never claimed, any right or interest in the subject-matter of the suit at or after the filing of the bill, he is entitled to be dismissed with costs.¹

Where a defendant simply states that he does not claim any right or interest, he will be dismissed without costs;² but if, before bill filed,

² Deacon v. Deacon, 7 Sim. 378, 382; see Hutchinson v. Reed, 1 Hoff. Ch. 315.

³ Ld. Red. 320.

⁴ Sidden v. Lediard, 1 R. & M. 110.

⁵ Seton v. Slade, 7 Ves. 265, 267.

⁶ Wood v. Taylor, 3 W. R. 321; 3 Eq. Rep. 513, V. C. K.

¹ Silcock v. Roynon, 2 Y. & C. C. C. 376; 7 Jur. 548; Hioris v. Holtom, 16 Jur. 1077, 1080, M. R.; Gabriel v. Sturgis, 5 Hare, 97, 100; 10 Jur. 215; Teed v. Carruthers, 2 Y. & C. C. C. 31, 41; 6 Jur. 987; Benbow v. Davies, 11 Beav. 369; Glover v. Rogers, 11 Jur. 1000, M. R.; Higgins v. Frankis, 15

Jur. 277, V. C. K. B.; Vale v. Merideth, 18 Jur. 992, V. C. W.; Ford v. Lord Chesterfield, 16 Beav. 516, 520; see, *contra*, Buchanan v. Greenway, 11 Beav. 58. Where disclaiming defendant, a satisfied judgment creditor, had not entered up satisfaction, he was not allowed his costs. Thompson v. Hudson, 34 Beav. 107. For forms of decree against disclaiming defendants, in foreclosure suits, see Seton, 395.

² Cash v. Belcher, 1 Hare, 310, 312; Tipping v. Power, *ib.* 405; Grigg v. Sturgis, 5 Hare, 93, 96; 10 Jur. 133; Ohrlly v. Jenkins, 1 De G. & S. 543; 11 Jur. 1001; Gibson v.

he offers to release his claim, or, after bill filed, to release his claim, and consent to the bill being dismissed, as against him, without costs, he will, if the offer be refused, and the plaintiff still retain him as a party to the record, be entitled to be dismissed with his costs, incurred subsequently to the offer.³ And it seems that the plaintiff is bound to bear the expense of the release.⁴

Where the plaintiff stated in his bill that, before the institution of the suit, he had applied to the defendant to release his claim, but the defendant refused to do so, and the defendant disclaimed and denied that any such application was made to him, and stated that if it had been made, he would have released his interest, *Sir John Stuart v. C.* held that he was entitled to his costs.⁵

It may be here observed, that in questions of this description, there is no difference between the right of an assignee in bankruptcy and that of the party whose interest he represents.⁶

Nicol, 9 Beav. 403, 406; 10 Jur. 419; *Ford v. Lord Chesterfield*, *ubi sup.*; *Appleton v. Sturgis*, 10 W. R. 312, V. C. S.; *Vale v. Meredith*, *ubi sup.*; *Furber v. Furber*, 30 Beav. 523; *Durham v. Crackles*, 8 Jur. N. S. 1174, V. C. W.; [*Roberts v. Hughes*, L. R. 6 Eq. 20]. Where the defendant was not content simply to disclaim, but put in an answer and appeared for the purpose of claiming his costs, it was held that he was not entitled to any costs. *Maxwell v. Wightwick*, L. R. 3 Eq. 210.

³ *Ford v. Lord Chesterfield*, *ubi sup.*; *Lock v. Lomas*, 15 Jur. 162, V. C. K. B.; *Talbot v. Kemshead*, 4 K. & J. 93; *Bellamy v. Brickenden*, *ib.* 670; *Bradley v. Borlase*, 7 W. R. 125, V. C. K.; *Ward v. Shakeshaft*, 1 Dr. & Sm. 269; *Dillon v. Ashwin*, 10 Jur. N. S. 119; 12 W. R. 366, V. C. K.; *Ridgway v. Kynnersley*, 2 H. & M. 505; *Howkins v. Bennet*, *ib.* 567, n.; *Fogg v. James*, *ib.* 568, n.; *Clarke v. Rawlins*, 1 W. N. 332, V. C. W.; *Maxwell v. Wightwick*, 1 W. N. 379, V. C.

W.; but see *Gowing v. Mowberry*, 9 Jur. N. S. 844; 11 W. R. 851, V. C. S.; *Davis v. Whitmore*, 28 Beav. 617; 6 Jur. N. S. 880.

⁴ *Furber v. Furber*, 30 Beav. 523, 525.

⁵ *Gurney v. Jackson*, 1 Sm. & G. 97; 17 Jur. 204; see, however, observations of the M. R. on this case, in *Ford v. Lord Chesterfield*, *ubi sup.*

⁶ *Grigg v. Sturgis*, 5 Hare, 93, 96; 10 Jur. 133; see also *Cash v. Belcher*, 1 Hare, 310, 312; *Appleby v. Duke*, 1 Phil. 272, 275; 7 Jur. 985; *Clarke v. Wilmot*, 1 Phil. 276; *Staffurth v. Pott*, 2 De G. & S. 571. [A disclaiming heir-at-law is in the same position as any other disclaiming defendant. *Gray v. Adamson*, 35 Beav. 383. Where the defendant dies after disclaimer, the plaintiff cannot revive on a question of disputed costs. *Ridgway v. Kynnersley*, 2 H. & M. 565. And see as to costs of a disclaiming defendant paid by plaintiff in an administration suit. *Jones v. Pickslay*, W. N. (1868), 26.]

ANSWERS.

SECTION I. — *General Nature of Answers.*

THE answer of a defendant consists of such statements, material to his case, as he may think it necessary or advisable to set forth [as defences to the plaintiff's demand];¹ and of his answers to [the discovery sought by the bill];² or, if he has put in a demurrer or plea, to such discovery as relates to the parts of the bill not covered by the demurrer or plea.³ If no interrogatories have been filed, the answer is called a voluntary answer, [under the new system].

This twofold character of an answer is peculiar to pleadings in Equity, and is not found even in those that are formed on the same model in the Civil and Ecclesiastical Courts: the answer which the defendant is required to make, upon oath, to the allegation and articles being, in those Courts, a wholly distinct instrument from the responsive allegation which contains the defence.⁴

*712 * Although an answer has, in general, the twofold property above stated, it is seldom possible, in framing one, to keep the

¹ See now 15 & 16 Vic. c. 86, § 14, [which confines discovery to the interrogatories filed].

² Ld. Red. 15, 16. [An answer, where relief is sought, properly consists of two parts: first of the defence of the defendant to the case made by the bill; and, secondly, of the examination of the defendant on oath as to the facts charged in the bill of which discovery is sought. It combines, therefore, two proceedings which, in the civil law and Ecclesiastical Courts, were completely separated. In the civil law, the pleadings were made up before the *Prator*, who afterwards assigned to the parties *judices*, and it was before these latter that the actor (plaintiff) propounded his positions in the *libellus articulatus*, to which the defendant was required to put in an answer, in the nature of a discovery. Gilb. For. Rom. 90. In the Ecclesiastical Courts also, the answer to the interrogatories for discovery was a wholly distinct instrument from the responsive allegation to the libel embodying the defence. Hare on Disc. 223. In a bill in Equity, both of these distinct parts are united in one instrument. And this ambiguity in the word "answer," importing, as it does a double sense and office, has sometimes, says Judge Story, led to erroneous decisions, and to no small confu-

sion of language. Story Eq. Pl. § 850; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 600; *Beech v. Haynes*, 1 Tenn. Ch. 574.]

³ An answer is the most usual method of defence to a bill in chancery. It may be put in to the whole bill, or to such parts of it as are not covered by plea or demurrer. As it is capable of embracing more circumstances than a plea, it may for this reason be used with much greater propriety in cases where the defendant is not anxious to prevent a discovery, although the plea might be a complete bar. But where, by introducing additional circumstances, he has a good opportunity of exhibiting his case in a more favorable light, the answer is the best mode of defence. 1 Barb. Ch. Pr. 130; see *Youle v. Richards*, Saxton (N. J.), 534. When a defendant makes his defence by answer he must set up all the various grounds of defence upon which he intends to rely. *Warren v. Warren*, 30 Vt. 530.

For forms of answer, see Vol. III.

⁴ Hare on Disc. 223; 3 Bla. Com. 100. A defendant cannot pray any thing in his answer but to be dismissed the Court. *Miller v. Gregory*, 1 C. E. Green (N. J.), 274. [*In-fra*, 1550.]

parts separate from each other: though, when it is practicable to do so, such a course is generally desirable. It is, however, of great importance to the pleader, in preparing an answer, to bear in mind that, besides answering the plaintiff's case as made by the bill, he should state to the Court, upon the answer, all the circumstances of which the defendant intends to avail himself by way of defence: for a defendant ought to apprise the plaintiff, by his answer, of the nature of the case he intends to set up, and that, too, in a clear, unambiguous manner: and, in strictness, he cannot avail himself of any matter in defence which is not stated in his answer, even though it should appear in his evidence.¹ The last-mentioned rule was formerly, when an answer was required in every case, strictly enforced. Under the present practice, however, by which, if the defendant has not been required to answer, and has not answered, he will be considered to have traversed the case made by the bill,² the rule has been much relaxed in cases where no answer has been required, and none has been put in.

In such a case, the defendant has been permitted to set up the Statutes of Frauds,³ and of Limitations,⁴ by his evidence, and orally at the hearing, and not been compelled to put in a voluntary answer for that purpose. Where, however, he had been interrogated, it was held, that he ought to have set up the defence of being a purchaser for valuable consideration without notice, by his answer, and he was not allowed to raise it at the hearing.⁵ Where the facts were put in issue and proved, a defence was allowed, although it was not distinctly raised on the pleadings.⁶

A defendant is not bound to state, upon his answer, the conclusions in Law which he intends to deduce from the facts he has set out: ⁷ that, as has been before stated,⁸ would be contrary to the principles of good pleading. Indeed, the most correct method of pleading is, merely to state the facts intended to be proved, and to leave the inference of Law to be drawn from them upon the argument of the case; but the established rule is, that if the defendant states upon his answer certain facts as evidence of a particular case, which he represents to be the consequence of those * facts, and upon which he rests his de- *713 fence, he will not be permitted afterwards to make use of the same facts, for the purpose of establishing a different defence from that to which, by his answer, he has drawn the plaintiff's attention.¹

A defendant may, by his answer, set up any number of defences, as

¹ Stanley v. Robinson, 1 R. & M. 527, 529; Harrison v. Borwell, 10 Sim. 382; 4 Jur. 245; Hodgson v. Thornton, 1 Eq. Ca. Ab. 228, pl. 5; Burnham v. Dalling, 3 C. E. Green (N. J.), 132; Moors v. Moors, 17 N. H. 481.

² 15 & 16 Vic. c. 86, § 26.

³ Lincoln v. Wright, 4 De G. & J. 16; 5 Jur. N. S. 1142; Jackson v. Oglander, 2 H. & M. 465.

⁴ Green v. Snead, 30 Beav. 231; S. C.

nom. Snead v. Green, 8 Jur. N. S. 4; contra, Holding v. Barton, 1 Sm. & G. Ap. 25.

⁵ Phillips v. Phillips, 3 Giff. 200; 7 Jur. N. S. 1094; 8 id. 145; 10 W. R. 236, L. C.

⁶ Ormes v. Beadel, 2 De G., F. & J., 333; 6 Jur. N. S. 1103, 1104.

⁷ Ibid.

⁸ Ante, p. 371.

¹ Bennett v. Neale, Wightw. 324.

the consequence of the same state of facts, which his case will allow,² or the ingenuity of his legal advisers may suggest; thus, in setting up an immemorial payment in lieu of tithes, a defendant has been allowed to rely upon it, either as a *modus*, or as a composition real existing from time immemorial, or as a composition undetermined by notice.³ In none of these cases were any facts stated in the answers which were inconsistent with any of the defences set up, and the evidence to prove them was, in either case, the same.

Although a defendant may be permitted to set up, by his answer, several defences as the consequence of the same state of facts, or of facts which are consistent with each other, a defendant cannot insist upon two defences which are inconsistent with each other, or are the consequence of inconsistent facts.⁴ And, in the application of this rule, it makes no difference whether the inconsistent defences are each substantially relied upon, or are set up in the alternative; "that answer is bad which either contains inconsistent defences, or an alternative of inconsistent defences."⁵ Thus, although a defendant, in a tithe suit, might set up a payment, either as a *modus*, or as a composition real existing from time immemorial, he could not set up the same payment, either as a *modus* or as a composition real not alleged to be immemorial.⁶

From the cases of *Jesus College v. Gibbs* and *Leech v. Bailey*, above referred to, it is to be collected, that where a defendant sets up, by his answer, two inconsistent defences, the result will be to deprive him of the benefit of either, and to entitle the plaintiff to a decree.⁷ Sometimes, indeed, the Court will, where, from redundant expressions or other verbal inaccuracy, a defence has been rendered inconsistent, though evidently not intended to be so, either reject the redundant expressions as surplusage,⁸ or direct *them to be struck out:¹ such indulgence, however, is confined to cases of verbal inaccuracy only, which would not have embarrassed the plaintiff in the conduct of his case.

Although a defendant cannot, by his answer, set up, in opposition to the plaintiff's title, two inconsistent defences in the alternative, he will not be precluded from denying the plaintiff's general title, and also insisting that, in case the plaintiff establishes his title, he is precluded from recovering by some other circumstance which would equally serve

² Story Eq. Pl. § 851. The defendant may set up, in his answer, matters which have occurred since the filing of the bill. *Lyons v. Brooks*, 2 Edw. Ch. 110.

³ *Atkyns v. Lord Willoughby de Brooke*, 2 Anst. 397; *Atkins v. Hatton*, *ib.* 386; *Wolley v. Brownhill*, M'Lel. 317; *Bishop v. Chester*, 3 Gwill. 1316.

⁴ A defendant may both deny the charges in the bill, and set up distinct defences, so they be not wholly inconsistent with such denial. *Hopper v. Hopper*, 11 Paige, 46.

⁵ Per Alderson, B., in 1 Y. & C. Ex. 160.

⁶ *Jesus College v. Gibbs*, 1 Y. & C. Ex. 145, 160; and see *Leech v. Bailey*, 6 Pri. 504.

⁷ But see *Nagle v. Edwards*, 3 Anst. 702, and the observations upon that case, in *Jesus College v. Gibbs*, 1 Y. & C. Ex. 163.

⁸ *Ellis v. Saul*, 1 Anst. 332, 341; *Jenkinson v. Royston*, 5 Pri. 495; see also *Unthoff v. Lord Huntingfield*, 1 Pri. 237.

¹ *Jesus College v. Gibbs*, 1 Y. & C. Ex. 145, 157.

to preclude him, or any other person in whom the title might be actually vested. Thus, in a tithe suit, the defendant might have denied the plaintiff's title as rector or vicar, and at the same time have set up a *modus*.²

In stating a defendant's case, it is only necessary to use such a degree of certainty as will inform the plaintiff of the nature of the case to be made against him;³ it is not requisite that the same degree of accuracy should be observed in an answer as is required in a bill.

If the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, or if it is doubtful whether a plea will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill.⁴ Thus, a defendant insisting upon the benefit of the Statute of Limitations by way of answer, may, at the hearing, have the like benefit of the statute as if he had pleaded it.⁵ So also, if a defendant can offer a matter of plea which would be a complete bar, but has no reason to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favorable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner.⁶ Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favor which he cannot set forth by way of plea, or of answer to support a plea, as the expending a considerable sum of money in improvements with the knowledge of the plaintiff, it may be more prudent to set out the whole by way of answer, than to rely on the single defence * by way of plea; unless it is material to prevent *715 disclosure of any circumstance attending his title.¹

Where the same benefit has been claimed, by answer, that the defendant would have been entitled to if he had demurred to the bill, or pleaded the matter, alleged in his answer, in bar, it is only at the hearing of the cause that any such benefit can be insisted upon; and then the defendant will, in general, be entitled to all the same advantage of this mode of defence that he would have had, if he had adopted the

² *Carte v. Ball*, 3 Atk. 496. 499.

³ See *Cummings v. Coleman*, 7 Rich. Eq. (S. C.) 599.

⁴ *Ld. Red.* 308.

⁵ *Norton v. Turvill*, 2 P. Wms. 144; [*Ruckman v. Decker*, 8 C. E. Green, 283]. The same strictness is not requisite in an answer to a bill in Equity, where the Statute of Limitations is relied on as a defence, as in a plea. *Maury v. Mason*, 8 Porter, 213. [The defence of the Statute of Limitations must be made by plea or answer, but it is otherwise with the defence that the claim is stale, which may be insisted on without a foundation by averment in the answer. *Sullivan v. Portland, &c. R. Co.*, 94 U. S. 806.] And see as to effect of answer insisting on Statute

of Frauds, *Jackson v. Oglander*, 2 H. & M. 465.

⁶ But it is said by Mr. Justice Story that "it is very far from being generally true, as is sometimes alleged in the books, that a defendant may, by answer, avail himself of, and insist upon, every ground of defence, which he could use by way of demurrer, or of plea, to the bill." *Story Eq. Pl.* § 847, and notes; *Portarlington v. Soulby*, 7 Sim. 28.

¹ *Ld. Red.* 309. A party setting up a legal right, in his answer to a bill in Equity, is not bound to deny notice of a subsequent lien or interest, unless the bill alleges notice. *King v. McVikar*, 3 Sandf. Ch. 192.

more concise mode of defence, by demurring or pleading.² In the case, however, of multifariousness, if the defendant does not take the objection *in limine*, the Court, considering the mischief as already incurred, will not, except in a special case, allow it to prevail at the hearing: although it may protect the defendant from the costs incurred, if it should appear that he had been improperly subjected to them.³

We now come to the consideration of the manner in which the interrogatories (if any) must be answered.

Under the old practice of the Court, it was necessary that the defendant should answer all the statements and charges in the bill, whether specially interrogated thereto or not; but he was not bound to answer any interrogatories which were not founded upon the statements or charges contained in the bill:⁴ though, if he did so, he thereby put them in issue. Under the present practice, a defendant may be required to answer any interrogatories which are pertinent to the case made by the bill, although they are not founded on specific *716 charges or statements in the * bill;¹ but he is not bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; nor is he bound to answer any of the interrogatories except those which he is required to answer.² A defendant is not, however, prohibited from answering any statement, charge, or interrogatory which he may consider it necessary to his defence to answer; and he is left at complete liberty, in this respect, to act in such manner as may be thought advisable: subject to the restriction that if he answer any statement or charge in the bill to which he is not inter-

² *Wray v. Hutchinson*, 2 M. & K. 235, 238, 242; see also *Milligan v. Mitchell*, 1 M. & C. 433, 447; [*Mulloy v. Paul*, 2 Tenn. Ch. 155; *Hume v. Commercial Bank*, 1 Lea, 220.]

³ *Benson v. Hadfield*, 4 Hare, 32, 39; *Cashell v. Kelley*, 2 Dr. & War. 181; *Raf-fety v. King*, 1 Keen, 601, 609; and see *ante*, p. 346.

⁴ *Jerrard v. Saunders*, 2 Ves. J. 454, 458; *Blaisdell v. Bowers*, 40 Vt. 126, 130; *Miller v. Saunders*, 17 Geo. 92; *Grim v. Wheeler*, 3 Edw. Ch. 334; *Mechanics' Bank v. Levy*, 3 Paige, 606; *Story Eq. Pl. §§ 36, 37*. It is sufficient, however, if the interrogatory is founded upon a statement in the bill, which is inserted therein merely as evidence in support of the main charges. *Mechanics' Bank v. Levy*, 3 Paige, 606. Where a fact is stated in a bill by way of recital merely, without any interrogatory calling for an answer as to that fact, the defendant is not bound either to admit or to deny the same. *Mechanics' Bank v. Levy*, 3 Paige, 606; *Newhall v. Hobbs*, 3 Cush. 274, 277. The general interrogatory or request in a bill "that the defendant may full answer make, to all and singular the premises, fully and particularly, as though the same were repeated, and he specially interrogated," &c.,

is sufficient to entitle the plaintiff to a full disclosure of the whole subject-matter of the bill, equally as if he had specially interrogated the defendant to every fact stated in the bill, with all the material circumstances. *Method. Epis. Church v. Jaques*, 1 John. Ch. 65, 75, 76; *Neale v. Hagthorp*, 3 Bland, 551. Special interrogatories in a bill seem not to be absolutely necessary. *Story Eq. Pl. § 38*; *Meth. Epis. Church v. Jaques*, 1 John. Ch. 65; [*Gleaves v. Morrow*, 2 Tenn. Ch. 597]. By the 40th Equity Rule of the United States Courts, it is provided, that "a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto, and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer," &c.

¹ *Ante*, p. 483; *Perry v. Turpin*, Kay Ap. 49; *Mansell v. Feeney*, 2 J. & H. 313, 318; *Law v. London Indisputable Society*, 10 Hare Ap. 20; *Barnard v. Hunter*, 1 Jur. N. S. 1065, V. C. S.; *Marsh v. Keith*, 1 Dr. & Sm. 342; *Hudson v. Grenfell*, 3 Giff. 388; 8 Jur. N. S. 878; [*McGarrel v. Moore*, L. R. 10 Eq. 22].

² Ord. XV. 3.

rogated, only by stating his ignorance of the matter so stated or charged, such answer will be deemed impertinent.³

The plaintiff's right to discovery is not extended, by the present practice; so that all the objections which could formerly have been urged by the defendant, to protect himself from a discovery of any portion of the matter of the bill, can now be urged against a discovery of that concerning which the defendant is specially interrogated; and there have always existed certain special reasons upon which the defendant might object to the discovery sought by the plaintiff: either because the discovery might subject him to pains and penalties, or to a forfeiture, or to something in the nature of a forfeiture;⁴ or because it was immaterial to the relief prayed;⁵ or because it might lead to a disclosure of matter, the subject of professional confidence;⁶ or of the defendant's own title, in cases where there is not a sufficient privity between him and the plaintiff to warrant the latter in requiring a disclosure of it.⁷ In all these cases, although, as we have seen, the defendant may protect himself from discovery by plea or demurrer, yet he has always been permitted to decline, by his answer, giving the objectionable discovery, and to state, in that form, the grounds upon which he claims protection; and he still retains the same privilege.⁸ He must, however, swear to his belief in the validity of such grounds;¹ and the Court must be satisfied, from the circumstances of the case, and the nature of the discovery which he is called upon to give, that the case falls within the above-mentioned grounds of objection.²

The principle upon which the Court proceeds, in exempting a defendant from a discovery under any of the above circumstances, has been fully discussed, in considering the grounds upon which a defendant,

³ Ord. XV. 3; see *Treadwell v. Cleaveland*, McLean, 283. The above order has been adopted by the Supreme Court of the United States. See 20th Equity Rule of the United States Courts, January Term, 1842.

⁴ *Ante*, p. 562. But the defendant cannot object to answer, if the period fixed by law within which he could be prosecuted for the offence or the forfeiture, has elapsed before the answer is filed. *Dwinal v. Smith*, 25 Maine, 379; *Story Eq. Pl.* § 589; *ante*, 584, 595, and notes.

⁵ *Ante*, p. 570.

⁶ *Ante*, 570.

⁷ *Ante*, p. 579; and see *Cooke v. Turner*, 14 Sim. 218, 221; 8 Jur. 703. The plaintiff is not entitled to discovery of the defendant's case, *ante*, 579, 580, notes; *Hoffman v. Postill*, L. R. 4 Ch. Ap. 673. Allegations of fraud in a bill must be answered, and a demurrer to a bill, containing such allegations and strong circumstances of equity, must be overruled. *Burnley v. Jeffersonville*, 3 McLean, 336. Such allegations must be denied in the plea as well as in the answer. *Lewis v. Baird*, 3 McLean, 56.

⁸ A defendant may in some cases answer in part, and by his answer state reasons why he should not be compelled to make further answer. *Hunt v. Gookin*, 6 Vt. 462; *Adams v. Fisher*, 3 M. & C. 526; *Cuyler v. Bogert*, 3 Paige, 168; see *Weisman v. Mining Co.*, 4 Jones Eq. 112.

But if a defendant rest himself upon a fact, as an objection to further discovery, it ought to be such a fact, as, if true, would at once be a clear, decided, and inevitable bar to the plaintiff's demand. *Method. Epis. Church v. Jaques*, 1 John. Ch. 65. If it clearly appears that the case is not of Equity cognizance, the answer, required only for the purposes of the particular suit, would avail nothing, and is not necessary. *Morton v. Grenada Academies*, 8 Sm. & M. 773.

¹ *Scott v. Miller* (No. 2), John. 328; 5 Jur. N. S. 858; see *Balguy v. Broadhurst*, 1 Sim. N. S. 111.

² *Sidebottom v. Adkins*, 3 Jur. N. S. 631; 5 W. R. 743, V. C. S.; see also *Reg. v. Boyes*, 1 B. & S. 311; 7 Jur. N. S. 1158; *Bunn v. Bunn*, 12 W. R. 561, L. J.J.; *Taylor on Evid.* § 1311.

although he does not object to the relief, provided the plaintiff makes out a case which may entitle him to it, may demur to the discovery sought; it is only necessary, therefore, to repeat in this place what has been before stated, that if a defendant objects to any particular discovery, upon any of the grounds above stated, he may, even though the grounds upon which he may object appear upon the bill, decline making such discovery, by submission in his answer.³

It may be observed here, that the only difference occasioned by this method of objecting to the discovery is, that if the objection be taken by demurrer or plea, the validity of it is at once decided by the Court, upon argument of the plea or demurrer; whereas, if the objection be taken by answer, the validity of it can only come before the Court in the form of exceptions to the answer, which is certainly a more circuitous and expensive mode of trying the question than that afforded by demurring. It has, however, been held, that where the ground of objection is, that the discovery would render the defendant liable to pains and penalties, the proper course is to submit the point by answer: because, by demurring, the defendant admits the facts to be true.⁴

It is a general rule, that the defendant is only required to answer to those points which are necessary to enable the Court to make a decree against him; ⁵ and the objection arising from want of materiality is one that the defendant has always been allowed to raise by answer.⁶

*718 *The application of this rule has been before discussed, in treating of demurrers to discovery, on the ground of want of materiality.¹ It may not be useless, however, in addition to the instances already referred to, to mention one or two cases where the defendant's right to exempt himself from answering to such parts of the bill has been recognized by the Court, upon exceptions. In *Codrington v. Codrington*,² a bill was filed by a person claiming under the limitations of a settlement, to set aside an appointment, by which his title was defeated, on the ground of fraud; and upon an answer being put in denying the fraud, the plaintiff amended his bill, by inserting

³ *Ante*, p. 582; Ld. Red. 200, 307.

⁴ *Honeywood v. Selwin*, 3 Atk. 276; see *Attorney-General v. Lucas*, 2 Hare, 566, 569; 7 Jur. 1080; *Earl of Lichfield v. Bond*, 6 Beav. 88, 93; 7 Jur. 209.

⁵ Per Sir Thomas Plumer V. C., in *Agar v. Regent's Canal Company*, G. Coop. 212, 214; see also *Wood v. Hitchings*, 3 Beav. 504, 510; [*Moore v. Craven*, W. N. (1870) 13].

⁶ The defendant is not bound to answer any allegations in the plaintiff's bill, which are not material to be answered. *Utica Ins. Co. v. Lynch*, 3 Paige, 210; *Butler v. Cotting*, 1 Root, 310; *Davis v. Mapes*, 2 Paige, 105; *Hagthorpe v. Hook*, 1 Gill & J. 270; *Mechanics' Bank v. Levy*, 3 Paige, 656; *Hardeman v. Harris*, 7 How. U. S. 726; *Hoffman v. Postill*, L. R. 4 Ch. Ap. 673. But see *Hogencamp v. Ackerman*, 2 Stockt.

(N. J.) 267; *Wootten v. Burch*, 2 Md. Ch. Dec. 190. A defendant cannot be called upon to answer a mere arithmetical proposition. *McIntyre v. Trustees of Union College*, 6 Paige, 239. As to this point of materiality and the tests of it, see *Story Eq. Pl. §§ 853, 853 a, 853 b, 853 c*; *Kuypers v. Reformed Dutch Church*, 6 Paige, 570.

"It must be borne in mind that it is almost impossible for the Court, in a preliminary stage of the proceedings, to determine what propositions will be material to the case of one or other of the parties. A certain latitude must always be allowed in seeking discovery." Sir C. J. Selwyn L. J. in *Hoffman v. Postill*, L. R. 4 Ch. Ap. 673, 678.

¹ *Ante*, p. 570.

² 3 Sim. 519, 524.

certain inquiries as to the manner in which the appointment was attested, in order to show that it was not executed in the manner required by the settlement. These inquiries the defendant, by his answer, declined answering; and upon the question coming before the Court, Sir Lancelot Shadwell V. C. held, that the defendant was not bound to answer the interrogatories in the amended bill: because the plaintiff, having by his bill set up a case of fraud, the fact, whether the appointment was executed in conformity with the power or not, was immaterial to the case so set up.

Upon the same principle, the Court holds that, where a bill is filed by a creditor or legatee, or other person claiming a definite sum out of the personal estate of a deceased person, against an executor or administrator, if the defendant admits assets in his hands sufficient to answer the plaintiff's demands, he need not set out an account of the estate,³ or set out a schedule of the documents in his possession relating to the estate:⁴ because the admission by the defendant that he has assets in his hands to answer the plaintiff's demands, is sufficient to give the plaintiff all the relief he can require, and any discovery would be useless and irrelevant.⁵ So, also, the Court refused to compel discovery, where the executor of an executor admitted assets of the original *testator came to the hands of his testator;¹ and so, discovery *719 was not enforced where, in a suit by the holder of a policy, the directors of an insurance society admitted assets sufficient to pay the claims on the policy.²

The Court will not, in general, allow the circumstance of a plaintiff having a claim upon a defendant, to be used for the purpose of enabling the plaintiff to investigate all the private affairs of the defendant;³ thus, a vendor, in a bill for specific performance, cannot interrogate the vendee as to his property:⁴ even though the bill should charge that the defendant was insolvent.⁵ In order to entitle a plaintiff to an answer to such an inquiry, he must show some specific lien upon the defendant's property, and pray some relief respecting it;⁶ and the Court will not, even then, compel the defendant to make such discovery, where the interest which the plaintiff may have in it is very remote in its bearings upon the real point in issue, and would be an oppressive inquisition.⁷

The above cases, and those before cited, point out in what instances

³ *Agar v. Regent's Canal Company, ubi sup.*

⁴ *Forbes v. Tanner*, 9 Jur. N. S. 455; 11 W. R. 414, V. C. K.

⁵ *Pullen v. Smith*, 5 Ves. 21, 23. To a bill for discovery of assets and relief, an answer controverting the claim, without answering as to the assets, is insufficient. *Carneal v. Wilson*, 3 Litt. 80.

¹ *Lander v. Weston*, 13 Jur. 877, V. C. E.

² *Prichard v. Murray*, 12 Jur. 616, V. C. E.

⁸ See *Mayer v. Galluchat*, 6 Rich. Eq. (S. C.) 1.

⁴ *Francis v. Wigzell*, 1 Mad. 258, 260.

⁵ See *Small v. Attwood*, as reported in *Wigram on Disc.* 168.

⁶ *Francis v. Wigzell, ubi sup.*; [*Verdier v. Foster*, 4 Rich. Eq. 227; *Creswell v. Smith*, 2 Tenn. Ch. 416].

⁷ *Wigram on Disc.* 165; *Dos Santos v. Frietas*, cited *ibid.*; *Webster v. Threlfall*, 2 S. & S. 190, 193; see also *Janson v. Solarte*, 2 Y. & C. Ex. 132, 136.

the defendant may decline to make a particular discovery, when it is irrelevant to the general scope and object of the bill. A discovery may, however, be material to the plaintiff's general case, if made by one of the defendants, which would be wholly irrelevant if made by another: in such cases, the defendant from whom the discovery would be immaterial, is not obliged to make it; and, in general, a defendant is only obliged to answer such of the interrogatories as are necessary to enable the plaintiff to obtain a complete decree against him individually. Where, however, the defendant is involved in the whole case, and in that sense relief is asked against him, he must answer: though the interrogatory might seem to be immaterial to the relief asked against him.⁸

With reference to the objection of immateriality, it must be understood that the defendant is only required to answer as to matters which are well pleaded; that is, to the facts stated and charged. To matters of law, or inferences of law drawn from the facts, he need not answer.⁹ Thus, a defendant must answer * whether a will, executed before the Wills Act,¹ was published by the testator in the presence of three witnesses; but he need not answer to an interrogatory requiring him to say whether the publication was such as by law is required to pass freeholds by devise. Sometimes a defendant, instead of answering such interrogatories, submits the point to the judgment of the Court; but it is not necessary to do so.

All the objections to discovery that have hitherto been considered, are of a kind that the defendant has always been allowed to raise by answer, upon the principle that the Court does not oblige a defendant to answer such questions, even when the right to relief is admitted; but where these objections do not apply, it must be remembered that "there is no principle more clearly established in the Court than this: that, when a party answers, he is bound to answer fully, and for this, among other reasons, that if a defence which a party sets up by his answer should be decided against him, it is of the utmost importance that all consequential matters which are material for the purpose of the decree, should receive an answer."²

This rule is applicable to all cases where the defence intended to be set up by the defendant extends to the entire subject of the suit: such,

⁸ *Marsh v. Keith*, 1 Dr. & Sm. 342; 6 Jur. N. S. 1182. On the subject of immateriality, see also *Bleckley v. Rymer*, 4 Drew. 248; *Newton v. Dimes*, 3 Jur. N. S. 583, V. C. W.

⁹ *Story Eq. Pl.* § 846. In determining whether a question is one of fact, and, therefore, to be answered, it makes no difference that it is asked with reference to a written document. *Hoffman v. Postill*, L. R. 4 Ch. Ap. 673.

¹ 7 Will. IV. & 1 Vic. c. 26.

² Per Lord Lyndhurst, in *Lancaster v. Eyers*, 1 Phil. 351, 352; 8 Jur. 133; *Hare on Disc.* 255, 256; *Thorpe v. Macaulay*, 5 Mad.

218, 229; *Faulder v. Stuart*, 11 Ves. 296, 301; *Mazarredo v. Maitland*, 3 Mad. 66, 70; *Swinborne v. Nelson*, 16 Beav. 416; *Potter v. Waller*, 2 De G. & S. 410; *Ambler, ed. Blunt*, 353 (n); *Reade v. Woodrooffe*, 24 Beav. 421; *Leigh v. Birch*, 32 Beav. 399; 9 Jur. N. S. 1265; *Swabey v. Sutton*, 1 H. & M. 514; 9 Jur. N. S. 1321; *Phillips v. Prevost*, 4 John. Ch. 205; *Whitney v. Belden*, 1 Edw. Ch. 386; *Ogden v. Ogden*, 1 Bland, 288; *Kuypers v. Ref. Dutch Church*, 6 Paige, 570; *Salmon v. Claggett*, 3 Bland, 125; *Cuyler v. Bogert*, 3 Paige, 386; *Hagthorp v. Hook*, 1 Gill & J. 272; *Murray v. Coster*, 4 Cowen, 640; *New-*

for instance, as that the plaintiff has no right to equitable relief—or has no interest in the subject—or that the defendant himself has no interest in the subject—or that he is a purchaser for a valuable consideration³—that the bill does not declare a purpose for which Equity will assume jurisdiction to compel discovery—or that the plaintiff is under some personal disability, by which he is incapacitated from suing.⁴ In all these * cases, a defendant who does not avail himself of the objection to answering, either by demurrer or plea, but submits to answer, must answer fully.¹ Nor is a denial of the

hall v. Hobbs, 3 Cush. 274, 277; Hill v. Cray, 2 English, 536; Utica Ins. Co. v. Lynch, 3 Paige, 210; Mansfield v. Gambrell, 1 Gill & J. 503. The party submitting to answer, must answer the whole of the statements and charges in the bill, and all the interrogatories properly founded upon them, at least, so far as they are necessary to enable the plaintiff to have a complete decree against him in case he succeeds in the suit. Bank of Utica v. Messereau, 7 Paige, 517; Perkinson v. Trousdale, 3 Scam. 380; Batterson v. Ferguson, 1 Barb. 490; Langdon v. Goddard, 3 Story, 13. The above is the general rule, subject, however, to the exceptions named in the text and in the notes below.

[The latest decisions on this difficult point of chancery practice are Elmer v. Creasy, L. R. 9 Ch. App. 73; Saull v. Browne, L. R. 9 Ch. App. 364; Great Western Colliery Co. v. Tucker, L. R. 9 Ch. App. 376; French v. Rainey, 2 Tenn. Ch. 640. In the case last cited the authorities are reviewed, and the conclusion reached, that the operation of the denial by answer of the plaintiff's right of suit is to protect the defendant from the discovery sought so far as it is consequential to the final relief sought, but not from the discovery necessary to enable the plaintiff to prosecute his suit. *Ante*, 300, n. 6.]

In answering interrogatories filed by a defendant for the examination of the plaintiff, the general rule applies that he who is bound to answer must answer fully. Hoffman v. Postill, L. R. 4 Ch. Ap. 673.

³ See Cuyler v. Bogert, 3 Paige, 186; Method. Epis. Church v. Jaques, 1 John. Ch. 65.

⁴ Gilbert v. Lewis, 1 De G., J. & S. 38; 9 Jur. N. S. 187.

¹ Hare on Disc. 256; Newhall v. Hobbs, 3 Cush. 274, 277. The general rule of pleading in Chancery is, that the defendant cannot by answer excuse himself from answering. Bank of Utica v. Messereau, 7 Paige, 517. It is said by Mr. Justice Story to be far from universally true, as is sometimes alleged, that a defendant answering can take every ground of defence, which he might insist on by way of demurrer or plea to the bill. Story Eq. Pl. § 847. Thus, although it was formerly thought otherwise, it is now settled, that a defendant to a bill for discovery and relief must avail himself of the protection of being a *bonâ fide* purchaser for a valuable consideration without notice, by way of plea,—and that he cannot make this defence by answer,

for, if he answers at all, he must answer fully. *Ibid.* and note; Portarlington v. Soulbry, 7 Sim. 28; see, however, the counter-vailing rule of the Supreme Court of the United States, stated in note to *Ante*, 715.

There are, however, a few admitted exceptions to the above rule that a defendant cannot by answer excuse himself from answering, which furnish special grounds for objecting by answer to the discovery sought. Some of these exceptions will be found in the text. As, where an answer would tend to criminate the defendant, or subject him to a penalty, forfeiture, or punishment. Brockway v. Copp, 3 Paige, 539; Skinner v. Judson, 8 Conn. 528; Livingston v. Harris, 3 Paige, 528; Loggett v. Postley, 2 Paige, 599. So, where an answer would involve a violation of professional confidence. *Ante*, 570 *et seq.*, and notes, 715, and notes. The defendant may by answer refuse to make discovery on the ground of immateriality of the fact of which the discovery is sought. Kuypers v. Ref. Dutch Church, 6 Paige, 570; Davis v. Mapes, 2 Paige, 105. So, the defendant is not bound to answer matters, which are purely scandalous, or impertinent or irrelevant. Story Eq. Pl. § 846. The Statute of Limitations and lapse of time may be relied upon as a defence by answer, as well as by plea and demurrer. *Ib.* § 751; Van Hook v. Whitlock, 7 Paige, 373; Maury v. Mason, 8 Porter, 213. For other cases in which exceptions to the above rule have been taken and sustained, and the grounds of such exceptions, the learned reader is referred to the authorities, in which they are stated and explained. French v. Shotwell, 6 John. Ch. 235; Murray v. Coster, 4 Cowen, 641; Phillips v. Prevost, 4 John. Ch. 205; McDowl v. Charles, 6 John. Ch. 137; Smith v. Fisher, 2 Desaus. 275; Morris v. Parker, 3 John. Ch. 237; Hunt v. Gookin, 16 Vt. 462; Desplaces v. Goris, 1 Edw. Ch. 352, 353; Drew v. Drew, 2 V. & B. 159. The plaintiff is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or is necessary to substantiate his proceedings and make them regular. Davis v. Mapes, 2 Paige, 105.

Where suspicious circumstances, gross fraud, and collusion, are charged in a bill, a defendant will be held to a strict rule in answering. Not only his motives, but his secret designs, his "unuttered thoughts," must be exposed. Mechanics' Bank v. Levy, 1 Edw. Ch. 316.

plaintiff's title a reason for refusing to set out accounts required by the interrogatories; ² nor a denial of fraud a reason for refusing to discover the facts which are alleged to show it.³ In some cases, however, where it has appeared that the discovery was not necessary to enable the plaintiff to obtain a decree, and where the information could be

*722 * obtained in the proceedings under the decree, a full answer has not been enforced.¹

A defendant may, however, as we have seen,² by answer decline answering any interrogatory, or part of an interrogatory, from answering which he might formerly have protected himself by demurrer; and he may so decline, notwithstanding he answers other parts of such interrogatory, or other interrogatories from which he might have protected himself by demurrer, or other parts of the bill as to which he is not interrogated; ³ but he cannot decline answering a particular interrogatory on the ground that the whole bill is demurrable; ⁴ nor can he protect himself from discovery by raising by answer a defence which he might have pleaded.⁵

A defendant must answer as to his knowledge, remembrance, information, or belief.⁶ Where, however, a special cause is shown,

² *Dott v. Hoyes*, 15 Sim. 372; 10 Jur. 628; *Great Luxembourg Railway Company v. Magnay*, 23 Beav. 646; *Brookes v. Boucher*, 8 Jur. N. S. 639; 10 W. R. 708, V. C. W.; *Leigh v. Birch*, and *Swabey v. Sutton*, *ubi sup.*; *Robson v. Flight*, 33 Beav. 268; [*Thompson v. Dunn*, L. R. 5 Ch. App. 573].
³ *Padley v. Lincoln Water Works Company*, 2 M. & G. 68, 72; 14 Jur. 299; — *v. Harrison*, 4 Mad. 252.

¹ *De la Rue v. Dickinson*, 3 K. & J. 388; *Swinburne v. Nelson*, *refd. to ib.* 389; *Clegg v. Edmonson*, 3 Jur. N. S. 299, L. J.; [*Great Western Colliery Co. v. Tucker*, L. R. 9 Ch. App. 364; *French v. Rainey*, 2 Tenn. Ch. 640. *Ante*, 720, n. 2. A full answer has also been dispensed with where the discovery is not relevant to the relief sought, as where the bill was for a partnership account, and called for a discovery as to an item recognized in the articles of partnership. *Wier v. Tucker*, L. R. 14 Eq. 25. Or where the bill is for alternative relief, and the discovery relates to the second alternative. *Lett v. Parry*, 1 H. & M. 517.] And see *Lockett v. Lockett*, L. R. 4 Ch. App. 336. But a defendant cannot excuse himself from answering fully on the ground that the giving the discovery sought would anticipate the decree, such discovery being the same as that which would be ordered at the hearing if the plaintiff obtained a decree. *Chichester v. Marquis of Donegal*, L. R. 4 Ch. App. 416.

² *Ante*, p. 583.

³ *Ord. XV. 4*; *Padley v. Lincoln Water Works Company*, 2 M. & G. 68, 71; 14 Jur. 299; *Baddeley v. Curwen*, 2 Coll. 151, 155; *Fairthorne v. Western*, 3 Hare, 387, 391, 393; 8 Jur. 353; *Molesworth v. Howard*, 2 Coll. 145, 151; see, however, *Tipping v. Clarke*, 2 Hare, 383, 392; *Drake v. Drake*, *ib.*

647; 8 Jur. 642; *Kaye v. Wall*, 4 Hare, 127; *Ingilby v. Shafto*, 33 Beav. 31; 9 Jur. N. S. 1141. The 44th Equity Rule of the United States Courts adopts in terms this English order, and the 39th Equity Rule of the United States Courts proceeds further. [See those rules, *infra*, 2384, 2385, and *Gaines v. Agnelly*, 1 Woods, 238; *Samples v. Bank*, 1 Woods, 523.]
⁴ *Mason v. Wakeman*, 2 Phil. 516; *Fisher v. Price*, 11 Beav. 194, 199; *Marsh v. Keith*, 1 Dr. & Sm. 342, 350; 6 Jur. N. S. 1182; *Bates v. Christ's College, Cambridge*, 8 De G., M. & G. 726; 3 Jur. N. S. 348, L. J.; *Leigh v. Birch*, 32 Beav. 399; 9 Jur. N. S. 1265.

⁵ *Lancaster v. Evors*, 1 Phil. 349, 351; 8 Jur. 133; *Swabey v. Sutton*, 1 H. & M. 514; 9 Jur. N. S. 1321, V. C. W.; *ante*, 720, *note*.

⁶ *Tradesmen's Bank v. Hyatt*, 2 Edw. Ch. 195; *Bailey v. Wilson*, 1 Dev. & Bat. Eq. 187; *Norton v. Warner*, 3 Edw. Ch. 106; see, to this point, *Story Eq. Pl. § 854 et seq.*; *Miles v. Miles*, 27 N. H. 447; see *Hall v. Wood*, 1 Paige, 404; *Sloan v. Little*, 3 Paige, 103; *Pierson v. Meaux*, 3 A. K. Marsh. 6; *Woods v. Morrell*, 1 John. Ch. 103; *Devereaux v. Cooper*, 11 Vt. 103; *Pitts v. Hooper*, 16 Geo. 442; *Dinsmore v. Hazelton*, 22 N. H. 535; *Kittredge v. Claremont Bank*, 3 Story, 590; [*Gleaves v. Morrow*, 2 Tenn. Ch. 596]. On a bill filed charging usury, an answer that the defendant does not remember the terms on which the money was lent, will be considered evasive, and tantamount to an admission of usury. *Scotts v. Hume*, Litt. Sel. Ca. 379. So, where the bill directly charged upon the defendant that he had made and entered into a certain agreement, it was held that a simple denial by the defendant in his answer "according to his recollection and belief," was insufficient and ought to be treated as a mere evasion. *Taylor v. Luther*,

* so positive an answer may be dispensed with: ¹ and in *Hall v. Boddy* ² it is said, that the defendant having sworn in his answer that he had received no more than a certain sum, to his remembrance, it was allowed to be a good answer. As to facts which have not happened within his own knowledge, the defendant must answer as to his information and belief, and not as to his information merely, without stating any belief either the one way or the other. ³ It is not, however, necessary to make use of the precise words, "as to his information and belief:" the defendant may make use of any expressions which are tantamount to them; thus, to say that the defendant cannot answer to facts inquired after, as to his belief or otherwise, is generally considered a sufficient denial; ⁴ for, though the word "information" is not used, the expression "belief or otherwise," is held to include it. And so, where an answer was in this form: "And this defendant further answering saith, it may be true for any thing he knows to the contrary that," and after going through the several statements, it concluded thus: "but this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning the same," Sir John Leach V. C. was of opinion, that the defendant, in stating himself to be an utter stranger to all and every the matters in question, did answer as to his information, and did, in effect deny that he had any information respecting them. ⁵ It may be collected from the above case, that a defendant cannot, by merely saying "that a matter may be true for any thing he knows * to the contrary," avoid stating *724 what his recollection, information, or belief with reference to it

2 Sumner, 228. But where the facts are such that it is probable that the defendant cannot recollect them so as to answer more positively, a denial of the facts according to his knowledge, recollection, and belief, will be sufficient. *Hall v. Wood*, 1 Paige, 404; see also *Utica Ins. Co. v. Lynch*, 3 Paige, 210; *Brooks v. Byam*, 1 Story, 296. Whether the facts are charged in a bill as being the acts of the defendant, or within his own personal knowledge, he is bound to admit or deny the facts charged, either positively or according to his belief, whether they occurred within seven years, or at a greater distance of time. *Sloan v. Little*, 3 Paige, 103; *Hall v. Wood*, 1 Paige, 404.

¹ Wyatt's P. R. 13.

² 1 Vern. 470; and see *Nelson v. Ponsford*, 4 Beav. 41, 43.

³ Coop. Eq. Pl. 314.

⁴ See *Hall v. Wood*, 1 Paige, 404; *Sloan v. Little*, 3 Paige, 103; *Woods v. Morrell*, 1 John. Ch. 103; *Bolton v. Gardner*, 3 Paige, 273; *Brooks v. Byam*, 1 Story, 296; *Kittredge v. Claremont Bank*, 3 Story, 590; *Kittredge v. Claremont Bank*, 1 Wood. & M. 244; *King v. Ray*, 11 Paige, 235. If the defendant answers, that he has not any knowledge, or information of a fact charged in the bill, he is not bound to declare his belief one way or the other. *Morris v. Parker*,

3 John. Ch. 297. If he denies all knowledge of a fact charged in the bill, but admits his belief as to the fact charged, it is not necessary for him to deny any information on the subject. *Davis v. Mapes*, 2 Paige, 105. But if he has any information other than such as is derived from the bill, he must answer as to such information, and as to his belief or disbelief of the facts charged. *Utica Ins. Co. v. Lynch*, 3 Paige, 210; *Devereaux v. Cooper*, 11 Vt. 103. It is not sufficient to answer to certain specific facts charged in the bill, "that they may be true, &c., but the defendant has no knowledge of, but is a stranger to the foregoing facts, and leaves the plaintiff to prove the same." *Smith v. Lasher*, 5 John. Ch. 247. Nor is it sufficient to say that "the defendant has not any knowledge of the foregoing facts, but from the statement thereof in the bill." *Ibid*. Nor is a denial by a defendant "according to his recollection and belief" sufficient, where the fact is directly charged, as within his knowledge. *Taylor v. Luther*, 2 Sumner, 228. But where the defendant states that he is "utterly and entirely ignorant" as to the fact to which he is interrogated, it is sufficient. *Morris v. Parker*, 3 John. Ch. 297; *Norton v. Warner*, 3 Edw. Ch. 106.

⁵ *Amhurst v. King*, 2 S. & S. 133; *Utica Ins. Co. v. Lynch*, 3 Paige, 210.

is, or saying that he has no recollection or information, or that he cannot form any belief at all concerning it; either in these words, or in equivalent expressions.

Where defendants have in their power the means of acquiring the information necessary to enable them to give the discovery called for, they are bound to make use of such means, whatever pains or trouble it may cost them;¹ therefore, where defendants, filling the character of trustees, are called upon to set out an account, they cannot frame their answer so as merely to give a sufficient ground for an account; they are bound to give the best account they can by their answer: not in an oppressive way, but by referring to books, &c., sufficiently to make them parts of their answer, and to afford the plaintiff an opportunity of inspection, in order that he may be able to ascertain whether that is the best account the defendants can give.²

Where, however, the defendant has, since the filing of the bill lost his interest in the suit, and has no longer access to the documents, he will not be required to refer to them.³

Where defendants are required to set out accounts, they may, for the purpose of rendering their schedules less burdensome, instead of going too much into particulars, refer to the original accounts in their possession in the manner above stated;⁴ but when it is said that a defendant may refer to accounts in his possession, it must not be understood as authorizing him to refer, by his answer, to accounts made out by himself for the purposes of the case, but only to accounts previously in existence.⁵

*725 *To such of the interrogatories as it is necessary and mate-

¹ See *Taylor v. Rundell*, C. & P. 104, 113; 5 Jur. 112; *Earl of Glengall v. Frazer*, 2 Hare, 99, 103; 6 Jur. 1081; *Stuart v. Lord Bute*, 12 Sim. 450; *Attorney-General v. Rees*, 12 Beav. 50, 54; *M'Intosh v. Great Western Railway*, 4 De G. & Sm. 502; *Inglessi v. Spartali*, 23 Beav. 564; *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 35, 40; and see *post*, Chap. XLII., *Production of Documents*; *Story Eq. Pl.* § 856, note; *Davis v. Mapes*, 2 Paige, 105; *Swift v. Swift*, 13 Geo. 140; [*Gleaves v. Morrow*, 2 Tenn. Ch. 577.] But a defendant ought not to be required to obtain information so as to meet the plaintiff's wishes, and thereby become his agent to procure testimony. *Morris v. Parker*, 3 John. Ch. 301. In *Kittredge v. Clarendon Bank*, 1 Wood. & M. 244, Woodbury J. said, that the officers, answering for the bank sued, if they are not the same persons who were in office at the time of the transaction inquired about, ought to go not only to the records, books, and files, for information, but to the former officers, if living, and ascertain, as near as may be, the truth of the matters about which they are interrogated.

² *White v. Williams*, 8 Ves. 193, 194. A partner bound to account, must give a clear, distinct, and intelligible statement of the results of the business, referring also to par-

ticular books, and to the page, if necessary, so that a party entitled thereto may inquire into and investigate its correctness. A reference to the books of the concern, generally, and to former accounts, is not sufficient. *Gordon v. Hammell*, 4 C. E. Green (N. J.), 216.

³ *Ellwand v. M'Donnell*, 8 Beav. 14.

⁴ *White v. Barker*, 5 De G. & S. 746; 17 Jur. 174; *Major v. Arnott*, 2 Jur. N. S. 387, V. C. K.; *Drake v. Symes*, Johns. 647; *Telford v. Ruskin*, 1 Dr. & Sm. 148; *Christian v. Taylor*, 11 Sim. 401; *Bally v. Kenrick*, 13 Pri. 291; *Lockett v. Lockett*, L. R. 4 Ch. Ap. 336.

⁵ *Telford v. Ruskin*, 1 Dr. & Sm. 148; *arguendo* *Alsager v. Johnson*, 4 Ves. 224. If the bill requires the defendant to state an account between the parties, the account so stated is responsive to the bill. *Bel lows v. Stone*, 18 N. H. 465. Where a defendant, having stated an account in his answer, dies during the pendency of the suit, and the matters involved in the account are of long standing, if there is evidence tending to support the account, the Court may direct that the account be taken as *prima facie* evidence, irrespective of the question whether it is responsive to the bill. *Bel lows v. Stone*, *ubi sup.*; *Chalmer v. Bradley*, 1 J. & W. 65.

rial for the defendant to answer, he must speak directly and without evasion;¹ and any interrogatory not intended to be admitted, ought to be traversed with accuracy.² Where a fact is alleged, with divers circumstances, the defendant must not deny or traverse it literally, as it is alleged in the bill; but must answer the point of substance, positively and certainly;³ thus, if a defendant is interrogated whether he has in his possession, custody, or power books, papers, or writings, a statement in his answer that there are certain books, papers, or writings in the West Indies, the particulars of which he is unable to set forth, without any answer as to the fact whether they are in the defendant's possession, custody, or power, will be insufficient: for if the defendant admits the books and writings to be in his possession, custody, or power, the plaintiff may call upon the defendant to produce them; which the Court will order within a reasonable time.⁴ The reference in the answer must describe the books or documents with such accuracy as to enable the plaintiff to move for their production: otherwise, the answer will be open to exceptions for insufficiency.⁵

Where a defendant stated in his answer that he had not certain books, papers, and writings in his possession, custody, or power, because they were coming over to this country, Lord Eldon held, that they were in his power, and that the defendant ought to have so stated in his answer.⁶ Where books, papers, or writings are in the custody or hands of the defendant's solicitor, they are considered to be in the defendant's own custody or power, and should be stated to be so in his answer.

If a defendant is called upon to set out a deed or other instrument, in the words and figures thereof, he should do so, or give some reason for not complying with the requisition:⁷ he may, however, avoid this by admitting that he has the deed or instrument in his possession, and offering to give the plaintiff a copy of it.⁸ Where a defendant sets out any deed or other instrument in his answer, whether *in hæc verba*, or by way of recital, it is always a proper precaution to crave leave to refer to it: as, by so doing, *the defendant makes it a part *726 of his answer, and relieves himself from any charge in case it should be erroneously set out.¹

If the defendant deny a fact, he must traverse or deny it directly, and not by way of negative pregnant² as, for example, where he is

¹ Ld. Red. 309.

² Patrick v. Blackwell, 17 Jur. 803, V. C. W.; Earp v. Lloyd, 4 K. & J. 58.

³ Ord. XV. 2; Ld. Red. 309; Bally v. Kenrick, 13 Pri. 291; Tipping v. Clarke, 2 Hare, 383, 390.

⁴ Farquharson v. Balfour, T. & R. 190.

⁵ Inman v. Whitley, 4 Beav. 548; Phelps v. Olive, *ib.* 549 n., where Lord Cottenham M. R. refused to order production of documents described as "a bundle of papers marked G."

⁶ Farquharson v. Balfour, *ubi sup.*

⁷ Wyatt's P. R. 204. As to the cases in which it may be prudent to set out documents *in hæc verba*, see *ante*, p. 363.

⁸ Harr. by Newl. 185.

¹ See New v. Barne, 3 Sandf. Ch. 191.

² High v. Batte, 10 Yerger. 385; Robinson v. Woodgate, 3 Edw. Ch. 422; King v. Ray, 11 Paige, 235; Walker v. Walker, 3 Kelly, 302; Woods v. Morrell, 1 John. Ch. 103; Morris v. Barker, 3 John. Ch. 297; Smith v. Lasher, 5 John. Ch. 247; Pettit v. Candler,

interrogated whether he has received a sum of money, he must deny or traverse that he has received that sum, or any part thereof, or else set forth what part he has received.³

Where the defendant is interrogated as to particular circumstances, a general denial must be accompanied by an answer as to such circumstances:⁴ for although it is true that the general answer may include in it an answer to the particular inquiry, yet such a mode of answering might, in some cases, be resorted to, in order to escape from a material discovery;⁵ and, therefore, a general denial is not enough, but there must be an answer to sifting inquiries upon the general question.⁶ The advantage of this rule is strongly illustrated by the circumstance referred to in *Hibbert v. Durant*.⁷ In that case, the defendant was interrogated whether he had not received certain sums of money, specified in the bill, in the character of a ship's husband; in his answer, he swore that he had not received any sums of money whatever, except those set forth in the schedule to his answer, in which schedule the sums specified in the bill were not comprised, but he did not otherwise answer the interrogatory. On the question of the sufficiency of the answer, Lord Thurlow said, that a man could not deny, generally, particular charges which tended to falsify such general denial, and, therefore, held the answer insufficient; and it appears by a note of the reporter, that it turned out in point of fact, that the defendant afterwards recollected the receipt of the particular sums, and admitted them by his further answer. But, although the Court requires, that all the particular inquiries should be answered, as well as the general question, it will be no objection to the answer to the particular interrogatory, that the defendant has not answered it so particularly

*727 *as to meet it in all its terms, provided it is, with reference to the object of the bill, fairly and substantially answered.¹

It is, however, the general practice, where the defendant is required to set forth a general account, or to answer as to moneys received, or documents in his possession, to set forth the account or list of the sums, or documents, in one or more schedules annexed to the answer,

3 Wend. 618; *Thompson v. Mills*, 4 Ired. Eq. 290. An answer to an interrogatory must be positive and direct, and not argumentative. *New England Bank v. Lewis*, 8 Pick. 113, 119; *Manning v. Manning*, 8 Ala. 138.

[A denial in an answer that defendant "delivered" a specified deed goes for nothing if the answer admit facts and circumstances which do in law constitute delivery. *Adams v. Adams*, 21 Wall. 185. So, of an averment in a bill that a deed was not delivered to and accepted by a married woman, the bill showing on its face that the married woman had in fact acted under the deed. *Nichol v. County of Davidson*, 3 Tenn. Ch. 547.]

⁴ Ord. XV. 2.

⁵ Story Eq. Pl. § 852, note. But a general answer of denial to a general allegation in a

bill, without specifying the facts upon which it is founded, is sufficient. *Cowles v. Carter*, 4 Ired. Eq. (N. C.) 105.

⁶ *Wharton v. Wharton*, 1 S. & S. 235; *Tipping v. Clarke*, 2 Hare, 383, 389; *Duke of Brunswick v. Duke of Cambridge*, 12 Beav. 281; *Jodrell v. Slaney*, 10 Beav. 225; *Patrick v. Blackwell*, 17 Jur. 803, V. C. W.; *Earp v. Lloyd*, 4 K. & J. 58; see also *Anon.*, 2 Y. & C. Ex. 310; *Bridgewater v. De Winton*, 9 Jur. N. S. 1270; 12 W. R. 40, V. C. K.

⁶ Per Lord Eldon, in *Mountford v. Taylor*, 6 Ves. 792.

⁷ Cited in *Prout v. Underwood*, 2 Cox, 135; *Hepburn v. Durand*, 1 Bro. C. C. 503; *Ld. Red.* 310.

¹ *Bally v. Kenrick*, 13 Pri. 291; see also *Reade v. Woodroffe*, 24 Beav. 421; [*Lockett v. Lockett*, L. R. 4 Ch. App. 336].

which the defendant prays may be taken as part of his answer; and such practice is very convenient, and in many cases indispensable. The defendant must, however, be careful to avoid any inconsistency between the body of the answer and the schedule: for if there is any, the answer will be insufficient, and the defendant may be required to put in a further answer.² The defendant may also resort to a schedule for the purpose of showing the nature of his own case, or of strengthening it: even though there is nothing in the interrogatories which may render a schedule necessary.³

In general, a defendant must be careful not to frame his schedule in a manner which may be burdensome and oppressive to the plaintiff: otherwise, it will be considered impertinent.⁴ Thus, where a bill was filed for an account, containing the following interrogatory, "whether any and what sum of money was due from the house of A. to the house of B., and how the defendant made out the same?" and the defendant, by his answer, set forth a long schedule, containing an account of all dealings and transactions between the two houses, the answer was held to be impertinent, and the Court said the defendant ought merely to have answered, that such a sum was due, and that it was due upon the balance of an account.⁵ In the last case, although there was an inquiry how the defendant made out that there was a balance, there were no particular inquiries in the bill as to the items, constituting the account, from which the defendant made out that there was a balance due to him; and even where there has been such an inquiry, the Court has gone the length of saying, that a schedule containing such items will be impertinent, if the items are set out with a minuteness not called for by the nature of the case. Thus, where the bill called upon a defendant to set forth an account of all and every the quantities of ore, metals, and minerals dug in particular mines, and the full value thereof, and the costs and expenses of working the mines, and the clear profits made thereby, and the defendant put in a schedule to his

* answer, comprising 3431 folios, wherein were set forth all the *728 particular items of every tradesman's bill connected with the mines, the Court held the schedule to be impertinent.¹ In like manner, it seems that in the case of an executor called upon to account for his disbursements, it is not necessary to set out every separate item.²

² *Bridgewater v. De Winton*, 9 Jur. N. S. 1270; 12 W. R. 40, V. C. K.

³ *Parker v. Fairlie*, T. & R. 362; 1 S. & S. 295; *Lowe v. Williams*, 2 S. & S. 574, 576; *Story Eq. Pl.* § 856, and notes. As to the production of documents and papers, and the proper mode of discovery as to them, see *Story Eq. Pl.* §§ 858-860 *a*.

[If the answer does not refer to the schedule as forming part of it, it will be insufficient. *Bolders v. Saunders*, 3 N. R. 59. A defendant will not, however, be permitted to refer to printed books of account, and parliamentary blue books, as schedules to his

answer; but he may deposit them in Court, and then make them part of his answer as so deposited. *Attorney-General v. Edmunds*, 15 W. R. 138.]

⁴ As to impertinence, see *ante*, p. 326.

⁵ *French v. Jacko*, 1 Mer. 357, n.

¹ *Norway v. Rowe*, 1 Mer. 347, 356; see also *M'Morris v. Elliot*, 8 Pri. 674; *Slack v. Evans*, 7 Pri. 278, n.; *Alsager v. Johnson*, 4 Ves. 217, 225; *Byde v. Masterman*, C. & P. 265, 272; 5 Jur. 643; *Marshall v. Mellersh*, 6 Beav. 558; *Tench v. Cheese*, 1 Beav. 571, 574; 3 Jur. 768.

² *Norway v. Rowe*, *ubi sup.*

It is difficult, however, to point out any precise rules with regard to what will be considered impertinent in a schedule; much must depend upon the nature of each case, and the purposes for which the discovery is required. The cases above referred to, and the others which may be found in the books show, however, that even though the plaintiff, by the minuteness of his inquiries, in some measure affords an excuse for the defendant setting forth a long and burdensome schedule, the Court will not, unless in instances in which, from the nature of the case, great minuteness is required, permit a defendant to load the record with useless and impertinent matter, even though the introduction of such matter might be justified by the terms of the interrogatories. On the other hand, it is to be observed, that the Court will not, where the defendant, in complying with the requisitions in the bill, has *bonâ fide* given the information required, though in a manner rather more prolix than might perhaps be necessary, consider the answer as impertinent: for, although prolixity sometimes amounts to impertinence,³ whether the Court will deal with it as such depends very much upon the degree in which it occurs.⁴

*729 *In answering an amended bill, the defendant, if he has answered the original bill, should answer those matters only which

³ Slack v. Evans, *ubi sup.*

⁴ Gompertz v. Best, 1 Y. & C. Ex. 114, 117. As to impertinence in an answer, see Story Eq. Pl. § 863. Impertinence in pleading consists in setting forth what is not necessary to be set forth; as stuffing the pleadings with useless recitals and long digressions about immaterial matters. Hood v. Inman, 4 John. Ch. 437. It was said by Mr. Chancellor Kent, in Woods v. Morrell, 1 John. Ch. 103, that, perhaps the best rule to ascertain whether matter be impertinent, is to see whether the subject of the allegation could be put in issue, or be given in evidence between the parties. [See Spaulding v. Farwell, 62 Me. 319, where the rule was applied to an averment in an answer of a counter claim not connected with the transaction set forth in the bill, which was by tenants in common for an account of the earnings of a vessel. See also Mrzena v. Brucker, 3 Tenn. Ch. 161.] Where in the answer to a bill in Equity, an allegation was made impeaching the *bona fides*, and validity of a codicil to a will, which had been already approved and allowed by a Court having competent and exclusive jurisdiction over the probate thereof, it was ordered that the allegation be expunged as being impertinent and immaterial. Langdon v. Goddard, 3 Story, 13. In reference to the above allegation, Mr. Justice Story said, "It is not a matter which can be filed in controversy, or admitted to proof." 3 Story, 23. If the matter of an answer is relevant, that is, if it can have any influence whatever in the decision of the suit, either as to the subject-matter of the controversy, the particular relief to be given, or as to the cost, it is not impertinent. Van Reusselaer v. Brice, 4 Paige, 174; Wood

v. Mann, 1 Sumner, 579; Price v. Tyson, 3 Bland, 392. Long recitals, stories, conversations and insinuations tending to scandal, are impertinent. Woods v. Morrell, 1 John. Ch. 103; Langdon v. Goddard, 3 Story, 13. A short sentence is said not to be impertinent, although it contains no fact or material matter, and may be inserted in an answer only from abundant caution. A statement in an answer introduced to show the temper with which a bill is filed, and the offensive course pursued by the plaintiff, is not impertinent; it may have an effect on the costs. Whatever is called for by the bill or will be material to the defence, with reference to the order or decree that may be made, is proper to be retained in an answer. Desplaces v. Goris, 1 Edw. Ch. 350; Monroy v. Monroy, *ib.* 383; Bally v. Williams, 1 M'Clel. & Y. 334.

An exception to an answer for impertinence will be overruled, if the expunging of the matter excepted to will leave the residue of the clause, which is not covered by the exception, either false or wholly unintelligible. M'Intyre v. Trustees of Union College, 6 Paige, 240. The plaintiff cannot except to a part of the defendant's answer as impertinent, which refers to and explains the meaning of a schedule annexed to such answer, without also excepting to the schedule itself as impertinent. *Ibid.* If a bill against executors calls specifically and particularly for accounts in all their various details, a very voluminous schedule, containing a copy from the books of account, specifying each item of debt and credit, will not be impertinent. Scudder v. Bogert, 1 Edw. Ch. 372. If the plaintiff put impertinent questions, he must take the answer to them, though it be im

have been introduced by the amendments. In fact the answer to an amended bill constitutes, together with the answer to the original bill, but one record; ¹ in the same manner as an original and an amended bill; hence, it is impertinent to repeat, in the answer to the amended bill, what appears upon the answer to the original bill, unless by the repetition the defence is materially varied.²

SECTION II. — *Form of Answers.*

Two or more persons may join in the same answer; and where their interests are the same, and they appear by the same solicitor, they ought to do so.³ The Court will not, however, before the hearing, and at a time when it cannot be known how the defence should be conducted, visit the defendants with costs as a penalty for not joining in their answer; and it is only at the hearing, when all danger of prejudice to the parties is over, that the Court * will make any order *730 upon the subject.¹ Where the same solicitor has been employed for two or more defendants, and separate answers have been filed, or other proceedings had by or for two or more of such defendants separately, the Taxing Master will consider, in the taxation of such solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper; and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the

pertinent. *Woods v. Morrell*, 1 John. Ch. 103. [So of matter responsive to irrelevant matter in the complaint. *McIntyre v. Ogden*, 24 N. Y. Sup. Ct. 604. See, however, *Langdon v. Pickering*, 19 Me. 214.] Copies of receipts taken by the defendant for moneys paid and charged in account and making an immense schedule to an answer, are impertinent. *Scudder v. Bogert*, 1 Edw. Ch. 372. An executor in setting forth in his answer the account and inventory of the estate which came to his hands, should not add copies of the appraiser's and executor's oaths, and of the surrogate's certificate. Such matter will be impertinent. *Jolly v. Carter*, 2 Edw. Ch. 209.

An exception for impertinence must be supported *in toto*, or it will fail altogether. *Wagstaff v. Bryan*, 1 R. & M. 30; *Tench v. Cheese*, 1 Beav. 571; *Van Rensselaer v. Brice*, 4 Paige, 174.

When an exception was taken to the jurisdiction, in the answer, it was properly struck out, on reference to a Master, for impertinence. *Wood v. Mann*, 1 Sumner, 579; but see *Teague v. Dendy*, 2 M'Cord Ch. 207, 210. As to impertinence, see further, *Story Eq. Pl. § 863*; *Jolly v. Carter*, 2 Edw. Ch. 209; *Somers v. Torrey*, 5 Paige, 54. As to scandal in an answer, see *Story Eq. Pl. §§ 861, 862*. As in a bill, so in an answer, nothing relevant can be deemed scandalous. *Story*

Eq. Pl. § 862; *Jolly v. Carter*, 2 Edw. Ch. 209. Separate exceptions to the same answer, one for scandal and the other for impertinence, will not be allowed; as nothing in a pleading can be considered as scandalous which is not also impertinent. *McIntyre v. Trustees of Union College*, 6 Paige, 240. [See *infra*, 759.]

¹ *Ld. Red. 318*; *Hildyard v. Cressy*, 3 Atk. 303.

² *Smith v. Serle*, 14 Ves. 415.

³ Where two defendants answer jointly, and one speaks positively for himself, the other may, in cases where he is not charged with any thing upon his own knowledge, say that he perused the answer and believes it to be true; but it is otherwise where the defendant answers separately. 1 Har. 185, ed. Newl. A defendant may sufficiently answer by adopting the answer of his co-defendant. *Binney's Case*, 2 Bland, 99; *Warfield v. Banks*, 11 Gill & J. 98. But an answer simply averring that the facts stated in a paper purporting to be the answer of another defendant in the cause, "are substantially correct as far as these defendants are concerned," is formally and substantially defective. *Carr v. Weld*, 3 C. E. Green (N. J.), 41.

¹ *Vansandau v. Moore*, 1 Russ. 441, 454; 2 S. & S. 509, 512; and see *Woods v. Woods*, 5 Hare, 230; *Story Eq. Pl. § 869*.

same will be disallowed.² No general rule can be laid down, determining when defendants, appearing by the same solicitor, may sever in their defence;³ practically, the Taxing Master has to exercise his discretion in each particular case.

Where defendants have a joint interest only, they will not, in general, be allowed to sever in their defence; and there are many cases where only one set of costs has been allowed by the Court to two defendants, whose interest was so far joint as to have made a severance of their defence unnecessary. Thus, trustees will not, in general, be allowed costs consequent upon their separate defences, unless some of them have a beneficial interest, or there is some special reason for their severance.⁴ So, trustees and *cestui que trusts*, if they have no conflicting interests, will, in general, be only allowed one set of costs.⁵ The same principle applies, as between a husband and his wife,⁶ a bankrupt and his assignees,⁶ and, in an administration suit, between an assignor and his assignee.⁷ The severance will, however, be justifiable where the suit is against two trustees, one of whom only is charged with a breach of trust;⁸ and, in some cases, where they reside at a distance from each other.⁹

Where only one set of costs is allowed, the Court does not, generally, declare to whom it is to be given;¹⁰ but where one trustee
*731 * only, in obedience to an order, paid a sum of money into Court, he was held entitled to the whole of the costs.¹

If the defendants are permitted to sever, they will be allowed the costs of separate counsel, though they take the same line of defence.²

An answer must now be divided into paragraphs, numbered consecutively, each paragraph containing, as nearly as may be, a separate and distinct statement or allegation.³ It must not refer to another document, not on the files of the Court, as containing the statement of the defendant's case.⁴

² Ord. XL. 12; *Woods v. Woods*, 5 Hare, 229, 231. By the 62d Equity Rule of the United States Courts, it is provided, that in such a case "costs shall not be allowed for such separate answers or other proceedings, unless a Master, upon reference to him, shall certify, that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together."

³ *Greedy v. Lavender*, 11 Beav. 417, 420; *Remnant v. Hood* (No. 2), 27 Beav. 613.

⁴ *Gaunt v. Taylor*, 2 Beav. 346; 4 Jur. 166; *Dudgeon v. Corley*, 4 Dr. & War. 158; *Tarback v. Woodcock*, 3 Beav. 289; *Hodson v. Cash*, 1 Jur. N. S. 864, V. C. W.; *Course v. Humphrey*, 26 Beav. 402; 5 Jur. N. S. 615; *Prince v. Hine*, 27 Beav. 345; *Attorney-General v. Wyville*, 28 Beav. 464; and see *Morgan & Davey*, 87; and *post*, Chap. XXXI., § 2, *Costs*.

⁵ *Woods v. Woods*, *ubi sup.*; *Farr v. Sheriffe*, 4 Hare, 528; 10 Jur. 630; *Remnant v. Hood*, *ubi sup.*

⁶ *Garey v. Whittingham*, 5 Beav. 268, 270; 6 Jur. 545.

⁷ *Remnant v. Hood* (No. 2), 27 Beav. 613; *Greedy v. Lavender*, 11 Beav. 417, 420.

⁸ *Webb v. Webb*, 16 Sim. 55.

⁹ *Aldridge v. Westbrook*, 4 Beav. 212; *Wiles v. Cooper*, 9 Beav. 298; *Commins v. Brownfield*, 3 Jur. N. S. 657, V. C. W.

¹⁰ *Course v. Humphrey*, 26 Beav. 402; 5 Jur. N. S. 615; *Attorney-General v. Wyville*, 28 Beav. 464.

¹ *Prince v. Hine*, 27 Beav. 345; and see *Morgan & Davey*, 87, 88.

² *Bainbridge v. Moss*, 3 Jur. N. S. 107, V. C. W.

³ 15 & 16 Vic. c. 86, § 14; Ord. XV. 1; see forms of answers in Vol. III.

⁴ *Falkland Islands Company v. Lafone*, 3 K. & J. 267; [*Wells v. Stratton*, 1 Tenn. Ch. 328. Documents previously deposited in Court in the cause may, however, be made part of the answer by referring to them as so deposited. *Attorney-General v. Edmunds*, 15 W. R. 138.]

An answer must be intituled in the cause, so as to agree with the names of the parties as they appear in the bill, at the time the answer is filed.⁵ A defendant may not correct or alter the names of the parties as they appear in the bill; if there is a mistake in his own name, he must correct it in the part following the title of the cause, thus: "The answer of John Jones (in the bill by mistake called William Jones)." ⁶

An answer is headed: "The answer of A. B., one of the above-named defendants, to the bill of complaint of the above-named plaintiff." If the bill has been amended after answer, the heading states that the answer is "to the amended bill of complaint of the above-named plaintiff."⁷ If two or more defendants join in the same answer, it is headed: "The joint and several answer;" but if it be the answer of a man and his wife, it is headed "The joint answer." If a female defendant has married since the filing of the bill, but before answering, she must either obtain an order for leave to answer separately, or answer jointly with her husband, who, although not named on the record as a defendant, may join in the answer: in which case, the answer should be headed "The answer of A. B. and C. his wife, lately and in the bill called C. D., spinster (or widow, as the case may be)."⁸ The answer of an infant, or other person answering by guardian, or of an idiot or lunatic answering by his committee, is so headed.⁹

Any defect occurring in the heading of an answer, so that it does not appear distinctly whose answer it is, or to what bill it is an answer, is a ground for taking it off the file for irregularity. Thus, where an answer was intituled "the joint and several answer of A. B. and C. D., defendants, E. F. and G. H., complainants," omitting the words, "to the bill of complaint of," it was, on motion, * 732 taken off the file for irregularity.¹ So also, where the plaintiff was misnamed in the heading, an order was made to take the answer off the file, and for process of contempt to issue;² and so, where the bill was filed by six persons, and the document filed purported to be an answer to the bill of five only, the answer was ordered to be taken off the file.³ If, however, it is clear to whose bill it is intended to be an answer, this course will not now be followed.⁴ The notice of motion, in such a case, should not describe the document as the answer of A. B., &c., but as a certain paper writing, purporting to be the answer.⁵ An answer with a defect of this sort in the title is, in fact, a nullity,

⁵ Braithwaite's Pr. 44.

⁶ *Ibid.*; Attorney-General v. Worcester Corporation, 1 C. P. Coop. t. Cott. 18.

⁷ Rigby v. Rigby, 9 Beav. 311, 313; see forms in Vol. III.

⁸ Braithwaite's Pr. 46.

⁹ For forms of headings of answers, see Vol. III.

¹ Pieters v. Thompson, G. Coop. 249.

² Griffiths v. Wood, 11 Ves. 62; Fry v. Mantell, 4 Beav. 435; S. C. nom. Fry v. Mar-

tel, 5 Jur. 1194; Upton v. Sowten, 12 Sim. 45; S. C. nom. Upton v. Lowten, 5 Jur. 818.

³ Cope v. Parry, 1 Mad. 83. As to scandal and impertinence in the heading of an answer, see Peck v. Peck, Mos. 45.

⁴ Rabbeth v. Squire, 10 Hare Ap. 3. [See Bowes v. Farrar, L. R. 14 Eq. 71, where certain words of the prescribed form were omitted.]

⁵ See 11 Ves. 64. For form of notice of motion, see Vol. III.

and may be treated as such; and although a defendant may, if he pleases, apply to the Court for leave to take the answer off the file and re-swear it, it is not necessary that he should do so, but he may leave the answer upon the file, and put in another.⁶

Where an answer has been prepared for five defendants, it cannot be received as the answer of two only;⁷ and where such an answer had been filed, it was, upon the motion of the plaintiff, ordered to be taken off the file.⁸ In an earlier case, however, before the same Judge, where a joint and several answer included in the title the names of persons who refused to join in it, the answer was ordered to be received as the answer of those defendants who had sworn to it, without striking out the names of those who had not.⁹ And an answer, which had been prepared as the answer of several defendants, but only sworn to by some of them, may, by special order, be directed to be filed as the answer of those defendants only who have sworn to it; and an order may be subsequently made, that a defendant who has not sworn to it (he being out of the jurisdiction when the answer was filed) be sworn to it by the Record and Writ Clerk, without the answer being taken off the file, and that such answer, when so sworn, be treated as the joint answer of all the defendants whose answer it purports to be.¹⁰

An answer must be signed by counsel;¹¹ and no counsel is to sign any answer unless he has perused it; and he must take care *733 * that the documents are not unnecessarily set out therein *in hæc verba*; but that so much of them only as is pertinent and material is set out or stated, or that the substance of so much of them only as is pertinent and material be given, as counsel may deem advisable; and that no scandalous matter¹ be inserted therein.²

The signature of counsel is usually put to the draft of the answer, and thence copied on to the engrossment or print; and if not affixed either to one or the other, the plaintiff may apply, by motion, with notice to the defendant, that the answer may be taken off the file;³ but

⁶ Griffiths v. Wood, *ubi sup.*

⁷ Harris v. James, 3 Bro. C. C. 399; [Binney's case, 2 Bland, 99; Cook v. Dews, 2 Tenn. Ch. 496.]

⁸ Cooke v. Westall, 1 Mad. 265; [Bailey Washing Machine Co. v. Young, 12 Blatchf. 199, but with leave to the defendants who had signed to erase the names of the others, and file the answer as their own only.]

⁹ Done v. Read, 2 V. & B. 310. [See to the same effect, Young v. Clarksville Man. Co., 12 C. E. Green, 67.]

¹⁰ Lyons v. Read, 4 and 15 Nov., 1856, cited Braithwaite's Pr. 51, 52; and see Hayward v. Roberts (1857, H. 152), 6 March, 1858; and Lane v. London Bank of Scotland (1864, L. 128), 16 March, 1865, in which like orders were made; the latter on petition of course, by consent of the plaintiff.

¹¹ Ord. VIII. 1; Wall v. Stubbs, 2 V. & B. 358; Brown v. Bruce, 2 Mer. 1; Bishop v. Willis, 5 Beav. 83 n.; but see Sears v. Hyer, 1 Paige, 483. There is no objection to the

same counsel signing the separate answers of co-defendants. [The signature may be in the firm name of counsel. Hampton v. Coddington, 1 Stew. Eq. 557. And the signature of a solicitor is sufficient in New Jersey. Freehold Mutual Loan Association v. Brown, 1 Stew. Eq. 42. In Michigan. Henry v. Gregory, 29 Mich. 68. In Tennessee. 1 Hicks Man. Ch. Pr. 46, 133. In Illinois. Puterb. Ch. Pr. 59, 601. And see Hatch v. Eustaphie, Clarke, 63. *Ante*, 312, n. 1.]

¹ As to scandal, see *ante*, p. 346.

² Ord. VIII. 2.

³ See Wall v. Stubbs, *ubi sup.* A party has a right to suppose, that the pleading served on him is a correct copy of that filed; and where the copy of an answer contains neither the signature of solicitor or counsel, nor has a *jurat*, the plaintiff may apply to take the answer off the files for irregularity. Littlejohn v. Munn, 3 Paige, 280. Where the answer was put in without the defendant's signature, it was ordered to be taken off

the Court will not direct such a course to be adopted where the interest of the plaintiff may be prejudiced by the proceeding.⁴ Where, by inadvertence, an answer has been sworn or filed without the name of counsel being put to it, and the plaintiff has not served a notice of motion to take the answer off the file for irregularity, an order may be obtained, on motion of course, or on petition of course at the Rolls, to amend the answer by adding the name.⁵

An answer must, also, be signed by the defendant or defendants putting it in,⁶ unless an order has been obtained to take it without signature.⁷ Where an answer is put in by guardian or committee, the signature of such guardian or committee is alone required; and if such guardian is also a defendant, and puts in an answer in that character as well as in that of guardian, he need only affix his signature to the answer once.⁸ It is prudent, though not essential, to sign each sheet of the answer. Where there are any schedules, each schedule should be signed also.⁹ If the answer is put in upon *oath, the *734 signature must be affixed, or acknowledged, in the presence of the person before whom it is sworn;¹ and he also must sign each schedule, as well as the jurat.²

Sometimes the Court has, under special circumstances, directed an answer to be received, though it has not been signed by the defendant; as, where a defendant went abroad, forgetting, or not having had time, to put in his answer;³ and where a defendant had gone or was resident abroad, and had given a general power of attorney to defend suits.⁴ Where an answer was put in under the authority of a power of attorney, the Court thought it better to take the answer without any signature, than that the person to whom the power is given should sign it in the

the files for irregularity. *Denison v. Bassford*, 7 Paige, 370. For form of notice of motion, see Vol. III.

⁴ *Bull v. Griffin*, 2 Anst. 563.

⁵ *Braithwaite's Pr.* 48; and see *Harrison v. Delmont*, 1 Pri. 108.

⁶ [*Ordo curiæ*, 2 Atk. 290; *Cook v. Dews*, 2 Tenn. Ch. 496; *Denison v. Bassford*, 7 Paige, 370.] *Ord. XV.* 5; see *Rule 7 of Maine Chancery Practice*; 37 *Maine*, 583. The answer must be signed by the defendant, though the oath be waived. [*Denison v. Bassford*, 7 Paige, 370;] *Kimball v. Ward*, *Walk. Ch.* 439. But it is not necessary in all cases that an individual defendant should write his own name to an answer. *Supervisors, &c. v. Mississippi, &c. R. R. Co.*, 21 Ill. 338; *Hatch v. Eustaphie*, 1 *Clarke*, 63. And the signature may be waived by the plaintiff; and the filing of a replication is evidence of such waiver of the signature. *Fulton Bank v. Beach*, 2 Paige, 306; *Collard v. Smith*, 2 Beasley (N. J.), 43, 45.

On a bill against husband and wife, the husband is bound to enter a joint appearance, and put in a joint answer, unless for sufficient reason, as that the wife refuses to join or to swear to a plea, he is permitted by the Court to answer separately. *Leavitt v. Cruger*, 1

Paige, 421; *Collard v. Smith*, 2 Beasley (N. J.), 43, 44, 45.

Defendants may answer jointly, or jointly and severally or separately, but in either case each defendant must swear to his answer, or it will be no answer as to him. *Binney's case*, 2 Bland, 99; [*Cook v. Dews*, 2 Tenn. Ch. 496.]

⁷ *Fulton Bank v. Beach*, 2 Paige, 306.

The answer of a corporation should be signed by the principal officer. A secretary, or cashier, in case of a bank, frequently signs it also. 1 *Hoff. Ch. Pr.* 239; *Supervisors, &c. v. Mississippi, &c. R. R. Co.*, 21 Ill. 338. [If the name of the corporation is written to the answer, and there is nothing to show that it is unauthorized, it will be sufficient. *Lorison v. Peoria, &c. R. Co.*, 77 Ill. 11.]

⁸ *Anon.*, 2 J. & W. 553.

⁹ *Braithwaite's Pr.* 45, 342, n.

¹ *Ord. XV.* 5.

² *Braithwaite's Pr.* 342, n.; and see *post*, p. 746, n.

³ — *v. Lake*, 6 Ves. 171; — *v. Gwillim*, *ib.* 285; 10 Ves. 442; *Dumond v. Magee*, 2 *John. Ch.* 240.

⁴ *Bayley v. De Walkiers*, 10 Ves. 441; *Harding v. Harding*, 12 Ves. 159.

name of the defendant; the power of attorney should be recited in any order authorizing the answer to be put in under it.⁵

The signature of the defendant must be affixed to the engrossment or print, and not to the draft: the object in requiring it being to identify the instrument, to which the defendant has given the sanction of his oath, for the purpose of rendering a conviction for perjury more easy.⁶

Unless the Court otherwise directs, the answers of all persons (except persons entitled to the privilege of peerage, or corporations aggregate) must be put in upon the oath of the parties putting in the *735 same,⁷ where they are not exempted from taking an oath by *any statute in that behalf.¹ Persons entitled to the privilege of peerage answer upon protestation of honor; and corporations aggregate put in their answer under their common seal.² The Secretary of State for

⁵ Bayley v. De Walkiers, *ubi sup.*

⁶ Harr. by Newl. 170.

⁷ An answer should be regularly signed and sworn to. *Fulton Bank v. Beach*, 2 Paige, 307; S. C. 6 Wend. 36; *Trumbull v. Gibbons*, Halst. Dig. 172; *Salmon v. Claggett*, 3 Bland, 125; *Rogers v. Cruger*, 7 John. Ch. 557; *Van Valtensburg v. Alberry*, 10 Iowa (2 With.), 264; *Story Eq. Pl. § 874*; *Rule 7 of Maine Chancery Practice*. This rule in Maine gives the substance of the oath to be administered; and it provides that the certificate of the magistrate must state the oath administered. 37 Maine, 583.

"Answers," in New Hampshire, "unless required by the bill to be under oath, need not be sworn to, and they will then be regarded only as pleadings, and no exception for insufficiency can be taken thereto." *Rule 9 of Chancery Practice*. See *Dorn v. Bayer*, 16 Md. 144; *Mahaney v. Lozier*, 16 Md. 69; *Shepard v. Ford*, 10 Iowa (2 With.), 502; *Blakemore v. Allen*, 10 Iowa (2 With.), 550.

A defendant has a right to put in his answer under oath, although not required by the plaintiff. *White v. Hampton*, 9 Iowa (1 With.), 181.

The 59th Equity Rule of the United States Courts, declares, "Every defendant may swear to his answer before any Justice or Judge of any Court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any Master in Chancery appointed by any Circuit Court, or before any Judge of any Court of a State or Territory."

In New Jersey, an answer must be sworn to before a Master of the Court or before a commissioner authorized for that purpose; and an answer sworn to before a notary public, of the State of Connecticut, was considered irregular, as filed without oath. *Trumbull v. Gibbons*, *supra*. In Maryland, an answer sworn to before a justice of the peace, in another State or in the District of Columbia, who is certified to be a justice of the peace at the time, is received as sufficient. *Chapline v. Beatty*, 1 Bland, 197; *Lingan v. Henderson*, 1 Bland, 240; *Gibson v. Tilton*, 1

Bland, 352. As to New York, see 1 Barb. Ch. Pr. 145, 146. As to New Hampshire Chancery Rule, 30, 38 N. H. 611.

A defendant prepared an answer admitting the allegations of the plaintiff's bill, and it was certified as sworn to; but the person certifying did not style himself in the certificate a justice of the peace, nor was he otherwise proved to be a magistrate empowered to administer oaths; the defendant died, and this paper so certified was afterwards filed in the clerk's office, and it was held not to be the answer of the party, nor evidence in the cause. *Sitlington v. Brown*, 7 Leigh, 271.

¹ See stat. 7 & 8 Will. III. c. 34, § 1; 8 Geo. I. c. 6, § 1; 22 Geo. II. c. 30, § 1; *ib.* c. 46, § 36; 9 Geo. IV. c. 32, § 1; 3 & 4 Will. IV. c. 49; *ib.* c. 82; 1 & 2 Vic. c. 77; and see *ib.* c. 105. Parties, if conscientiously scrupulous of taking an oath, may, in lieu thereof, make solemn affirmation to the truth of the facts stated by them in the U. S. Courts. Equity Rule, 91. So in Massachusetts, and other States, either by statute or rule of Court. It is to be observed that an affirmation cannot be taken under a commission authorizing the commissioners to take an answer upon oath. *Parke v. Christy*, 1 Y. & J. 533.

² Ord. XV. 6. The answer of a corporation is put in without oath, under the corporate seal. 1 Hoff. Ch. Pr. 239; see *Vermilyea v. Fulton Bank*, 1 Paige, 37; *Fulton Bank v. N. Y. & Sharon Canal Co.*, 1 Paige, 311; *Baltimore & Ohio R. R. Co. v. City of Wheeling*, 13 Gratt. 40; *Haight v. Prop. of Morris Aqueduct*, 4 Wash. C. C. 601; *Champlin v. Corporation of New York*, 3 Paige, 573. An answer of a corporation, put in without their seal, was suppressed as irregular, in *Ransom v. Stonington Savings Bank*, 2 Beasley, 212. But it was held in the same case that the corporation may adopt and use any seal,—as a bit of paper attached by a wafer,—*pro hac vice*, *ibid.*; *Mill Dam Foundry v. Hovey*, 21 Pick. 417. If the seal is dispensed with, it should be by leave of the Court previously obtained and for good cause shown. *Ransom v. Stonington Savings Bank*,

India, and the Attorney-General, respectively sign, but do not swear to their answers; and such answers are received and filed without an order dispensing with the oath.³

The oath, when administered to a person professing the Christian religion, is upon the Holy Evangelists.⁴ But persons who do not believe the Christian oath, must, out of necessity, be put to swear according to their own notion of an oath;⁵ therefore, a Jew may be sworn upon the Pentateuch with his hat on;⁶ and a Heathen * may be *736 sworn in the manner most binding on his conscience. In *Ramkissenseat v. Barker*,¹ where the defendant to a cross-bill was resident in the East Indies, and professed the Gentoo religion, the Court directed a commission to the East Indies, and empowered the commissioners to administer the oath in the most solemn manner as in their discretion should seem meet, and, if they administered any other oath than the Christian, to certify to the Court what was done by them.

Sometimes an answer is put in without oath, or without oath or signature, and this practice is frequently resorted to in amicable suits;² such an answer, however, cannot be received, unless an order to that effect has first been obtained. This order may be obtained upon motion,³ or upon petition of course at the Rolls;⁴ the application is

ubi supra. The plaintiff cannot compel the officers, even those who have signed it, to swear to it. 1 Hoff. Ch. Pr. 239; *Brumly v. The Westchester Manuf. So.*, 1 John. Ch. 266; see *Kittredge v. Claremont Bank*, 1 Wood. & M. 244. But where it is the object of the corporation to obtain the dissolution of an injunction, it is necessary to have the answer verified by the oath of some of the corporators, or officers of the corporation, who are acquainted with the facts; as the injunction cannot be dissolved upon an answer without oath, denying the equity of the bill. *Fulton Bank v. New York and Sharon Canal Co.*, 1 Paige, 311.

Individual members of a corporation may be called upon to answer to a bill of discovery under oath; but in that case the individuals must be named as defendants in the bill. *Brumly v. Westchester Manuf. So.*, 1 John. Ch. 266; *Buford v. Rucker*, 4 J. J. Marsh. 551; *Vermilyea v. Fulton Bank*, 1 Paige, 37. As to making officers and members of corporations parties for discovery, see *ante*, 135, notes. The answer of a corporation, under its seal is nothing more than a pleading, and although it negatives the bill, will not warrant the dissolution of an injunction. [*Griffin v. State Bank*, 17 Ala. 258, overruling] *Hogan v. Branch Bank of Decatur*, 10 Ala. 485. A foreign corporation cannot be compelled to file an answer; and the want of an answer where it was not needed for the purposes of discovery, was held no good objection on a motion to dissolve an injunction. *Balt. & Ohio R. R. Co. v. City of Wheeling*, 13 Gratt. 40.

It is desirable, though not essential, that the affixing of the seal should be attested by some official of the corporation. *Braith-*

waite's Pr. 53. For forms of oath, affirmation, and attestation, see Vol. III. *Coale v. Chase*, 1 Bland, 137; *Gibson v. Tilton*, 1 Bland, 355.

³ For form of special attestation to the signature of the Secretary of State, see Vol. III.

⁴ Except in cases within the stat. 1 & 2 Vic. c. 105, *post*, p. 746. Where that Act is inapplicable, a Christian, in making oath, holds the book in his right hand, the hand being uncovered, and, in the case of a male person, the head being uncovered also. *Braithwaite's Pr.* 343.

⁵ *Omychund v. Barker*, 1 Atk. 21, 46.

⁶ *Hinde*, 228; see *Tryatt v. Lindo*, 3 Edw. Ch. 239. But, though the head be covered, the right hand in which the book is held, must be uncovered. A Jew may, if he pleases, be sworn while his head is uncovered. *Braithwaite's Pr.* 343.

¹ 1 Atk. 19, 20. For form of jurat in the case of a Hindoo, see *Braithwaite's Oaths* in Chan. 86.

² An answer may by consent of the plaintiff be received without being sworn to. *Contee v. Dawson*, 2 Bland, 264; *Billingslea v. Gilbert*, 1 Bland, 567; see *Reed v. Warner*, 5 Paige, 650. And in New York the filing of a replication is evidence of such consent. *Fulton Bank v. Beach*, 2 Paige, 307. But it is otherwise in New Jersey; *Trumbull v. Gibbons*, Halst. Dig. 172; and in Maryland, *Nesbitt v. Dellam*, 7 Gill & J. 494.

³ *Hinde*, 228.

⁴ *Braithwaite's Pr.* 47. For form of order on motion, see *Seton*, 1254, No. 2; and for forms of motion paper and petition, see Vol. III.

usually made by petition. If the answer is to be put in without oath, and the plaintiff applies for the order, no consent is necessary; but if the defendant applies, the plaintiff's solicitor must instruct counsel to consent to the motion, or must subscribe his own consent to the *737 petition, as the case may be.⁵ If * the answer is to be put in without oath or signature, the consent of the party not applying

⁵ Where the parties agree, that the answer may be received without oath or signature, it is of course for the Court so to order. *Fulton Bank v. Beach*, 2 Paige, 307; S. C. 6 Wend. 36; *Trumbull v. Gibbons*, Halst. Dig. 172; *Billingslea v. Gilbert*, 1 Bland, 567.

[And an answer without oath merely puts the cause at issue, and is of no more weight as evidence than the bill. *Guthrie v. Quinn*, 43 Ala. 561.]

It is provided by statute in Massachusetts, that an answer shall be supported by oath, unless waived by the adverse party. Genl. Sts. c. 113, § 5. And the rule of Court is that, "when a bill shall be filed other than for discovery only, the plaintiff may waive the necessity of the answer being made on the oath of the defendant, and, in such cases, the answer may be made without oath, and shall have no other or greater force as evidence than the bill. No exception for insufficiency can be taken to such answer." Rule 8. Answers in New Hampshire need not be sworn to unless an oath is required by the bill; if not sworn to they will be regarded only as pleadings, and no exception for insufficiency can be taken thereto. Rule 9 of Chancery Practice; 33 N. H. 606. This provision, authorizing the plaintiff to waive an answer on oath from the defendant, has introduced a new principle into the system of Equity pleading. This provision was intended to leave it optional with the plaintiff to compel a discovery from the defendant in aid of the suit, or to waive the oath of the defendant, if the plaintiff was unwilling to rely upon his honesty, and chose to establish his claim by other evidence alone. He has no right, therefore, to call upon the defendant for a discovery as to a part of the matters of his bill, and to deprive the defendant of the benefit of his answer on oath, as responsive to other matters stated in the bill. He must waive an answer on oath as to every point of the bill, or to no part thereof. And after the defendant has put in an answer on oath as to the whole or any part of the bill, it is too late for the plaintiff to get rid of the consequences of a denial upon oath of all or any of the matters of the bill. An amendment in that stage of the suit, waiving an answer on oath, is irregular, and cannot be allowed. If the plaintiff is unwilling to rely upon an answer on oath to the amendments, his only remedy is to dismiss the bill, and commence a new suit, in which suit he can waive an answer on oath. *Burras v. Looker*, 4 Paige, 227; 1 Hoff. Ch. Pr. 234, 235; *Bingham v. Yeomans*, 10 Cush. 58; *Chace v. Holmes*, 2 Gray, 431.

[A motion to dismiss a bill for want of equity on its face is not the proper mode of

testing the question whether the plaintiff can call upon the defendant to answer a part of the bill under oath, and waive the oath as to another part. *Henderson v. Mathews*, 1 Lea, 34; S. C. 2 Leg. Rep. 181.]

The plaintiff, who has waived an answer on oath, cannot apply to have the answer taken off the file on the ground that the defendant knows it to be wholly untrue. *Denison v. Bassford*, 7 Paige, 370. All material allegations of the bill may be proved as if they had been distinctly put in issue by the answer; and, if no replication is filed, the matters of defence set up will be considered as admitted by the plaintiff, as in the case of a sworn answer. 1 Hoff. Ch. Pr. 235. Although the plaintiff in an injunction bill waive an answer on oath, the defendant may file it on oath for the purpose of moving to dissolve the injunction, or discharge a *ne exeat*. *Dougrey v. Topping*, 4 Paige, 94; *Mahaney v. Lazier*, 16 Md. 69. In such case, the unsworn answer is no evidence on which to dissolve an injunction. *Rainey v. Rainey*, 35 Ala. 282; *Mahaney v. Lazier*, *ubi supra*. Where the defendants are not jointly interested in respect to the claim made against them by the bill, the plaintiff may waive an answer on oath as to some of them and not as to the others. *Bulkeley v. Van Wyck*, 5 Paige, 536; *Morse v. Hovey*, 1 Barb. Ch. 404; S. C. 1 Sandf. Ch. 187; see *Stephenson v. Stephenson*, 6 Paige, 353.

The defendant has been held entitled to answer under oath, although the bill waived a sworn answer. *White v. Hampton*, 10 Iowa, 238; S. C. 9 Iowa, 181.

Although where an answer on oath is waived, it is not evidence in favor of the defendant for any purpose at the hearing, even when actually sworn to, yet, as a pleading, the plaintiff may avail himself of admissions and allegations made therein, which establish the case made by his bill; *Bartlett v. Gale*, 4 Paige, 504; *Moore v. Hunter*, 1 Gilman, 317; *Miller v. Avery*, 2 Barb. Ch. 582; *Wilson v. Towle*, 36 N. H. 129; and for the purpose of ascertaining what points are at issue. *Dorn v. Bayer*, 16 Md. 144; *Durfee v. McClurg*, 6 Mich. 223; *Smith v. Potter*, 3 Wis. 432; *Union Bank of Georgetown v. Geary*, 5 Peters, 99, 110, 112. [An answer sworn to where the oath is waived will be treated as if it were not. *Stevens v. Post*, 1 Beas. 408; *Hyer v. Little*, 5 C. E. Green, 443; *Sweet v. Parker*, 7 C. E. Green, 453. The oath in such case is not evidence at the hearing. *Walker v. Hill*, 6 C. E. Green, 191. But any admissions made are operative against defendant. *Hyer v. Little* 5 C. E. Green, 443; *Symmes v. Strong*, 1 Stew. Eq. 131.]

is requisite.¹ It is usual for the plaintiff's solicitor to require to see the draft or a copy of the proposed answer, before he applies or consents to the defendant's application, in order that he may be satisfied that it is sufficient:² as no exceptions can be taken to an answer put in without oath or signature, or attestation of honor.³

If the answer is put in by a guardian *ad litem*, or committee, the order should express that the answer is to be put in without the oath or signature of such guardian or committee; and the order will not be acted upon, if it bears date antecedently to the order appointing the guardian.⁴ So, likewise, an order to file the separate answer of a married woman, without oath or signature, will not be acted on, if dated previously to the date of the order giving her leave to answer separately.⁵

The Court will not permit the answer of a defendant, represented to be in a state of incapacity, to be received without oath or signature, though a mere trustee and without interest: the proper

* course, in such case, being for the Court to appoint a guardian *738 by whom the defendant may answer.¹

The method of dispensing with the attestation of honor of a peer or peeress putting in an answer, is, *mutatis mutandis*, the same as the method adopted for dispensing with the oath of a commoner.²

The signature to an answer taken without oath must be attested by the defendant's solicitor, or by some person competent to be a witness: otherwise, the answer cannot be filed. The attestation is written on the left-hand side of the signature.³

An answer put in without oath or attestation of honor or signature, and accepted without either of those sanctions, gives the same authority to the Court to look to the circumstances denied or admitted in the answer so put in, for the purpose of administering civil justice between the parties, as if it was put in upon attestation of honor or upon oath.⁴ No exceptions, however, as we have seen, can be taken to an answer so put in.⁵

¹ Braithwaite's Pr. 47; and see — *v. Lake*, 6 Ves. 171; — *v. Gwillim*, *ib.* 285; Bayley *v. De Walkiers*, 10 Ves. 441; Codner *v. Hersey*, 18 Ves. 468. It would seem from the language of some of the books, that if the plaintiff chooses to dispense with the oath, the Court, upon his motion, will require the defendant to answer without oath, even without the consent of the defendant. Cooper Eq. Pl. 325; Story Eq. Pl. § 874. But in all such cases the dispensation is supposed to be made for the convenience of the defendant, and upon his expressed or presumed consent. The application may be made on the part of the plaintiff or of the defendant, but the order will only be made where both parties consent, and not against the will of either. Brown *v. Bulkley*, 1 McCarter (N. J.), 306; Hinde, 228; Codner *v. Hersey*, *ubi supra*.

² Braithwaite's Pr. 48.

³ Hill *v. Earl of Bute*, 2 Fowl. Ex. Pr. 10; [McCormick *v. Chamberlain*, 11 Paige, 548; Wallace *v. Wallace*, Halst. N. J. Dig. 173; Sheppard *v. Akers*, 1 Tenn. Ch. 326; Smith *v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599. See *infra*, 760.]

⁴ Braithwaite's Pr. 47.

⁵ *Ibid.*

¹ Wilson *v. Grace*, 14 Ves. 172; Matter of Barber, 2 John. Ch. 235; and see Order VII. 3; *ante*, p. 176.

² Hinde, 228.

³ Braithwaite's Pr. 47, 43. For form of attestation, see Vol. III.

⁴ Per Lord Eldon, in Curling *v. Marquis Townshend*, 19 Ves. 628, 630.

⁵ Hill *v. Earl of Bute*, 2 Fowl. Ex. Pr. 10.

SECTION III. — *Swearing, Filing, and Printing Answers.*

A defendant required to answer a bill, whether original or amended, must put in his plea, answer, or demurrer thereto, not demurring alone, within twenty-eight days from the delivery to him, or his solicitor, of a copy of the interrogatories which he is required to answer.⁶ If the plaintiff amends his bill, after interrogatories to the original bill have been served, but before answer, the twenty-eight days will be computed from the service of the amended or new interrogatories; or if no such interrogatories are served, then from the service of a copy of the amended bill.⁷ Where a defendant is required to answer amendments and exceptions together,⁸ he must put in his further answer, and his answer to the amendments of the bill, within fourteen days after he shall have been served with interrogatories for his examination, in answer to the amended bill.⁹ If he does not, and procures no enlargement of the time allowed, he will be subject to the following liabilities:—

*739 *1. An attachment may be issued against him.¹

2. He may be committed to prison, and brought to the bar of the Court.¹

3. The plaintiff may file a traversing note; or proceed to take the bill *pro confesso* against him.²

If the defendant, not being in contempt, submits to exceptions to his answer for insufficiency before they are set down for hearing, he has fourteen days from the date of the submission within which he must put in his further answer.³ If, not being in contempt, he submits to the exceptions after they are set down for hearing, or the Court holds his first or second answer to be insufficient, he must put in his

⁶ Ord. XXXVII. 4; 15 & 16 Vic. c. 86, § 13; *ante*, p. 485.

⁷ Braithwaite's Manual, 156. Where the defendant is served abroad, the times are regulated by the special order directing such service. *Ante*, p. 452.

⁸ *Ante*, p. 413.

⁹ Ord. XXXVII. 6.

¹ *Ante*, Chap. X. § 1. If the defendant is a peer, M. P., corporation aggregate, or *non compos*, or the Attorney-General, the process is of a different kind; *ante*, Chap. X. § 2.

² *Ibid.*; see *ante*, pp. 514, 518. In Massachusetts, "if the defendant shall not appear and file his answer, plea, or demurrer, within one month after the day of appearance, the plaintiff may enter an order to take his bill for confessed, and the matter thereof shall be decreed accordingly, unless good cause shall appear to the contrary." Rule 9 of the Rules for Practice in Chancery.

As to the course of practice in the Court of Chancery, heretofore existing in New York, in regard to the time of filing answers,

and applications for the extension of time, see 1 Hoff. Ch. Pr. 228; 1 Barb. Ch. Pr. 146, 147. A defendant may, on motion, obtain further time to answer. *Carroll v. Parsons*, 1 Bland, 125. After a demurrer overruled, an order for further time to answer merely, can be obtained only by a special application. *Trim v. Barker*, T. & R. 253. After a plea overruled, an order for further time to answer, obtained as of course, is irregular. *Ferrand v. Pelham*, T. & R. 404. A notice of an application for time to answer, and an affidavit filed in support of it, according to the Irish practice, prevent all further proceedings by the plaintiff, until the notice is regularly disposed of by the Court. *Ormsby v. Palmer*, 1 Hogan, 191; see *Burrall v. Raineteaux*, 2 Paige, 331; *Hunt v. Wallis*, 6 Paige, 371; *Hurd v. Haines*, 9 Paige, 604. After an order, allowing further time to answer, it is irregular for the defendant to demur. *Davenport v. Sniffen*, 1 Barb. 223; *Lakens v. Fielden*, 11 Paige, 644; *Bedell v. Bedell*, 2 Barb. Ch. 99.

³ Ord. XVI. 9.

further answer within such time as the Court may appoint.⁴ If he does not answer within the above periods, or obtain further time and answer within such further time, the plaintiff may sue out process of contempt against him.⁵

If a defendant is not required to answer a bill, he may put in a plea, answer, or demurrer, not demurring alone, within fourteen days after the expiration of the time within which he might have been served with interrogatories for his examination, in answer to such bill;⁶ but not afterwards, without leave of the Court.⁷ It follows from these rules, that if a defendant, served within the jurisdiction of the Court, appears within the time limited, he has thirty days from the service of the bill,⁸ or, if he does not appear within the time limited, twenty-two days from the time of his actual appearance,⁹ within which he may put in a voluntary answer.

If the plaintiff amends his bill, without requiring an answer to * the amendments, a defendant who has answered, or has not *740 been required to answer, the original bill, but desires to answer the amended bill, must put in his answer thereto within fourteen days after the expiration of the time within which, if an answer had been required, he might have been served with interrogatories for his examination in answer to such amended bill, or within such further time as the Judge may allow; in this case, therefore, the defendant has thirty days, from the service of the amended bill, within which he must put in his voluntary answer.¹

Where an attachment for want of answer has been executed against a defendant, but he has been discharged from prison or from the custody of the Sergeant-at-arms, or messenger, because he was not brought up to the bar of the Court within the proper time,² he must put in his answer within eight days after such discharge; and if he does not do so, a new attachment for want of answer may be issued against him.³

After a traversing note has been filed and served, a defendant cannot put in his answer without special leave of the Court.⁴ In such a case, the defendant should move to take the traversing note off the file, with leave to put in an answer.⁵

A married woman answering separately, under an order, has the full time from the date of the order to do so.⁶

The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward, until and including the day on

⁴ Ord. XVI. 14. If the defendant is in contempt, on the allowance of exceptions, he cannot apply for further time. *Wheat v. Graham*, 5 Sim. 570.

⁵ Ord. XVI. 15.

⁶ Ord. XXXVII. 5.

⁷ 15 & 16 Vic. c. 86, § 13.

⁸ Ord. X. 3; Ord. XI. 5; Ord. XXXVII.

5.

⁹ *Ibid.*; Braithwaite's Manual, 156.

¹ Ord. XXXVII. 7; *Cheeseborough v.*

Wright, 28 Beav. 173; Braithwaite's Manual, 156.

² See *ante*, pp. 490, 494.

³ Ord. XII. 2, 3.

⁴ Ord. XIII. 7; *ante*, p. 515.

⁵ *Towne v. Bonnin*, 1 De G. & S. 128; *ante*, p. 516. For form of notice of motion, see Vol. III.

⁶ *Ante*, p. 183; Braithwaite's Manual, 11, 12; *Jackson v. Haworth*, 1 S. & S. 161.

which such security is given, are not reckoned in the computation of time allowed a defendant to plead, answer, or demur or otherwise make his defence to the suit.⁷

If a defendant, using due diligence, is unable to put in his answer to a bill within the time allowed, the Judge, on sufficient cause being shown, may, as often as he shall deem right, allow to such defendant such further time, and on such, if any, terms as to the Judge shall seem just.⁸

Applications for further time to answer are made by summons *741 at *Chambers;¹ and should be supported by affidavit, that due diligence has been used, and that further time is necessary.²

If the defendant has not been interrogated, he or his solicitor must also swear, that he is advised and believes that it is necessary, for the purposes of his defence, that he should put in an answer, and that the application is not made for the purpose of delay.³

The summons must be served on the solicitor for the plaintiff two days before the return thereof, exclusive of Sunday,⁴ unless a shorter return be granted, by special leave, on issuing the summons; and a printed copy of the bill, and the interrogatories, if any, to be answered, must be produced at the hearing of the application.⁵ An affidavit in opposition to the application may be filed, and either party may use any affidavit previously filed. Notice of the intention to use an affidavit must, however, be given.⁶ If the plaintiff's solicitor is not in attendance when the summons is called on, an order may be made in his absence, on a case for further time being shown, and subject to the production of the office copy of an affidavit of service on him of the summons.⁷

⁷ Ord. XXXVII. 14.

⁸ Ord. XXXVII. 8; 15 & 16 Vic. c. 86, § 13. [Time may be given, where defendant is interrogated as to a document in plaintiff's possession, until a limited time after the document is produced. *Princess of Wales v. Lord Liverpool*, 1 Swanst. 114, 123, 580; *Jones v. Lewis*, 2 S. & S. 242; *Taylor v. Heming*, 4 Beav. 235. So, time will be granted for answering a cross-bill until the defendant in the original bill has complied with an order for the production of documents. *Holmes v. Baddeley*, 7 Beav. 69. So, in a cross-suit, the defendant may, on motion of course, obtain an order enlarging the time to answer for a limited period after the defendant to the original suit has put in his answer. *Harris v. Harris*, T. & R. 165; *Noel v. King*, 3 Mad. 183; *Waterton v. Croft*, 5 Sim. 502.] A defendant has the whole of the last day specified in the order to answer, in which to serve his answer. *Hoxie v. Scott*, 1 Clarke, 457. And after the time of answering has expired, the defendant may serve an answer at any time before an order to take the bill as confessed is actually entered with the clerk. *Hoxie v. Scott*, 1 Clarke, 457. But the Court may, in its discretion, receive or reject an answer filed after the regular time for answering has passed, and the motion for leave to file it and the decision should appear in

the record. *Lindsey v. Stevens*, 5 Dana, 185; see *Scales v. Nichols*, 3 Hayw. 230; *Fisher v. Fisher*, 4 Hen. & M. 484; *Daly v. Duggan*, 1 Irish Eq. 315; *Vassar v. Hill*, 1 Hayes, 355.

[After *pro confesso* taken, leave to file an answer will only be granted upon good cause shown. Anonymous, 1 Tenn. Ch. 2. And a sufficient answer. *Emery v. Downing*, 2 Beas. 59; *Lewis v. Simonton*, 8 Humph. 185.]

¹ 15 & 16 Vic. c. 80, § 26. Under some special circumstances the application should be made to the Court. *Manchester and Sheffield Railway Company v. Workson Board of Health*, 2 K. & J. 25. For forms of summons, see Vol. III.

² *Brown v. Lee*, 11 Beav. 162; 12 Jur. 687. In practice, however, further time is usually granted, on the first application, without an affidavit. For form of affidavit, see Vol. III.

³ For form of affidavit, see Vol. III.

⁴ Ord. XXXV. 7; Ord. XXXVII. 11. The summons must be served before two o'clock on a Saturday, and before seven o'clock on any other day. Ord. XXXVII. 2.

⁵ Regulations, 8 Aug. 1857, r. 2.

⁶ Ord. XXXV. 27. For form of notice, see Vol. III.

⁷ For form of affidavit, see Vol. III.

This affidavit should, in strictness, be produced to the Chief or Junior Clerk, before the Chambers close on the day the application is heard.

The order on the summons is drawn up in Chambers, and must be entered at the entering seat in the Registrar's Office.⁸

The written consent of the plaintiff's solicitor to further time being given will be acted on at Chambers, without his attendance; but care should be taken, in drawing up an order thereon, that the terms of the consent are strictly pursued; thus, a consent to further time "to answer," will not justify an order being drawn up for time "to plead, answer, or demur."⁹

The Judge is expressly empowered to impose terms, on an application for further time:¹⁰ and, as a general rule, the costs of the first application will be made costs in the cause, but those of subsequent applications will be ordered to be paid by the defendant. It may also be here observed, that if any person who has obtained * any decree *742 or order upon condition, does not perform or comply with such condition, he will be considered to have waived or abandoned such order, so far as the same is beneficial to himself; and any other person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the order may in such case warrant, or such proceedings as might have been taken if no such order had been made, unless the Court otherwise directs.¹ Under the old practice, when a defendant obtained further time, or permission for any other thing upon a condition, if he neglected to perform the condition, he lost all benefit of the permission; but the Court could not compulsorily direct the performance of the condition.²

Where the application for further time came on in open Court, and counsel certified that he required further time, it was given.³ The necessity of the defendant being enabled to state his own defence, as well as give the discovery required by the plaintiff, will be taken into consideration.⁴

The summons for further time to put in the answer should be made returnable before the expiration of the time which the defendant already has for that purpose:⁵ for, if returnable after such time, an attachment may be issued, even though the summons has been served.⁶ An attachment, however, which has been issued after the hearing of an application for further time, and pending the decision upon it, is irregular, and will be discharged.⁷

⁸ Ord. XXXV. 32; Ord. I. 18. No service of an order for time is now necessary. 2 Smith's Pr. 131.

⁹ *Ante*, p. 690; *Newman v. White*, 16 Beav. 4; and see *Hunter v. Nockolds*, 2 Phil. 540; 12 Jur. 149.

¹⁰ Ord. XXXVII. 8. See on this point, *Zulueta v. Vinent*, 15 Beav. 575; see also, *Lee v. Read*, 5 Beav. 381, 386; 6 Jur. 1026; 23 Ord. Dec., 1833; *Sand. Ord.* 781; *Beav. Ord.* 51; Ord. XXXV. 61.

¹ Ord. XXIII. 22.

² *Henley v. Stone*, 4 Beav. 392, 394; *Judd v. Wartnaby*, 2 M. & K. 813, 816.

³ *Byng v. Clark*, 13 Beav. 92.

⁴ *York and North Midland Railway v. Hudson*, *ib.* 69.

⁵ See Ord. XXXVII. 18.

⁶ *Braithwaite's Pr.* 56.

⁷ *Davis v. Tollenache*, 2 Jur. N. S. 564, V. C. S.; see also *Taylor v. Fisher*, 6 Sim. 566; *Barritt v. Barritt*, 3 Swanst. 395, 397.

The defendant cannot, in strictness, apply for further time after an attachment has actually been issued against him, for he is then in contempt;⁸ but where an application in such case is entertained, and an extension of time is granted, it should appear by the order that it is made "without prejudice to the attachment issued against the said defendant for want of answer."

If the Court grants any further time to any defendant for pleading, answering, or demurring to the bill, the plaintiff's right to move for a decree is, in the mean time, suspended.⁹

The answer having been drawn, or perused and settled by counsel, must be written bookwise,¹⁰ or printed,¹¹ on paper of the same size and description as that on which bills are printed.¹² Any
*743 *schedules or documents annexed to the answer must be written on paper of the same kind as the answer itself.¹ Dates and sums occurring in the answer should be expressed by figures, instead of words.²

The Clerk of Records and Writs may refuse to file an answer in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is improperly written, or so altered as to cause any material disfigurement; or in which there is any interlineation: unless the person before whom the answer is sworn duly authenticates such interlineation with his initials, in such manner as to show that it was made before the answer was sworn, and so to mark the extent of such interlineation.³ Where the answer is sworn before one of the Clerks of Records and Writs, and is thereupon left in his custody, he does not usually authenticate the interlineations;⁴ and where, in the case of a joint answer, it is intended to have it sworn by some of the defendants at the Record and Writ Clerks' Office, and by others elsewhere, it is the practice to have it sworn by such other defendants first: if this is not done, and the answer is taken away from the Record and Writ Clerks' Office before it is filed, it must be resworn by the defendants who were sworn to it at that office.⁵

If, after the answer has been sworn, there is discovered any defect in the formal parts, such as the title or jurat, or any unauthenticated alteration or interlineation, the answer must be resworn, unless the plaintiff will consent that the answer be filed notwithstanding such defect.⁶ The consent may be indorsed by the plaintiff or his solicitor

⁸ *Wheat v. Graham*, 5 Sim. 570, decided on the 8th Ord. of 3 April, 1828; Sand. Ord. 714; Beav. Ord. 7.

⁹ 15 & 16 Vic. c. 86, § 13; see *post*, Chap. XX., *Motion for Decree*.

¹⁰ Ord. 6 March, 1860, r. 1.

¹¹ *Ib.* r. 5; as to printing answers, see *post*, pp. 755, 756.

¹² As to such paper, see Ord. IX. 3, *ante*, p. 361; but an answer not so written has been allowed to be filed under special circumstances; the application in such case must always be made to the Court. *Harvey v.*

Bradley, 10 W. R. 705, M. R.; *Whale v. Griffiths*, 10 W. R. 571, L. J.J.; *Morris v. Honeycombe*, 2 N. R. 16, V. C. W.

¹ *Whale v. Griffiths*, *ubi sup.*; under special circumstances, schedules not so written were allowed to be filed: S. C.

² Ord. 6 March, 1860, r. 3; Ord. IX. 3.

³ Ord. I. 36; 15 & 16 Vic. c. 86, § 25.

⁴ *Braithwaite's Pr.* 52.

⁵ *Ibid.*; *Attorney-General v. Hudson*, 9 Hare Ap. 63; 17 Jur. 205.

⁶ See *Sittington v. Brown*, 7 Leigh, 271; *ante*, p. 734 note.

on the answer itself; or an order of course, may, with his consent, be obtained at the Rolls, on a petition of course, allowing the answer to be filed; but the defect must be specified in the consent or order.⁷ The giving such consent will not waive the right to except to the answer for scandal or insufficiency; but as it might affect an indictment for perjury, the plaintiff's solicitor should, as a general rule, see the answer before the consent is given.⁸

The answer must, as has been before stated,⁹ unless an order has been obtained to file it without oath, or without oath or signature, be signed and sworn by the defendant.¹⁰ Under the old practice, * it was necessary, where the answer was upon oath, and was in- *744 tended to be sworn beyond twenty miles from London, that a commission should issue for the purpose of taking it. Now, however, the practice of issuing commissions to take pleas, answers, and disclaimers, in causes pending in the Court, has been abolished with respect to pleas, answers, and disclaimers taken within the jurisdiction of the Court; and any such plea, answer, or disclaimer may be filed without any further or other formality than is required in the swearing and filing of an affidavit.¹

Where the answer is sworn within the jurisdiction, it must, if taken in London, or within ten miles of Lincoln's Inn Hall, be sworn before a Clerk of Records and Writs,² the Clerk of Enrolments in Chancery,² or a London Commissioner to administer oaths in Chancery;³ and, if taken in any place in England or Wales, ten miles or more from Lincoln's Inn Hall, before a Commissioner to administer oaths in Chancery in England.⁴ The Commissioners to administer oaths in Chancery in London and England are appointed by the Lord Chancellor, and are, in practice, solicitors of ten years' standing.⁵ The London Commissioners have power to administer oaths at any place within ten miles of Lincoln's Inn Hall,⁶ and the Country Commissioners at all other places in England and Wales.⁷

Where the answer is taken in Scotland, Ireland, the Channel Islands, the Isle of Man,⁸ or in any place in foreign parts under the dominion of

⁷ Braithwaite's Pr. 48; but see Pilkington v. Himsworth, 1 Y. & C. Ex. 612. For forms of consent and petition, see Vol. III.

⁸ Braithwaite's Pr. 48.

⁹ *Ante*, p. 734.

¹⁰ *Ante*, pp. 734, 735 and notes. For New Hampshire, see 38 N. H. 611, Chancery Rule, 30. In the United States Courts, every defendant may swear to his answer before any justice or judge of any Court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any Master in Chancery appointed by any Circuit Court, or before any judge of any Court of a State or Territory. Equity Rule, 59.

¹ 15 & 16 Vic. c. 86, § 21. The form of oath to be administered to the defendant is not altered by this enactment. Attorney-General v. Hudson, 9 Hare Ab. 63; 17 Jur. 205.

² Ord. I. 39.

³ 16 & 17 Vic. c. 78, § 2.

⁴ *Ib.* § 1; Ord. IV. The following fees are payable to the person taking an answer: before an officer of the Court, 1s. 6d., payable in stamps, but nothing for marking exhibits; before a London commissioner, 1s. 6d., and 1s. for marking each exhibit; and before a country commissioner, 2s. 6d., and 1s. for each exhibit; 16 & 17 Vic. c. 78, § 2; Regul. to Ord. Sched. 2, 4.

⁵ 16 & 17 Vic. c. 78. For the course of procedure to obtain such appointment, see Braithwaite's Oaths in Chan. 4-11.

⁶ 16 & 17 Vic. c. 78, § 2; *Re* Record and Writ Clerks, 3 De G., M. & G. 723; 18 Jur. 499; Hill v. Tollit, 3 De G., M. & G. 725 n.

⁷ 16 & 17 Vic. c. 78, §§ 1, 5; Ord. IV.

⁸ See 16 & 17 Vic. c. 78, § 6.

her Majesty,⁹ it may be sworn before any Judge, Court, notary public, or person legally authorized to administer oaths in such country or place respectively; and the Court of Chancery will take judicial notice of the seal or signature of such Judge, Court, notary public, or person attached or subscribed to the answer.¹⁰ In the case of an answer taken *745 in the Channel * Islands, or the Isle of Man,¹ or in Scotland or Ireland,² it may also be sworn before Commissioners appointed by the Lord Chancellor to act in such places, respectively.

Where the answer is taken in any place out of the dominions of her Majesty, it may be sworn before any British ambassador, envoy, minister, chargé d'affaires, or secretary of legation or of embassy, exercising his functions in any foreign country, or before any British consul-general, or consul, vice-consul,³ acting consul, pro-consul, or consular agent exercising his functions in any foreign place,⁴ whose seal or signature, affixed, impressed, or subscribed on or to the answer, is admissible in evidence, without proof of such seal or signature being the seal or signature of the person whose seal or signature it purports to be, or of the official character of such person.⁵

An answer may also be sworn abroad before Commissioners specially appointed for that purpose, according to the former practice of the Court, as hereafter explained.⁶

If the defendant is an invalid, and resident at any place within ten miles from Lincoln's Inn Hall, one of the Clerks of Records and Writs will, upon a memorandum in writing bespeaking his attendance being left with him, and upon his necessary expenses being paid, attend upon such defendant, for the purpose of taking his answer.⁷ It is, however, now more usual to procure the attendance of a London Commissioner.⁸

In order to relieve persons in prison from the expense of procuring the attendance of a Commissioner to take their answer or affidavit, the Lord Chancellor may appoint the Warden, Keeper, or other chief officer of every prison within the city of London or the bills of mortality, and their deputies, to be Commissioners, for the purpose of taking and receiving such affidavits and answers as any person or persons, within any such prison, shall be willing and desirous to make, and for no other purpose.⁹

⁹ For a list of these places, see Braithwaite's Oaths in Chan. 18-20; and *post*, Vol. III.

¹⁰ 15 & 16 Vic. c. 86, § 22. This section is retrospective; *Bateman v. Cook*, 3 De G., M. & G. 39; and see *Haggett v. Iniff*, 5 De G., M. & G. 910; 1 Jur. N. S. 49.

¹ 16 & 17 Vic. c. 78, §§ 3, 6.

² 6 & 7 Vic. c. 82, § 1.

³ 15 & 16 Vic. c. 86, § 22.

⁴ 6 Geo. IV. c. 87, § 20; 18 & 19 Vic. c. 42, § 1. These Acts do not mention answers, but there can, it is conceived, be no doubt that they apply to them.

⁵ 15 & 16 Vic. c. 86, § 22; 18 & 19 Vic. c. 42, § 3.

⁶ See *post*, pp. 747-752.

⁷ Braithwaite's Pr. 514. The memorandum must bear a 10s. fee fund stamp; Regul. to Ord. Sched. 4. Reasonable payment for travelling expenses will be allowed; Braithwaite's Oaths in Chan. 27. For form of memorandum, see Vol. III.

⁸ If a commissioner attends elsewhere than at his own office to administer an oath, he is entitled to reasonable payment for his travelling expenses; but there is no fixed fee for his attendance. Braithwaite's Pr. 349.

⁹ 1 Will. IV. c. 36, § 15, r. 20; 16 & 17 Vic. c. 78, §§ 1, 5; and see 23 & 24 Vic. c. 149, § 3; 25 & 26 Vic. c. 104; and *ante*, pp. 501, 502.

The jurat to an answer should be written, either at the end of the answer or of the schedule thereto;¹⁰ it is usually placed at the right-hand corner of the end of the answer.¹¹ It may be written * on either side of the page, or on the margin; but not on a page *746 upon which no part of the statements in the answer appears. If there are many defendants who are sworn together, one jurat is sufficient. If the defendants are sworn at different times, there must be separate jurats for each defendant, or each set of defendants swearing. The jurat must correctly express the time when, and the place where, the answer is sworn.¹ The defendant must sign his name, or put his mark, at the side of the jurat: not underneath it;² and the person before whom the answer is sworn must sign his name at the foot thereof; to which must be added his full official character and description:³ not necessarily, however, in his own handwriting. Any schedule should be signed, both by the defendant and the person before whom the answer is sworn.³ The oath must be administered in a reverent manner,⁴ and, if not administered in the usual form, the authority for the form in which it is administered should appear in the jurat.⁵

The answer of a person entitled to the privilege of peerage is taken upon his protestation of honor;⁶ that of a corporation aggregate, under their common seal;⁷ that of a Quaker, Moravian, ex-Quaker, ex-Moravian, or Separatist, upon his solemn affirmation.⁸

If the defendant be blind, or a marksman, the answer must be first truly, distinctly, and audibly read over to him, either by the person before whom it was sworn or some other person: in the first case, it must be expressed in the jurat that the answer was so read over, and that the signature or mark of the defendant was affixed in the presence of the person taking the answer; in the second case, such other person must attest the signature or mark, and must be first sworn that he has so read over the answer, and that the signature or mark was made in his presence; and this must be expressed in the jurat.⁹

In the case of a foreigner, not sufficiently versed in the English lan-

¹⁰ Braithwaite's Pr. 342, n. (a).

¹¹ See *Whelpley v. Van Epps*, 9 Paige, 332.

¹ *Ibid.*; 18 & 19 Vic. c. 134, § 15; Ord. IV. The jurat to a bill is not rendered defective by the absence of a statement of the county where the bill was sworn to. *Barnard v. Darling*, 1 Barb. Ch. 218; see *Smith Ch. Pr.* (3d ed.) 352.

² *Anderson v. Stather*, 9 Jur. 1085. [When the verification of an answer is in the form of an affidavit, the name of the respondent must be subscribed at the foot of the affidavit; when in the form of a certificate of the officer who administered the oath, the name of the respondent should be subscribed to the answer. *Pincers v. Robertson*, 9 C. E. Green, 348; *Hathaway v. Scott*, 11 Paige, 173.]

³ Braithwaite's Pr. 342. This has been held to be unnecessary, where the answer is

sworn before the Clerk of Enrolments; *Wilton v. Clifton*, 2 Hare, 535; 7 Jur. 215; and is omitted by the Record and Writ Clerks, where answers are sworn before them.

⁴ Ord. XIX. 14.

⁵ 1 & 2 Vic. c. 105; see Braithwaite's Oaths in Chan. 25; and forms, *post*, Vol. III.

⁶ Ord. XV. 6; *ante*, pp. 734, 735; see form, Vol. III.

⁷ Ord. XV. 6; *ante*, p. 735 and note.

⁸ Ord. XV. 6; and statutes cited *ante*, pp. 734, 735. As to the answer of the Secretary of State for India, or of the Attorney-General, see *ante*, p. 735. For forms, see Vol. III.

⁹ The attestation may be written near the jurat. Braithwaite's Pr. 380, 396; and see *Wilton v. Clifton*, 2 Hare, 535; 7 Jur. 214. For forms, see Vol. III.

guage to answer in that tongue, and desiring to answer in a foreign language, an order of course to do so must be obtained, on motion, *747 or on petition at the Rolls. The answer must be * engrossed on paper, in the foreign language; and the defendant, together with an interpreter, must then attend before a person authorized to administer oaths in Chancery; the interpreter is first sworn in English that he well understands the foreign language, and that he will truly interpret the oath about to be administered to the defendant; and the ordinary oath is next administered to the latter.¹ The defendant must previously sign his name opposite the jurat; and the interpreter should do the same. Before the answer can be filed, it is necessary to obtain an order of course, either on motion, or on petition at the Rolls,² appointing the interpreter or another person to make, and swear to the truth of, a translation thereof, and directing the answer to be filed, with such translation annexed.³ The translator must then attend with the answer, translation, and order before a person authorized to administer oaths in Chancery, and be sworn to the truth of the translation:⁴ after which, the answer and translation will be filed at the Record and Writ Clerks' Office, on production of the order.⁵

A foreigner may also answer in English, although ignorant of that language.⁶ No order to do so is necessary; but where the defendant is not sufficiently versed in English to understand the language of the answer, and of the oath, the answer must be interpreted to him by some person skilled in a language understood by both; after which, both must attend before a person authorized to administer an oath in Chancery. The interpreter must first be sworn that he well understands the foreign language; that he has truly, distinctly, and audibly interpreted the contents of the answer to the defendant; and that he will truly interpret the oath about to be administered to him; after which, the ordinary oath is administered to the defendant, through the interpreter.⁷ The defendant must, and the interpreter should, first sign the answer, opposite the jurat.⁸

In all the above cases, the jurat must express that the necessary formalities have been observed.⁹

Formalities of a similar nature, by which it may appear that the defendant fully understands the contents of his answer before he is sworn to it, must be adopted where the defendant is deaf, or deaf and dumb, and in every like case.¹⁰ In a case, however, which *748 occurred in the 18th Geo. II. (1745), a different course * appears to have been adopted: for there the Court, on motion (the

¹ For forms of oath and jurat, see Vol. III.

² For forms of motion paper and petition, see Vol. III.

³ *Simmonds v. Du Barré*, 3 Bro. C. C. 263; *Lord Belmore v. Anderson*, 4 Bro. C. C. 90.

⁴ For form of jurat, see Vol. III.

⁵ *Braithwaite's Pr.* 45.

⁶ *Hayes v. Deguin*, 1 Hogan, 274.

⁷ *St. Katherine Dock Company v. Mantzgu*, 1 Coll. 94; 8 Jur. 237; *Braithwaite's Pr.* 45, 389. For forms of oaths, see Vol. III.

⁸ For forms of jurats, see Vol. III.

⁹ *Ibid.*

¹⁰ *Reynolds v. Jones*, Trin. Term, 1818; *Braithwaite's Pr.* 383, 395; see Vol. III., for forms of jurats.

defendant being deaf, and incapable of giving instructions for his answer), ordered a commission for taking the answer to issue in the old way with the bill annexed, in order that the commissioners themselves might endeavor to take the answer.¹

It is an universal principle, in all Courts, that any irregularity in a jurat may, unless expressly waived, be objected to in any stage of a cause. This does not depend upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rules of the Court;² and therefore a motion to take an answer off the file, on the ground of such an irregularity was allowed, notwithstanding the plaintiff had taken an office copy of the answer.³ If, by any accident, the jurat is cancelled, the answer must be resworn, and a new jurat added.⁴

As we have seen, the practice of issuing Commissions for the purpose of taking answers is now abolished, in all cases where the answer is to be sworn within the jurisdiction of the Court;⁵ and the various enactments, under which answers may be sworn out of the jurisdiction, have been considered;⁶ but, if no person can be found who is authorized, under such enactments, to administer the oath, a commission under the old practice is still necessary;⁷ and, consequently, the mode of proceeding in such case must be stated.

A commission to take an answer abroad will only be issued upon an order;⁸ which may be obtained, as of course,⁹ on motion or petition.¹⁰ After the order has been obtained, the defendant's solicitor must give notice in writing to the plaintiff's solicitor, to furnish him with the names of commissioners to see the answer taken, on the plaintiff's part.¹¹

¹ Gregory v. Weaver, 2 Mad. Prac. 363.

² Pilkington v. Hinsworth, 1 Y. & C. Ex. 612, 616; see Barnard v. Darling, 1 Barb. Ch. 218. [An answer without authentication of the jurat by the signature of the proper officer may be treated as no answer. Westfield v. Bried, 11 C. E. Green, 357. And if the certificate to the official character of a justice of the peace, by whom the oath is administered in another State, is defective, as where the prothonotary failed to state that he was Clerk of the Court in which the justice presided, the answer will only stand as resp. Chester v. Canfield, 1 Tenn. Leg. Rep. 258. But it is sufficient if the official character of the notary, who administers the oath, is stated in the body of the jurat, without being annexed to the signature. Feuchtwanger v. McCool, 2 Stew. Eq. 151.]

³ Ibid., and see ante, p. 743.

⁴ Attorney-General v. Hudson, 9 Hare Ap. 63; S. C. nom. Attorney-General v. Henderson, 17 Jur. 205; and see Attorney-General v. Donnington Hospital, 17 Jur. 206, V. C. W.

⁵ 15 & 16 Vic. c. 86, § 21; ante, p. 744.

⁶ Ante, pp. 744, 745; and see 6 Geo. IV. c. 87, § 20; 6 & 7 Vic. c. 82; 15 & 16 Vic. c.

86, § 22; 16 & 17 Vic. c. 78, § 6; 18 & 19 Vic. c. 42, § 1.

⁷ When the defendant is absent from the country, the oath to his answer may be taken under a commission. Trumbull v. Gibbon, Halst. Dig. 225; Read v. Consequa, 4 Wash. C. C. 335; Stotesbury v. Vail, 2 Beasley, (N. J.), 390, 394. An answer by a defendant beyond sea, must be taken and sworn to before a commissioner, under a *dedimus* issued by the Court in which the case is pending, directing him to administer the oath in the most solemn forms observed by the laws and usages of the country where the answer is taken. Read v. Consequa, 4 Wash. C. C. 335. In New York, an answer in Equity, must, if made by a person out of the State, be sworn to before a judge of some Court having a seal. A Master extraordinary, in the English Court of Chancery, had not the authority to administer such oath. Lahens v. Fielden, 1 Barb. Ch. 52.

⁸ Baron de Feuchères v. Dawes, 5 Beav. 144.

⁹ Veal's Pr. 52.

¹⁰ For forms of motion paper and petition, see Vol. III.

¹¹ For form of notice, see Vol. III.

*749 *The plaintiff's solicitor thereupon, if he intends to join in the commission, should send the names of two or more commissioners to the defendant's solicitor, and inform him to which of them the defendant is to give notice of executing the commission. The defendant adds to these commissioners the names of two or more on his own part; ¹ the names of all of them, or of the four agreed upon, are inserted in the commission: the defendant's commissioners being placed first in order.² Two on each side are usually named.³ If the plaintiff's solicitor omits to give his commissioners' names, within a reasonable time, and will not consent to the commission being directed to the defendant's commissioners only, it seems the defendant should obtain an order of course on motion, or on petition at the Rolls,⁴ requiring the plaintiff to name commissioners within two days after notice of the order, or, in default, that the defendant may issue the commission directed to his own commissioners.⁵ The order must be served on the plaintiff's solicitor; and if, within the time prescribed, the plaintiff does not furnish commissioners' names, the commission is made out in favor of the defendant's commissioners only.

None of the commissioners need be professional men; and it has been held that the defendant's own solicitor may be a commissioner to take his answer.⁶ It is no objection to a commissioner that he is under twenty-one years of age, provided he is of sufficient age to take an oath.⁷

Care must be taken to have the commission, with the answer, returned before the time limited for filing the answer has expired.⁸

The commission is prepared by the defendant's solicitor, and is sealed by the Clerk of Records and Writs, upon a *præcipe* being left with him.⁹

Where the defendant is entitled to the privilege of peerage, the words, "upon his protestation of honor" are inserted in the commission, instead of the words, "on his corporal oath upon the Holy Evangelists."¹⁰

Where the defendant is a Quaker, Moravian, Separatist, or
*750 other *person exempted from taking an oath by statute, the writ should direct the commissioners to take the answer on his solemn declaration or affirmation.¹

¹ Hinde, 231; 1 Turn. & Ven. 542; Ord. III. 1.

² Veal's Pr. 51.

³ 1 Turn. & Ven. 542; Veal's Pr. 51.

⁴ For forms of motion paper and petition, see Vol. III.

⁵ Hinde, 229; Harr. by Newl. 171; 1 Turn. & Ven. 542.

⁶ Bird v. Branker, 2 S. & S. 186; see *contra*, as to swearing affidavits within the jurisdiction before the deponent's own solicitor, or his clerk, *Re Hogan*, 3 Atk. 813; *Hopkin v. Hopkin*, 10 Hare Ap. 2; *Wood v. Harpur*, 3 Beav. 290; *Foster v. Harvey* (1), 11 W. R. 899, V. C. W.; 3 N. R. 98, L. J.J.

⁷ Wyatt's P. R. 117.

⁸ See *Hughes v. Williams*, 5 Hare, 211. Issuing the commission does not, *per se*, extend the time for answering; and therefore the plaintiff, though he has joined in the commission, may issue an attachment for want of answer, before the return of the commission, if the time for answering has expired. *Boschetti v. Power*, 8 Beav. 180; *Hughes v. Williams*, *ubi sup.*

⁹ Ord. III. 1; Ord. I. 37; for forms of *præcipe*, commission, and indorsement, see Veal's Pr. 52, 57; and *post*, Vol. III.

¹⁰ Hinde, 239, n.

¹ See statutes cited, *ante*, pp. 734, 735 n., and form of commission, Vol. III.

Where the defendant is a Jew, the words, "upon the Holy Evangelists," may be left out of the form of the oath mentioned in the commission.

And where a defendant was a Gentoo, and the answer was to be taken in Calcutta, the commission was directed to be in a special form, authorizing the commissioners to administer the oath in the most solemn manner, as in their discretion should seem meet; or, if they should think proper, to administer another oath, certifying to the Court what they did.²

The above distinctions in the form of commissions are necessary to be attended to, because a commission to take an answer in one form, will not authorize the commissioners taking it in another; thus, commissioners will not, under an authority to take an answer upon oath, be empowered to take the affirmation of a Quaker; and where it appeared by the caption of the answer that they had done so, the answer was ordered to be taken off the file.³

The commission may be sent to some professional person in the foreign country, to take care that it is properly executed. Though the foreign country be at war with this country, it must be executed there; in which respect, a commission to take an answer differs from a commission to examine witnesses: which it seems may be executed at the nearest neutral port.⁴ The manner of executing the commission is as follows: When the plaintiff has named commissioners, notice in writing, of the time and place of executing the commission, signed by two of the defendant's commissioners, must be served upon the plaintiff's acting commissioner, six days before the day appointed for executing the commission.⁵ If this notice be given on a Sunday, the commission may be executed on the Saturday following.⁶

If the party who has the carriage of the commission gives notice of executing it, but neither countermands it in due time (as three or four days before the time, or as the distance of the place may require), nor executes it at the time, the Court, on motion, will order costs to be taxed for the adverse party's attendance.⁷

Where the plaintiff has not named commissioners, no notice need be given, and the commission may be executed by the commissioners named in the writ, *ex parte*.⁸

* On the day appointed, the commissioners are to meet, and if *751 one only attends on each side it will be sufficient; but in case none of the plaintiff's commissioners attend, the defendant must have two commissioners present: because no fewer than two can take his answer and return the writ.¹

It seems, that where there is a joint commission, and the commis-

² *Ramkissenseat v. Barker*, 1 Atk. 19, 20; ante, pp. 735, 736.

³ *Parke v. Christy*, 1 Y. & J. 533.

⁴ — *v. Romney*, Amb. 62.

⁵ For form of notice, see Vol. III.

⁶ *Wyatt's Pr.* 115.

⁷ *Ib.* 116.

⁸ *Hinde*, 234; 1 *Turn. & Ven.* 544.

¹ *Wyatt's P. R.* 116; *Hinde*, 235; 1 *Turn. & Ven.* 544.

sioners of one party only attend, the commissioners in attendance may, after waiting till six o'clock in the evening, proceed to take the answer.²

When the commissioners are ready to proceed, the answer or plea, properly written, as before explained,³ is produced to the commissioners, and the defendant attends for the purpose of swearing it: whereupon one of the commissioners, having opened the commission, interrogates the defendant in the following manner:⁴ "Have you heard this your answer read? and do you exhibit it as your answer to the bill of complaint of A. B.?" upon which, the defendant answering in the affirmative, the commissioner proceeds to administer to him the oath, or affirmation, or attestation of honor (as the case may be), in the same form as when the answer is sworn in England.⁵

It is said, that commissioners may refuse to execute the commission, unless they are allowed to read the answer;⁶ and where a commission to take a defendant's answer only has been issued, and the defendant tenders a demurrer to the commissioners, and refuses to answer upon oath, they must return such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the Court.⁷

Before the defendant is sworn, as above stated, he must sign his answer and each schedule thereto, in the presence of the commissioners;⁸ and the answer thus taken, together with the schedules (if there are any), are to be annexed to the commission, and the commissioners must then write and sign the caption at the foot of the answer.⁹ Any alterations made in the answer or schedules, previous to the taking thereof, must be authenticated by the commissioners, according to the practice in use with respect to affidavits.¹⁰

This caption must be varied according to the nature of the case; thus, in the case of a peer, it must state the answer to have been

*752 * taken "upon the attestation of honor;" in the case of a

Quaker or Moravian, or other person exempted from taking an oath by statute, it must be expressed to have been taken upon the "solemn affirmation;" and the date when, and the place where, it was taken must also appear in the caption. Care must also be taken to express correctly whether the document be an answer, or an answer coupled with a plea or demurrer.¹ The commissioners should also be particular, when the answer is by two or more defendants, to state that they are all sworn: because, where the caption of the joint and several answer of two defendants expressed only that it was sworn, without

² Wyatt's P. R. 116; see *Griggs v. Staple*, 11 Jur. 920, V. C. K. B.

³ *Ante*, p. 743.

⁴ *Hinde*, 235; 1 Turn. & Ven. 544.

⁵ *Ibid.*; *ante*, p. 688. For forms see Vol. III.

⁶ *Harr. by Newl.* 176.

⁷ Wyatt's P. R. 118.

⁸ Ord. XV. 5. Where the defendant is blind, or deaf and dumb, or a foreigner, or a marksman, the directions before given in these respects, must of course be attended to, and the caption varied accordingly.

⁹ For form of caption, see Vol. III.

¹⁰ 15 & 16 Vic. c. 85, § 25; *ante*, p. 743.

¹ *Hinde*, 236; 1 Turn. & Ven. 545.

stating that the defendants were both sworn, the answer was suppressed.²

The answer and schedules, with the caption, being thus annexed to the writ, the return must be endorsed upon the writ, and be signed by two commissioners.³ All these documents should then be folded together, in a convenient size and form, and bound round with tape or string: at the crossings of which the seals of the commissioners should be affixed; they should then sign their names in the vacant spaces, near their respective seals, enclose the whole in an envelope, and direct and return the same to the defendant's solicitor to be filed. The oath of a messenger is not now required.⁴

By the old practice of the Court, no second commission could be granted without the special order of the Court, upon good reason to induce the same, or upon the plaintiff's own assent;⁵ and it does not appear that any alteration has been made in this respect. If, therefore, a commissioner dies, application must be made to the Court for a new commission: preparatory to which, it seems that the usual course is for the solicitor to name two more commissioners, one of whom must be struck by the solicitor of the adverse party, and the Court must then be moved for a new commission, with the new commissioner added to those who are living.⁶

If, by the fault of the party who has the carriage of the first commission, the other is put to unnecessary charges, the Court will order his costs to be taxed, and, upon cause shown, direct the party in fault to give security to pay them before he has a second commission; and if he has the carriage of the second commission, to pay the costs upon that also, if he again fails.⁶

After an answer has been reported insufficient, no new commission will be issued, except by order made on affidavit showing * some good reason, and payment of the costs of the insufficient *753 answer.¹ A new commission may, however, be issued, upon the consent of the plaintiff's solicitor: which is seldom, if ever, refused.

It seems that, if the return of a commission be delayed, it may be hastened by motion. It seems, also, that an attachment and other process of contempt may issue against the commissioners, for not returning the commission with the answer.² Where, however, it appeared that the omission to make a return arose from the circumstance of one of the plaintiff's commissioners refusing to join with one of the defendant's, to take the answer, the attachment was discharged, upon payment of the ordinary fees, and a new commission was granted to different commissioners named by the defendant.³

Where any irregularity has taken place in the execution of a commission, the proper course appears to be, to move, after the return, that

² Anon., Mos. 238.

³ Hinde, 236; Turn. & Ven. 545. For form of return, see Vol. III.

⁴ 15 & 16 Vic. c. 86, § 25.

⁵ Wyatt's P. R. 115.

⁶ *Ib.* 116.

¹ Beames's Ord. 183; Harr. by Newl. 202.

² Wyatt's P. R. 116.

³ *Ibid.*

the commission and answer may be quashed, or that the answer may be taken off the file.

Where the friends of an infant wish to defend the suit on his behalf, an order appointing a guardian *ad litem* may, as we have seen,⁴ be obtained on motion of course, or on petition of course at the Rolls;⁵ and where the defence of the infant is by an answer or plea requiring to be upon oath, the plea or answer must be sworn to by the guardian,⁶ unless an order has been obtained to take it without oath. The guardian, however, only swears to his belief in the truth of the defence of the infant.⁷ The order appointing the guardian must be produced at the time the answer is sworn; and the jurat must express that the answer is sworn pursuant to it.⁸

We have before seen, that a person who has been found a lunatic by inquisition, answers by his committee, and that, in such case, it is not necessary that there should be any order appointing a guardian, unless

there be a conflict of interest between the committee and the
*754 lunatic: in which case, a guardian *ad litem* should be appointed.¹

A person of weak or unsound mind,² not so found by inquisition, answers by his guardian, who is appointed in the same manner as the guardian *ad litem* of an infant defendant;³ and, as in the case of infants, the guardian only swears to his belief in the truth of the defence, where an oath is required,⁴ and the order appointing the guardian must be produced at the time the answer is sworn; and the jurat must express that the answer is sworn pursuant to it.⁵

With respect to married women, we have before seen,⁶ that where a husband and wife are defendants to a bill, neither of them can regularly put in an answer without the other, except under an order granted for that purpose.⁷ Where, however, the wife is defendant to a bill filed by her husband,⁸ or, being judicially separated, or, having obtained a protection order, is sued as a *feme sole*,⁹ no order is requisite. Where she

⁴ *Ante*, p. 160.

⁵ In the United States Courts, guardians *ad litem* to defend a suit may be appointed by the Court, or by any Judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable, may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the Court may direct for the protection of infants and other persons. Equity Rule, 87.

⁶ And it is termed his answer, and not that of the infant. *Rogers v. Cruger*, 7 John. 581; and the infant is not bound by it, if he dissents within a proper time. *James v. James*, 4 Paige, 115; *Pruzman v. Pittsell*, 3 Harr. & J. 77; *Mills v. Dennis*, 3 John. Ch. 367; *Winston v. Campbell*, 4 Hen. & M. 777; *Mason v. Debow*, 2 Hayw. 178. Such answer cannot be read against the infant. *Stephenson v. Stephenson*, 6 Paige, 353. Nor is it evidence in his favor, though it be responsive to the bill and sworn to by the guardian *ad litem*. *Bulkley v. Van Wyck*, 5

Paige, 536; *Stephenson v. Stephenson*, 6 Paige, 353. [*Ante*, 169, n. 2.]

⁷ *Braithwaite's Pr.* 393; see form of oath, Vol. III.

⁸ Ord. VII. 4; *Braithwaite's Pr.* 393. For form of jurat, see Vol. III.

¹ *Ante*, p. 175.

² Superannuated persons, on proof of imbecility, may appear and answer by guardian. *Matter of Barber*, 2 John. Ch. 235; see *Murkle v. Murkle*, 4 John. Ch. 168.

³ *Ante*, p. 176; *Braithwaite's Pr.* 393, n.

⁴ For form of oath, see Vol. III.

⁵ For form of jurat, see Vol. III.

⁶ *Ante*, pp. 180, 182.

⁷ A joint answer of husband and wife must be sworn to by both, unless the plaintiff consents to receive such answer upon the oath of the husband only. *New York Chemical Co. v. Flowers*, 6 Paige, 654; *Leavitt v. Cruger*, 1 Paige, 422.

⁸ *Ante*, p. 179; *Earl v. Ferris*, 19 Beav. 67; 1 Jur. N. S. 5.

⁹ *Ante*, p. 178.

answers separately, under an order, her time for answering runs from the date of the order.¹⁰ Where the answer is filed under such an order, the jurat should state that the answer is sworn pursuant to the order,¹¹ and the order should be produced at the time the answer is sworn; otherwise, the order must be produced when the answer is presented for filing.¹²

Where a married woman is an infant, her answer cannot be taken, either jointly or separately, until a guardian has been assigned to her.¹³

An answer is filed in the Record and Writ Clerks' Office, in the same manner as an affidavit;¹⁴ and is not considered of record until filed.¹⁵ The year, letter, and number by which the cause is distinguished in the Record and Writ Clerks' Books,¹⁶ and the date of the filing, must be written or printed on the first page.¹⁷

The name and place of business or residence, as the case may be, of the solicitor or party filing the answer, and his address for service, if any, must be indorsed thereon, as in the case of other *plead- *755 ings and proceedings.¹ If the answer is put in without oath or signature, the order must be produced at the time the answer is presented for filing, and the record is inscribed "Without oath (or, without oath or signature, as the case may be), by order dated the — day of —." ² Where the answer is put in by a guardian, and the order appointing the guardian has not been previously entered at the Record and Writ Clerks' Office, it must also be produced when the answer is presented for filing.³

Unless the plaintiff has taken some step which prevents its reception, an answer will be filed by the Record and Writ Clerk, after the expiration of the time for putting it in, where it is put in by a defendant who has been required to answer the bill, whether original or amended, or where, the plaintiff having amended his bill without requiring an answer, it is put in by a defendant who has already answered or pleaded to the bill.⁴ In all other cases, an answer will not be received, after the expiration of the time within which it ought to have been put in, except under the authority of an order: which must be produced at the time the answer is presented for filing.⁵ Such order must be applied for by summons.⁶

As an answer is not strictly reputed such until filed,⁷ it ought not to

¹⁰ *Ante*, pp. 183, 740; *Jackson v. Haworth*, 1 S. & S. 161; *Braithwaite's Manual*, 11, 12.

¹¹ If not so verified, the answer will be suppressed for irregularity. But the irregularity will be waived by the plaintiff's filing a replication. *Fulton Bank v. Beach*, 2 Paige, 307; *S. C. 6 Wend. 36*; *Collard v. Smith*, 2 Beasley (N. J.), 43, 45; see *Leavitt v. Cruger*, 1 Paige, 432; *Perine v. Swaine*, 1 John. Ch. 24; *Smallwood v. Lewin*, 2 Beasley (N. J.), 123, 125.

¹² *Braithwaite's Pr.* 45, 397, n.

¹³ *Colman v. Northcote*, 2 Hare, 147; 7 Jur. 528. For petition to assign guardian, and affidavit in support, see Vol. III.

¹⁴ 15 & 16 Vic. c. 86, §§ 21, 25; *Ord. I.* 35.

¹⁵ *Ord. VIII.* 3.

¹⁶ *Ord. I.* 48.

¹⁷ *Ord. I.* 45.

¹ *Ord. III.* 2, 5; *ante*, pp. 453, 454.

² *Braithwaite's Pr.* 47.

³ *Ibid.*

⁴ *Ib.* 55, 56.

⁵ *Ib.* 56.

⁶ For form of summons, see Vol. III.

⁷ *Ord. VIII.* 3. An answer to a bill in Equity, complete in every respect, cannot be treated as an answer, until the party has filed it. *Giles v. Eaton*, 54 Maine, 186. If the defendant dies before filing his answer, it cannot be filed by his solicitor as an answer. *Giles v. Eaton*, *ubi supra*.

be filed until the costs of contempt for not answering, if incurred, are paid. It is frequently, however, the practice to file the answer before the costs of contempt have been paid, and in such case, the plaintiff must be careful not to take an office copy of the answer, or do any other act which may be construed into an acceptance of the answer: for, if he does, he will waive the contempt.⁸ The certificate of the Record and Writ Clerk is conclusive evidence as to the time at which the answer was filed.⁹

Notice of the filing of the answer must be served on the solicitor of the plaintiff, or on the plaintiff himself if he acts in person, before seven o'clock in the evening of the same day that the answer is filed: except on Saturday, when it must be served before two o'clock in the afternoon.¹⁰ The omission to give due notice of having filed the answer will not, however, render the latter inoperative: thus, it will not deprive the defendant of his right to move to dismiss the bill for want of prosecution, at the expiration of the period allowed for that *756 purpose, from the date of filing the * answer.¹ It would seem that, in such a case, the time allowed the plaintiff for taking the next step in the cause will, on his motion, be extended, so as to give him the benefit of the time he would otherwise have lost in consequence of the omission.²

If the defendant files a written answer, he must, at the time he does so, leave a copy thereof (without the schedules, if any, of accounts or documents).³ This copy will then be examined and corrected with the answer filed, and be returned, when so examined, by the Clerks of Records and Writs, with a certificate thereon that it is correct, and proper to be printed.⁴ The certified copy is, generally, ready for the defendant's solicitor the day after the answer is filed; and the Court will not dispense with the printing of the answer merely because the parties to the suit are poor, and to save expense.⁵

The defendant must then cause his answer to be printed from such certified copy, on paper of the same size and description, and in the same type, style, and manner on and in which bills are required to be printed; ⁶ and, before the expiration of four days from the filing of his answer, must leave a printed copy thereof with the Clerks of Records

⁸ *Ante*, p. 509.

⁹ *Beavan v. Burgess*, 10 Jur. 63. But see *Montgomery v. Buck*, 6 Humph. 416.

¹⁰ Ord. III. 9; XXXVII. 2.

¹ *Jones v. Jones*, 1 Jur. N. S. 863; 3 W. R. 638, V. C. S.; and see *Lowe v. Williams*, 12 Beav. 482, 484.

² *Wright v. Angle*, 6 Hare, 107, 109; *Lord Suffield v. Bond*, 10 Beav. 146, 153; *Lowe v. Williams*, and *Jones v. Jones*, *ubi sup.*; *Lloyd v. Solicitors' Life Assurance Company*, 3 W. R. 640, V. C. W.; see, however, *Matthews v. Chichester*, 5 Hare, 207, 209; overruled on appeal, 11 Jur. 49, L. C.

³ Ord. 6 March, 1860, r. 2. A copy of a former bill for the same matter may be printed

as a schedule. *Wright v. Wilkin*, 9 Jur. N. S. 195; 11 W. R. 253, V. C. K. In practice, where the schedule to an answer is very short, it is not unfrequently printed with the body of the answer; in such case, the fair copy should of course include the schedule.

⁴ Ord. 6 March, 1860, r. 2. For form of certificate, see Vol. III.

⁵ *Meux v. Watkins*, 7 N. S. 704; 9 W. R. 779, V. C. W.; but the answers of parties suing or defendant *in forma pauperis*, are excluded from the orders as to printing; see Ord. 6 March, 1860, r. 15, *post*, p. 758.

⁶ Ord. 6 March, 1860, r. 3; as to such paper, see Ord. IX. 3, *ante*, p. 396; see also, *ante*, p. 742.

and Writs, with a written certificate thereon by the defendant's solicitor, or by the defendant if defending in person,⁷ that such print is a true copy of the copy of the answer so certified by the Clerk of Record and Writs; and if such printed copy is not so left, the defendant will be subject to the same liabilities as if no answer had been filed.⁸

Under the former practice, where an answer taken in a foreign language was filed with a translation annexed, it was only required that an office copy should be taken of the translation.⁹ It is presumed, therefore, that now, a fair copy of the translation only need be left, and that such translation only need be printed.

* A defendant may, however, if he desires it, swear and file a *757 printed, instead of a written, answer;¹ although this course, in consequence of the inconveniences attending it, is rarely adopted.

On receiving notice of the filing of the answer, the plaintiff should demand in writing, from the defendant's solicitor, or the defendant himself if acting in person,² an official and certified printed copy of the answer; and on receiving such demand, the defendant must get a printed copy of the answer examined by the Clerks of Records and Writs with the answer as filed, and stamp such copy with a Chancery stamp for 5s., and the Clerks of Records and Writs, on finding that such copy is duly stamped and correct, will certify thereon that the same is a correct copy, and mark the same as an office copy,³ on a *præcipe* being left.⁴

The defendant must have this official and certified printed copy of the answer ready for delivery to the plaintiff, at any time after the expiration of four days from the filing of the answer, and within forty-eight hours after the receipt of the demand for the same;⁵ and must, on demand, deliver it to the plaintiff: who, on the receipt thereof, is to pay the defendant the amount of the stamp thereon, and at the rate of 4d. per folio for the same.⁶

The Clerks of Records and Writs are not to certify or mark any printed copy of an answer which has any alteration or interlineation in writing.⁷ Where, however, some very slight typographical errors had been so corrected, they were directed to certify the official copy, and to alter the copy left with them, so as to agree with the written answer on the file.⁸

The plaintiff is entitled to demand and receive from the defendant any additional number (not exceeding ten) of printed copies of the answer, on payment for the same at the rate of one halfpenny per

⁷ For form of certificate, see *ibid.*

⁸ Ord. 6 March, 1860, r. 3; *Bloxam v. Chichester*, 11 Jur. N. S. 48; 13 W. R. 285, L. J.J.; 34 Beav. 76; S. C. *nom.* *Bloxsome v. Chichester*, 2 De G., J. & S. 444. An attachment, for not leaving the printed copy, is usually issued in such a case.

⁹ *Braithwaite's Pr.* 491. An office copy of the whole might, however, be taken, if desired. *Ibid.*

¹ Ord. 6 March, 1860, r. 5.

² For form of demand, see Vol. III.

³ Ord. 6 March, 1860, rr. 4, 6. For form of certificate, see Vol. III.

⁴ For form of *præcipe*, see Vol. III.

⁵ Ord. 6 March, 1860, r. 4.

⁶ *Ib.* r. 7.

⁷ Ord. 6 March, 1860, r. 12.

⁸ *Lee v. Dawson*, 1 J. & H. 37.

folio;⁹ and after all the defendants who are required to answer have filed their answers, a co-defendant is entitled to demand and receive from any other defendant, any number of printed copies (not exceeding six) of his answer, on payment after the same rate.¹⁰ It may be here mentioned, that before the practice of printing answers was introduced, any defendant might take an office copy of the answer of a co-defendant, as soon as he had filed his own answer, or, if he had not been required to answer, after the expiration of the time within which he might have put in a voluntary answer;¹¹ but it is presumed

*758 the former practice is now *abrogated, and that no defendant can require to be furnished with copies of a co-defendant's answer till all the defendants required to answer have answered, and till the time allowed the others to file voluntary answers has expired.

Office copies of schedules to answers of accounts or documents continue to be made in the Record and Writ Clerks' Office.¹ Where, however, by mistake a printed schedule has been attached to a printed answer, the answer was allowed to be filed, and a printed copy of the answer, with a written office copy of the schedule, to be issued, on the solicitor for the defendant undertaking not to charge his client with the costs of printing the schedule.²

Where a plaintiff is required to answer interrogatories,³ he must file his answer thereto, and get it printed, and furnish printed copies thereof, in the same manner as a defendant is required to do with respect to his answer.⁴

No costs will be allowed, either as between party and party, or as between solicitor and client, for any written brief of an answer, unless the Court directs the allowance thereof.⁵

The orders of the 6th March, 1860, do not apply to answers filed by defendants, or by plaintiffs, defending or suing *in formâ pauperis*, except the first of them, which directs that an answer is to be written on paper, instead of, as formerly, on parchment.⁶

⁹ Ord. 6 March, 1860, r. 8; and see *Attorney-General v. Etheridge*, 11 W. R. 927, V. C. K.

¹⁰ Ord. 6 March, 1860, r. 9.

¹¹ *Powys v. Blagrave*, 18 Jur. 462, 464; 2 Eq. Rep. 475, V. C. W.; and see *Braithwaite's Pr.* 491.

¹ Ord. 6 March, 1860, r. 10.

² *Watt v. Watt*, 8 Jur. N. S. 878; 10 W. R. 368, V. C. W. Where, however, the schedule is very short, it is often printed with the answer. *Ante*, p. 756, n.

³ This practice was introduced by 15 &

16 Vic. c. 86, § 19, and is a substitute for a cross-bill of discovery; see *post*, Chap. XXXIV. § 1, *Cross Bills*; see *post*, *Evidence, Admissions*; Genl. Sts. Mass. c. 129, §§ 46 *et seq.*; St. Mass. 1862, c. 40.

⁴ Ord. 6 March, 1860, r. 11.

⁵ Ord. 6 March, 1860, r. 13. As to the fees to which solicitors are to be entitled, in the case of printed answers, see *ib.* r. 14, and *sched.*; and *Attorney-General v. Etheridge*, 11 W. R. 927, V. C. K.; see also *post*, Vol. III.

⁶ Ord. 6 March, 1860, r. 15; *ante*, p. 756.

SECTION IV. — *Exceptions to Answers.*

If the plaintiff, upon an examination of the answer, finds that it contains scandalous matter, or that it does not sufficiently answer the [bill, or, under the new practice, the] interrogatories, he may file exceptions to it.⁷ Exceptions *are allegations in writing, stating *759 the particular points or matters with respect to which the plaintiff considers the answer scandalous, or those interrogatories to which he thinks there is not sufficient answer given.

Formerly, exceptions could, in like manner, be taken for impertinence;¹ but this practice has been abolished, and there is the same remedy for impertinence in answers as for impertinence in bills, and other proceedings.²

The nature of scandal and impertinence in pleadings has been, before, so fully gone into, that it is now only necessary to inform the reader, that the same rules which are there laid down for distinguishing scandal or impertinence, when comprised in a bill, apply to pleadings in general, and consequently to answers.³ The practice of the Court, also, with regard to exceptions to answers on account of scandal, is the same, *mutatis mutandis*, as that already described with respect to exceptions to bills on the same grounds.⁴

It has before been stated, that a bill may be excepted to for scandal at any time.⁵ In like manner, it seems that there is no precise limit to the time during which an answer may be excepted to for scan-

⁷ [Gleaves v. Morrow, 2 Tenn. Ch. 597.] No demurrer lies to an answer in Equity. Travers v. Ross, 1 McCarter (N. J.), 254, 258; Stone v. Moore, 26 Ill. 165; [Barry v. Abbot, 100 Mass. 398:] *ante*. p. 542, note. Under the practice in New Hampshire, Massachusetts, and some other States, an answer is open to exceptions which omits to notice material charges in the bill, under the general interrogatory, although no special interrogatory is thereto directed. Miles v. Miles, 27 N. H. 440; Tucker v. Cheshire R. R. Co., 21 N. H. 29; *ante*, pp. 376, 377, note; Methodist Epis. Church v. Jaques, 1 John. Ch. 65; Hagthorp v. Hook, 1 Gill & J. 270; Salmon v. Claggett, 3 Bland. 125; Bank of Utica v. Messereau, 7 Paige, 517; Parkinson v. Trousdale, 3 Seam. 380; Cuyler v. Bogert, 3 Paige, 186; see Pitts v. Hooper, 16 Geo. 442; Jordan v. Jordan, 16 Geo. 446. In Maine, "exceptions to an answer should be drawn and signed by counsel and filed with the clerk, and notice thereof given within thirty days after the answer is filed." Rule 8, Chancery Practice, 37 Maine, 583; see, for Massachusetts, Rule 17 of Chancery Practice; and for the form of such exceptions, in Langdon v. Goddard, 3 Story, 18, 19; Kittredge v. Claremont Bank, 3 Story, 605-609.

¹ [Langdon v. Goddard, 3 Story, 13; Mason v. Mason, 4 Hen. & M. 414; Burr v. Burton,

18 Ark. 215. And it is impertinent in an answer, after stating the facts in response to the bill, to give a summary, occupying several manuscript pages of supposed errors in previous proceedings, with reasons and authorities. Johnson v. Tucker, 2 Tenn. Ch. 244. But the use of a few unnecessary words, although strictly impertinent, will not constitute a sufficient ground for exception. Hawley v. Wolverton, 5 Paige, 522; Gleaves v. Morrow, 2 Tenn. Ch. 592. It is impertinent to set up in an answer an independent counter-claim. Spaulding v. Farwell, 62 Me. 319; Mrzena v. Brucker, 3 Tenn. Ch. 161. And the introduction of scandalous and impertinent matter in a bill will not justify similar matter in the answer, although introduced to meet the allegations of the bill. Langdon v. Pickering, 19 Me. 214. See, however, Woods v. Morrell, 1 John. Ch. 103. Matter in an answer which cannot be put in issue, or given in evidence is impertinent. Spaulding v. Farwell, 62 Me. 319. And see, as to what is impertinence, *ante*, 349, 728, 729, notes. See also note 6, *below*.]

² 15 & 16 Vic. c. 86, § 17; Dufaur v. Sigel, 4 De G., M. & G. 520.

³ *Ante*, pp. 346-349.

⁴ *Ante*, pp. 351-353.

⁵ *Ante*, p. 354.

*760 dal;⁶ and therefore, where the defendant became bankrupt * after putting in his answer, and the plaintiff, before the assignees were brought before the Court, obtained, under the old practice, an order to refer the answer for scandal and impertinence, the order was held to have been regularly obtained.¹

If a plaintiff conceives an answer to be insufficient, he should take exceptions to it:² stating such parts as he conceives are not answered, and praying that the defendant may, in such respect, put in a full answer.³ If, however, the answer is one which accompanies a plea,

⁶ [Booth v. Smith, 5 Sim. 639; Campbell v. Taul, 3 Yer. 563.]

Separate exceptions to the same answer, one for scandal and the other for impertinence, will not be allowed, as nothing in the pleading can be considered as scandalous, which is not also impertinent. *M'Intyre v. Trustees of Union College*, 6 Paige, 240. An exception for impertinence will be overruled, if the expunging of the matter excepted to will leave the residue of the clause, which is not covered by the exception, either false or wholly unintelligible. *M'Intyre v. Trustees of Union College*, 6 Paige, 240; see *Balcom v. New York Life Ins. & Trust Co.*, 11 Paige, 454; *Norton v. Woods*, 5 Paige, 260; *Franklin v. Keeler*, 4 Paige, 382; *Tucker v. Cheshire R. R. Co.*, 21 N. H. 36, 37. The Court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear, that it is such as ought to be struck out of the record, for this reason, that the error on one side is irremediable, on the other not. See *Davis v. Cripps*, 2 Y. & C. (N. R.) 443; *Woods v. Morrell*, 1 John. Ch. 106. [See, as to the practice, *Johnson v. Tucker*, 2 Tenn. Ch. 244.] Exceptions for scandal or impertinence must describe the particular passages which are alleged to be scandalous or impertinent. *Whitmarsh v. Campbell*, 1 Paige, 645; *Franklin v. Keeler*, 4 Paige, 382. An exception for impertinence must be supported *in toto*, or it will fail altogether. *Tench v. Cheese*, 1 Beav. 571.

If the matter of an answer is relevant, that is, if it can have any influence whatever in the decision of the suit in reference to any point to be considered in it, it is not impertinent. *Tucker v. Cheshire R.R. Co.*, 21 N. H. 38, 39; *Van Rensselaer v. Bruce*, 4 Paige, 177; *Hawley v. Wolverton*, 5 Paige, 522.

If a plaintiff wishes to refer an answer for insufficiency as well as for impertinence, he must procure the reference for impertinence first; for it has been decided, that a reference for impertinence can never be contemporaneous with exceptions for insufficiency. *Raphael v. Birdwood*, 1 Swanst. 229; *Livingston v. Livingston*, 4 Paige, 111. But by the practice under the former New York Chancery System, exceptions for scandal or impertinence, and exceptions for insufficiency, were to be taken at the same time and in the same manner. *Livingston v. Livingston*, 4 Paige, 111; *Woods v. Mor-*

rell, 1 John. Ch. 103. [So in Tennessee, *Johnson v. Tucker*, 2 Tenn. Ch. 244.] After a reference for insufficiency, or any other step taken in the cause, an answer cannot be referred for impertinence. *Pellaw v. —*, 6 Ves. 458 *arg.*; *Beavan v. Waterhouse*, 2 Beav. 58; [Jones v. Spencer, 2 Tenn. Ch. 776;] but it may be for scandal. *Story Eq. Pl.* § 876.

¹ *Booth v. Smith*, 5 Sim. 639.

² If the answer is evasive, it must be excepted to; all defects in the answer must be supplied by taking exceptions. *Blaisdell v. Stephens*, 16 Vt. 179; see *Travers v. Ross*, 1 McCarter (N. J.), 254. [The Court will not examine whether an answer is sufficient or not, except after a reference for insufficiency. *Davis v. Davis*, 2 Atk. 24. And, therefore, after exceptions overruled, the plaintiff cannot take the bill for confessed as to the part not answered. *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 604.]

In Massachusetts, when an oath is waived, and in New Hampshire when an oath is not required, to an answer, no exception can be taken to it for insufficiency. Rule 8 of Chancery Practice in Massachusetts; Rule 9 in New Hampshire.

An answer to which the oath of the defendant is waived cannot be excepted to for insufficiency; because such answers are not evidence. 1 Barb. Ch. Pr. 177; *Bartlett v. Gale*, 4 Paige, 504; *McCormick v. Chamberlain*, 11 Paige, 543. [Sheppard v. Akers, 1 Tenn. Ch. 326; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599. It is otherwise provided in New Jersey by Statute. Rev. Chancery, § 23; Dick. Ch. Pr. 98, note.] Exceptions will not lie to the answer of an infant for insufficiency. *Ante*, 169, n. Nor to the answer of a corporation, see *Wallace v. Wallace*, Halst. Dig. 173. [Nor to the answer of a peer upon protestation of honor. *Hill v. Earl of Bute*, 2 Fowl. Ex. Pr. 11. Nor to the answer of the Attorney-General. *Davison v. Attorney-General*, 5 Price, 398, note. *Ante*, 737, n. 3.]

³ Where the interrogatories are substantially, though not technically, answered, exceptions will not be encouraged. *Read v. Woodroffe*, 24 Beav. 421. Exceptions should not now be taken for want of answer to the interrogatory as to books and papers. *Law v. London Indisputable Society*, 10 Hare Ap. 20; *Barnard v. Hunter*, 1 Jur. N. S. 1065, V. C. S.; *Kidger v. Worswick*, 5 Jur. N. S. 37, V. C. W. [*Rochdale Canal Co. v. King*, 15

or a demurrer, to part of the bill, he must, unless he intends to admit the validity of the plea or demurrer, wait till it has been argued: for his exceptions would operate as an admission of its validity.⁴ This rule, however, will not, as we have seen, apply to cases where the defendant demurs, or pleads to the relief only, and not to the discovery.⁵ And where a demurrer and answer to interrogatories were put in, and the plaintiff, mistaking the practice, excepted to the answer before he set down the demurrer for argument, he was permitted, upon payment of costs, to withdraw his exceptions, without prejudice to his filing them again after the argument of the demurrer.⁶

* If a plea or demurrer to the whole bill is overruled, the *761 defendant must, if interrogatories have been filed, answer, without the plaintiff being driven to except; but, where a partial plea or demurrer is overruled, the plaintiff must except: because an answer being on the file, the defendant is not bound to answer further till exceptions have been taken.¹ Where the plaintiff had not excepted, and the defendant put in a further answer, leave was given to the plaintiff to file exceptions thereto, although he had filed none to the original answer.²

A plaintiff may also, where a partial demurrer is allowed, except to the answer to such of the interrogatories as are not covered by the demurrer; he must not, however, except to those which are covered by the demurrer.

In the case also of a plea, which is accompanied by an answer to the interrogatories, the plaintiff may, upon the allowance of the plea, except to the answer, as he may if a partial plea is overruled; and the rule that a plaintiff must except to the answer as insufficient, applies even where the plea or demurrer is accompanied by an answer as to a single fact.³ Where a plea is ordered to stand for an answer, with lib-

Beav. 11; 9 Hare Ap. note; Piffardy v. Beeby, L. R. 1 Eq. 623; see, however, Hudson v. Grenfell, 3 Giff. 388; 8 Jur. N. S. 878. An interrogatory as to particular documents must, however, be answered. Catt v. Tourle, 18 W. R. 966. Where, by the rules of Court, the particular statements which a defendant is expected to answer are required to be set forth in writing at the foot of the bill, the omission of the complainant to set them forth will preclude him from taking advantage of the failure of the defendant to answer. Sprague v. Tyson, 44 Ala. 338. And although the complainant's omission is a good ground of demurrer, yet if the defendant file a full answer with a demurrer for that cause, and go to hearing on the answer and an agreed statement of facts, the error will be waived. Martin v. Hewitt, 44 Ala. 418. If the whole answer to a compound interrogatory is a substantial reply, though each separate question therein may not be separately answered, the answer is sufficient. Mott v. Hall, 41 Ga. 117.] An exception to an answer for insufficiency should state the charges in the bill, the interrogatory

applicable thereto, to which the answer is responsive, and the terms of the answer, *verbatim*, so that the Court may see, whether it is sufficient or not. Brooks v. Byam, 1 Story, 296. Exceptions to answers for insufficiency can only be sustained where some material allegation, charge, or interrogatory in the bill is not fully answered. Where the matter of the bill is fully answered, and the defendant sets up new matter which is irrelevant, and forms no sufficient grounds of defence, the plaintiff may except to the answer for impertinence, but he cannot except to it for insufficiency. Stafford v. Brown, 4 Paige, 88. For form of exceptions, see Vol. III.

⁴ *Ante*, pp. 589, 691.

⁵ *Ante*, pp. 590, 691.

⁶ Boyd v. Mills, 13 Ves. 85; Story Eq. Pl. § 866.

¹ *Ante*, pp. 600, 691; see Kuypers v. Ref. Dutch Church, 6 Paige, 570, 571.

² Attorney-General v. Corporation of London, 12 Beav. 217, 219.

³ Cotes v. Turner, Bunb. 123; Story Eq. Pl. § 866.

erty to except, the plaintiff may file exceptions to the answer, or to that part of it to which he is, by the order, permitted to except, but where the plea is ordered to stand for an answer without liberty to except, expressly given by the order, the plaintiff cannot except.⁴

A plaintiff cannot except to an answer to an amended bill, on the ground that the defendant has not answered matters inquired after in the interrogatories to the original bill.⁵ In *Glassington v. Thwaites*,⁶ this rule appears to have been departed from; but the circumstances of that case were peculiar, and the Court made a special order, that the Master, in considering the exceptions taken by the plaintiff to "the thing" called an answer and disclaimer to the amended bill, should be at liberty to allow exceptions as to matters, not answered to, contained in the amended bill, notwithstanding the same matters were stated in the original bill, and no exceptions were taken to the answer to the original bill. Where, after a defendant had answered, the plaintiff amended his bill, by stating an entirely new case, it was held, that exceptions would lie, although some of the interrogatories embraced in them were contained in the original bill.⁷

*762 * And so, where the interrogatories to the original bill required the defendants to state certain particulars as to some goods alleged to have been purchased by the defendants (such as, the persons from whom, and by whom, and at what price, and in whose presence they were purchased), and the defendants put in an answer in the terms of the interrogatories, whereupon the plaintiff amended the bill, and the defendants availed themselves of the opportunity afforded by their being called upon to answer the amended bill, to state that, since putting in their answer to the original bill, they recollected that a parcel of the goods inquired after had been purchased of an individual not named in the former answer, but without stating from whom, or at what price, or in whose presence, the same had been purchased, and the plaintiff excepted to the answer for insufficiency, in not setting out those circumstances: the Court of Exchequer was of opinion, that the plaintiff ought not to be precluded, by the general rule above stated, from an opportunity of obtaining a sufficient answer as to the point excepted to: but held that, before delivering his exceptions, the plaintiff ought to have made a special application to the Court for leave to do so.¹

The reason of the rule that a plaintiff, if he does not except to the answer to the original bill, cannot afterwards except to the answer to an amended bill, on the ground that the defendant has not answered matters which were contained in the original bill is, that, by amending his bill, the plaintiff has admitted the answer to it to be sufficient.

⁴ *Ante*, p. 700.

⁵ *Overy v. Leighton*, 2 S. & S. 234; *Wich v. Parker*, 22 Beav. 59; 2 Jur. N. S. 582; *Denis v. Rochussen*, 4 Jur. N. S. 298, V. C. W.

⁶ 2 Russ. 458, 464.

⁷ *Mazarredo v. Maitland*, 3 Mad. 66, 72; *Partridge v. Hayercraft*, 11 Ves. 570, 581; see also, *Kaye v. Wall*, 4 Hare, 128; *Duncombe v. Davis*, 1 Hare, 184, 193.

¹ *Irvine v. Viana*, McClel. & Y. 563.

Upon the same ground it has been held, that where a plaintiff, after excepting to an answer, amends his bill without waiting for the decision upon the exceptions, he must be considered as having waived his exceptions.² The principle, however, will not be applied to cases in which the amendment of the bill extends only to the addition of another party, requiring no answer from the other defendants:³ and where a plaintiff, after answer to the original bill, changed his name, and then amended his bill by substituting his new name for his old one, and adding another defendant, and afterwards took exceptions to the answer, a motion to take the exceptions off the file was refused.⁴

Some doubt was formerly entertained, whether a plaintiff did not, by moving, upon admissions in an answer, either for payment of money into Court, or for the production of papers, waive his exceptions, if already taken, or his right to except, if he had not already excepted; and, in consequence of this doubt, a practice prevailed of making such motions, "without prejudice." In the *case of *Lane* *763 *v. Paul*,¹ however, Lord Langdale M. R. decided that the plaintiff's right to except for insufficiency, was not waived by his moving for the production of documents, and that it was not material that the notice of motion should be made expressly without prejudice to the right to except.

Exceptions to an answer for insufficiency must be in writing,² and must be signed by counsel;³ and if they do not appear to have been so signed, they may be ordered, on motion, with notice to the plaintiff, to be taken off the file: even though the defendant has taken a copy of them, and the plaintiff has set them down for hearing.⁴ They must also specify, that the answer complained of was an answer to the bill.⁵ They are intituled in the cause, and care must be taken that they are properly described in the heading: otherwise, they may be suppressed or taken off the file for irregularity. Thus, where, exceptions having been allowed to an answer, the plaintiff obtained the usual order, that he might be at liberty to amend his bill, and that the defendant might answer the amendments and exceptions at the same time, and amended his bill, whereupon the defendant put in a second answer, upon which the plaintiff took exceptions to the second answer, and described them as exceptions to the further answer to the original bill, and to the answer to the amended bill, the exceptions were held to be irregularly described, and were ordered to be taken off the file: because new exceptions cannot be taken to a further answer to an original bill.⁶

² *De la Torre v. Bernales*, 4 Mad. 396.

³ *Taylor v. Wrench*, 9 Ves. 315.

⁴ *Miller v. Wheatley*, 1 Sim. 296.

¹ 3 Beav. 66, 69.

² *Beames*, 78, 181; *Woods v. Morrell*, 1 John. Ch. 103.

³ Ord. XVI. 1. Exceptions for insufficiency, as well as those for impertinence, must have the signature of counsel, though there is no positive order requiring it. *Yates*

v. Hardy, Jac. 223; Story Eq. Pl. § 864; *Mitford Eq. Pl.* by Jeremy, 313.

⁴ *Yates v. Hardy*, Jac. 223. For form of notice of motion, see Vol. III.

⁵ *Earl of Lichfield v. Bond*, 5 Beav. 513, 514; 6 Jur. 1076. For form of exceptions, see Vol. III.

⁶ *Williams v. Davies*, 1 S. & S. 426; and see *post*, pp. 769, 770.

The present practice, however, in such a case, appears to be, to allow the plaintiff to amend on payment of costs.⁷

Formerly, exceptions for insufficiency appear to have set forth the tenor or scope of the bill, and the substance of the answer, and then to have proceeded to point out particularly in what respect the answer was considered defective;⁸ but, according to the modern practice, the tenor of the bill and substance of the answer are omitted, and the plaintiff proceeds at once to point out, specifically, the interrogatories or parts of the interrogatories which are unanswered, by separate exceptions, applicable to each part.⁹ Thus, * where several questions are comprised in one numbered interrogatory, the unanswered questions only should be included in the exceptions;¹ and where a plaintiff complains that a particular interrogatory to his bill has not been answered, he must state the interrogatory in its terms, and not throw upon the Court the trouble of determining whether the expressions of the exceptions are to be reconciled with the interrogatory.² It is not, however, necessary that the exception should follow the very words of the interrogatory,³ provided that it plainly points out the interrogatory to which it refers,⁴ and does not vary therefrom in any important particular.⁵

An exception for insufficiency may be allowed as to part, and overruled as to part.⁶

Care must be taken, in drawing exceptions, that no mistakes happen therein: for, after they have been delivered, no new exception can regularly be added.⁷ Cases, however, have occurred, where the amendment of exceptions has been permitted on the ground of mistake;⁸ as where the plaintiff's solicitor, for the purpose of instructing his counsel in drawing the exceptions, sent him, by mistake, the original draft of the bill, instead of another draft from which the bill was engrossed,

⁷ *Earl of Lichfield v. Bond*, 5 Beav. 513; 6 Jur. 1076; *Bradstock v. Whatley*, 6 Beav. 61.

⁸ See 2 *Prax. Alm.* 508 *et seq.*; *Curs. Canc.* 137 *et seq.*

⁹ On exceptions for insufficiency, the particular points or matters in the bill which remain unanswered, or which are imperfectly answered, should be stated in the exceptions. *Stafford v. Brown*, 4 Paige, 88; *Mitford Eq. Pl.* by Jeremy, 315; *Cooper Eq. Pl.* 319; *Lubé Eq. Pl.* 87; see *Dexter v. Arnold*, 2 Sumner, 108. Material and necessary matter must be explicitly met in an answer; but exceptions, founded on verbal criticisms, slight defects, and omissions of immaterial matter, will be invariably disallowed, and treated as vexatious. *Baggott v. Henry*, 1 Edw. Ch. 7; [*Gleaves v. Morrow*, 2 Tenn. Ch. 592]. See form in Vol. III.

¹ *Higginson v. Blockley*, 1 Jur. N. S. 1104, V. C. K.; see, however, *Hambrook v. Smith*, 17 Sim. 209, 212; 16 Jur. 144; *Hoffman v. Postill*, L. R. 4 Ch. Ap. 673, 681.

² *Hodgson v. Butterfield*, 2 S. & S. 236.

³ *Brown v. Keating*, 2 Beav. 581, 583; 4 Jur. 477.

⁴ *Woodroffe v. Daniel*, 10 Sim. 243.

⁵ *Duke of Brunswick v. Duke of Cambridge*, 12 Beav. 279, 280; *Esdaile v. Molyneux*, 1 De G. & S. 218; *Brown v. Keating*, *ubi sup.*

⁶ Per Lord Hardwicke, in *East India Company v. Campbell*, 1 Ves. S. 247. An exception bad in part is not necessarily to be overruled. *Hoffman v. Postill*, L. R. 4 Ch. Ap. 673; see *Van Rensselaer v. Brice*, 4 Paige, 174; *Tucker v. The Cheshire R. R. Co.*, 21 N. H. 37; *McIntyre v. Union College*, 6 Paige, 240; *Higginson v. Blockley*, 1 Jur. N. S. 1104.

⁷ *Partridge v. Haycraft*, 11 Ves. 575.

⁸ *Dolder v. Bank of England*, 10 Ves. 284. The application may be made by summons, which must be served on the solicitors of all the defendants affected by the exceptions. For form of summons, see Vol. III.

which differed materially, and the mistake was not discovered till it was too late to rectify it.⁹ In *Northcote v. Northcote*,¹⁰ it is stated, that liberty was given to amend exceptions after arguing them; it does not, however, appear upon what ground such liberty was given.

In the case of several defendants answering separately, exceptions must be taken to each answer;¹¹ and if a defendant, who has answered jointly with another defendant, dies, exceptions may be taken to the answer, as being that of the survivor only.¹²

The exceptions, after they have been drawn or perused, and signed by counsel, must be written on paper of the same description * and size as that on which bills are printed.¹ The *765 signature of counsel is affixed to the draft, and copied on to the engrossment.² The exceptions must be indorsed with the name and place of business of the plaintiff's solicitor,³ or with the name and residence of the plaintiff himself, if suing in person,⁴ and with the address for service, if any, as in the case of other proceedings to be filed at the Record and Writ Clerks' Office.⁵ Formerly, the exceptions were only delivered to the clerk in Court of the opposite party, and were not of record; but now, they must be filed at the Record and Writ Clerks' Office, and notice of the filing thereof must, on the same day, be given by the plaintiff or his solicitor to the defendant's solicitor, or to the defendant himself, where he acts in person.⁶ If the plaintiff does not give due notice, the exceptions will not be thereby rendered invalid, but further time will be given for the next step, on the application of either party, on payment of costs by the plaintiff.⁷

The defendant whose answer is excepted to, should take an office copy of the exceptions.⁸

After the filing of a defendant's answer, the plaintiff has six weeks within which he may file exceptions thereto for insufficiency;⁹ and if he

⁹ *Bancroft v. Wentworth*, cited 10 Ves. 285, n.

¹⁰ 1 Dick. 22.

¹¹ *Sydolph v. Monkston*, 2 Dick. 609.

¹² *Lord Herbert v. Pusey*, 1 Dick. 255.

¹ Ord. 6 March, 1860, r. 16. As to such paper, see Ord. IX. 3, *ante*, p. 396.

² *Ante*, p. 312.

³ Ord. III. 2.

⁴ Ord. III. 5.

⁵ *Ante*, pp. 453, 454.

⁶ Ord. XVI. 3. The notice must be served before seven o'clock in the evening, except on Saturday, when it must be served before two o'clock in the afternoon, or the service will be deemed to have been made on the following day, or Monday, as the case may be. Ord. XXXVII. 2; *ante*, p. 455. For form of notice, see Vol. III.

⁷ *Bradstock v. Whalley*, 6 Beav. 61, 62; see also *Lowe v. Williams*, 12 Beav. 482, 484.

⁸ Ord. XXXVI. 1.

⁹ By the 61st Equity Rule of the United States Courts, it is provided, that "after an answer is filed on any rule day, the plaintiff

shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown, to the Court or a Judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient." See the 17th of the Rules for the Regulation of Practice in Chancery in Massachusetts, by which it is provided, that "the plaintiff shall reply, or file exceptions, or set down, the cause for hearing on the bill and answer, within one month after the answer is required to be filed; or if the answer be filed before it is required, then within one month after written notice of such filing; and if he fail so to do, a decree may be entered for the dismissal of the bill with costs." See for New Hampshire, 38 N. H. 609, Rule 20; for Maine, 37 Maine, 583, Rule 8.

[In Tennessee, exceptions must be filed within twenty days after notice of answer filed. Code, § 4400; Chancery Rules, rule 1, § 5.]

does not file them within six weeks, such answer on the expiration of the six weeks, will be deemed sufficient.¹⁰ Where the plaintiff desires to except to an answer filed to an amended bill, to which the plaintiff has not required an answer, he must obtain a special order for that purpose within fourteen days after the answer is filed.¹¹

By the original practice of the Court the plaintiff might obtain, *766 * as of course, an order to deliver exceptions *nunc pro tunc*; but this is now expressly prohibited;¹ and such an order will not now be made even by consent. If necessary, however, a special order will be made, that the plaintiff may be at liberty to file exceptions, notwithstanding the time for filing them has expired.² The application for such order may be made by notice of motion, or by summons;³ and the notice or summons should be served on the solicitors of those defendants only to whose answers the exceptions are to be filed. By consent, such an order may also be made, on petition, as of course, at the Rolls.⁴ Further time to file exceptions may also be applied for by summons at Chambers,⁵ which must be served on the solicitors of the defendants to whose answers exceptions are in contemplation.

If a plea and answer, or demurrer and answer, have been filed, and the plea or demurrer is overruled, the time for excepting to the answer for insufficiency is six weeks, reckoned from the day on which the plea or demurrer is overruled.⁶

If a plea is ordered to stand for an answer, with liberty to except, and no time is fixed within which the exceptions are to be filed, the six weeks for filing the exceptions will be reckoned from the date of the order directing the plea to stand for an answer.⁷

The times of vacation are not reckoned in the computation of the time allowed for filing exceptions for insufficiency.⁸ No exceptions can be taken to an answer for insufficiency, after replication;⁹ in some cases, however, the Court has, on special application, permitted the replication to be withdrawn, and exceptions to be then filed.¹⁰ If the plaintiff files replication, or serves notice of motion for a decree, he is considered to have admitted the answer to be sufficient, and cannot compel a further answer, even though the first has been found insufficient.¹¹

¹⁰ Ord. XXXIII. 12 (3). In New Hampshire, exceptions will be deemed waived, unless allowed and delivered to the defendant's solicitor within one month from the delivery of the answer, or unless further time be allowed by the justice. Rule 20 of Chancery Practice, 38 N. H. 609.

¹¹ Ord. XVI. 6. The time runs strictly from the filing of the answer, and not from the acceptance of costs of a contempt. *Nicklin v. Patten*, 4 Beav. 126; 5 Jur. 547; *Coyle v. Alleyne*, 16 Beav. 548; but the times of vacation are excluded. Ord. XXXVII. 13 (2).

¹ Ord. XVI. 5.

² *Biddulph v. Lord Camoys*, 9 Beav. 155.

⁸ For forms of notice of motion and summons, see Vol. III.

⁴ For form of petition, see Vol. III.

⁵ Ord. XXXVII. 17; and see *Nicklin v. Patten*, *ubi sup.* For form of summons, see Vol. III.

⁶ *Esdaile v. Molyneaux*, 2 Coll. 614; 11 Jur. 201.

⁷ *Ante*, p. 701. Every special order for leave to except should specify the time within which the exceptions are to be filed.

⁸ Ord. XXXVII. 13 (2); but see, in cases of election, Ord. XLII.

⁹ Ord. XVI. 7.

¹⁰ *Wyatt's P. R.* 202.

¹¹ *Boyse v. Cokell*, 18 Jur. 770, V. C. W.

The defendant may, if he think it advisable, submit to the exceptions; and where he does so without an order of the Court, the answer will be deemed insufficient from the date of the submission.¹² If he desires to prevent the exceptions being set down for hearing, he must submit to them within eight days after the filing thereof.¹³ The submission is made by notice to the plaintiff's *solicitor, and *767 payment of 20s. costs;¹ and where a defendant, not being in contempt, submits before the exceptions are set down for hearing, he has fourteen days from the date of the submission within which to put in his further answer;² but he may apply for further time, by summons at Chambers,³ which must be served on the plaintiff's solicitor, but not on the solicitor of any co-defendant. If the defendant does not answer within the fourteen days, or obtain further time, and answer within such further time, the plaintiff may sue out process of contempt against him.⁴

Where two or more defendants put in a joint and several answer, which is excepted to for insufficiency, and one or more of them submit to the exceptions, the others may have them argued.⁵

If the defendant does not submit to the exceptions, the plaintiff may set them down for hearing.⁶ The exceptions are not, however, to be set down before the expiration of eight days from the filing thereof, unless, in a case of election, the defendant has, by notice in writing required the plaintiff to set them down within four days from the service of the notice.⁷ The exceptions must be set down within fourteen days from the filing thereof; otherwise, the answer, on the expiration of such fourteen days, will be deemed sufficient.⁸

The Court will, however, on a special case being made, allow exceptions to be set down for hearing after the expiration of the fourteen

¹² Ord. XVI. 18.

¹³ *Ibid.* It is presumed that, in a proper case, further time to submit may be obtained on summons, to be served on the plaintiff's solicitor; see Ord. XXXVII. 17; and see *Mayer v. Frith*, 1859, M. 164. For form of summons, see Vol. III.

¹ *Braithwaite's Pr.* 129; Ord. XL. 13. For form of submission, see Vol. III.

² Ord. XVI. 9. By the 63d Equity Rule of the United States Courts, "where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a Judge of the Court; and shall enter, as of course, in the order book an order for that purpose; and if he shall not set down the same for a hearing, the exceptions shall be deemed abandoned and the answer shall be deemed sufficient." [In Tennessee, the exceptions shall be set for hearing by the plaintiff within ten days after they are filed, and acted on by him immediately. Ch. Rules, rule 1, § 5; Code, § 4402. Appeal lies to the

Chancellor, from the action of the Master. Code, §§ 4402, 4403, 4404; Ch. Rules, rule 1, § 4; *Johnson v. Tucker*, 2 Tenn. C. 246.]

³ Ord. XVI. 15; Ord. XXXVII. 17, 18. For form of summons, see Vol. III.

⁴ Ord. XVI. 15. In New Hampshire, "if the defendant, on notice of exceptions to his answer, shall deliver to the plaintiff's solicitor, before the day appointed for the hearing thereon, a sufficient answer, the same shall be received without costs. If the exceptions are sustained, the defendant shall deliver to the plaintiff's solicitor a full and complete answer thereto within one month, and pay such costs as the justice allowing such exceptions shall order; or the bill shall be taken *pro confesso*; but if the plaintiff so elects, he may move for process of contempt to compel an answer." Rule 21 of Chancery Practice, 38 N. H. 609.

⁵ *Hinde*, 268; *Wyatt's Pr.* 204.

⁶ 13 & 14 Vic. c. 35, § 27.

⁷ Ord. XVI. 11; XLII. 6.

⁸ Ord. XVI. 12; but see *ante*, p. 766, n. (13); see 61st Equity Rule of the United States Courts, and the 17th of the Rules of Practice in Chancery in Massachusetts; *ante*, 765, note.

days;⁹ and, in injunction cases, if the insufficiency of the answer is shown as a cause against dissolving the injunction, the Court will direct the exceptions to be set down and argued *instanter*.¹⁰ Any objection, on the ground that the exceptions were not set down in proper time, should be taken when they come on for hearing.

*768 * The times of vacation are not reckoned in the computation of the times appointed for setting down exceptions for insufficiency, except where the time has been limited, in a case of election, in consequence of the defendant having by notice in writing, required the plaintiff to set down the exceptions within four days from the service of the notice.¹

Exceptions to answers for insufficiency are set down to be heard before the Judge to whose Court the cause is attached,² on production to the Registrars' clerk, at the order of course seat, by the plaintiff of a certificate of the Clerk of Records and Writs of the filing of such exceptions, or of the filing of a further answer. The plaintiff's solicitor must indorse the certificate, with a request that the exceptions be set down, which will be done on the same day that the certificate and request are produced to the Registrars' clerk.³ The exceptions will then be advanced, and put in the paper for hearing on an early day; and the plaintiff's solicitor must, on the same day on which the exceptions are set down, serve notice thereof on the defendant: otherwise, the exceptions will be deemed not set down.⁴

Before the exceptions come on to be heard, the solicitor for the plaintiff should leave with the Usher, for the use of the Court, two printed copies of the bill and answer, and a copy of the exceptions, and of the interrogatories to the answers to which the exceptions are taken.⁵

If the defendant does not appear at the hearing, the exceptions will be heard *ex parte*, on production by the plaintiff of an office copy of an affidavit of service on the defendant of the notice of setting down the exceptions.⁶ If the plaintiff does not appear, the exceptions will be overruled, as of course, with costs, on production by the defendant of an office copy of an affidavit of having been served with the notice of setting down the exceptions.⁷ If neither side appear, the exceptions will be struck out of the paper.

⁹ See *Tuck v. Rayment*, 9 Beav. 38; Ord. XXXVII. 17.

¹⁰ *Hughes v. Thomas*, 7 Beav. 584.

¹ Ord. XXXVII. 13 (2); XLII. 6.

² Ord. VI. 4. Exceptions to a defendant's answer in South Carolina may be heard and determined by the Court without the intervention of a Master. *Satterwhite v. Davenport*, 10 Rich. Eq. (S. C.) 305. In New Hampshire, exceptions to an answer may be allowed by a justice, a copy thereof and a notice of the time and place at which the same will be heard before such justice, being seasonably given to the defendant's solicitor. Rule 20 of Chancery Practice.

³ Ord. XVI. 10; Reg. Regul. 15 March, 1860, rr. 1, 5. For form of request, see Vol. III.

⁴ Ord. XVI. 10. For form of notice, see Vol. III.

⁵ See *Davis v. Earl of Dysart*, 4 W. R. 41, M. R.; and Ord. XXI. 12. Each counsel should be furnished with printed copies of the bill and answer, and brief copies of the exceptions and interrogatories above mentioned.

⁶ For form of affidavit, see Vol. III.

⁷ [Lumley v. Desborough, 17 W. R. 5.] For form of order, see Seton, 1257, No. 9; and for form of affidavit, see Vol. III. In *Latouche v. Sampson*, cited Seton, 1257, it was, however, held that the exceptions being in the paper, and the defendant present, was sufficient proof of the notice having been served; so that the affidavit of service seems to be unnecessary where the plaintiff is the defaulter.

Where both sides appear, the plaintiff's counsel is first heard in *support of the exceptions; then the counsel for the defend- *769 ant; and the plaintiff's counsel is entitled to a reply. The Court will then dispose of the exceptions, by overruling or allowing them, in whole or in part.¹

No exceptions will be allowed to stand over for an indefinite period;² and in deciding on the sufficiency or insufficiency of any answer, the relevancy or materiality of the statement or question referred to is to be taken into consideration.³ Either party has a right to the judgment of the Court upon each of the exceptions.⁴

If, upon the hearing of the exceptions, the answer is held sufficient, it will be deemed to be so from the date of the order made on the hearing.⁵

If the first or second answer is held to be insufficient, or the defendant (not being in contempt) submits to answer the exceptions after they are set down for hearing, the Court may appoint a time within which the defendant must put in his further answer;⁶ and if the defendant does not answer within the time so appointed, or obtain further time,⁷ and answer within such further time, the plaintiff may sue out process of contempt against him.⁸ A defendant, however, who is in contempt for want of a further answer, cannot procure an enlargement of the time for putting in his further answer,⁹ unless the plaintiff waives his right to object to the application on that ground.

If, after the exceptions have been allowed or submitted to, the plaintiff desires to amend his bill, he may, on petition at the Rolls,¹⁰ obtain an order, as of course, that he may be at liberty to amend his bill, and that the defendant may answer the amendments and exceptions at the same time.¹¹ The defendant must then, as we have before

¹ For form of order, see Seton, 1256, No. 8. [As to the effect of the death of the defendant pending the exceptions, see *Pearse v. Dobinson*, L. R. 3 Ch. App. 8. And where, on argument of the exceptions, it has been held that the defendant is bound to disclose the contents of a deed, an order for its production, so far as any interest is given thereby to the plaintiff, is a matter of course. *Chichester v. Marquis of Donegal*, 18 W. R. 427.]

² Ord. XXI. 13.

³ Ord. XVI. 4; see *ante*, pp. 715-719, as to objections on the ground of want of materiality.

⁴ *Rowe v. Gudgeon*, 1 V. & B. 331; *Agar v. Gurney*, 2 Mad. 389.

⁵ Ord. XVI. 18.

⁶ Ord. XVI. 14; see *Manchester, Sheffield, and Lincolnshire Railway Co. v. Work-sop Board of Health*, 2 K. & J. 25.

⁷ An application for further time may be made at Chambers by summons, which must be served on the plaintiff's solicitor. For form, see Vol. III.

⁸ Ord. XIV. 15. By the 64th Equity Rule of the United States Courts, it is provided,

that "if, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto, on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody, upon such writ, shall not be discharged therefrom but by an order of the Court, or of a Judge thereof, upon his putting in such answer and complying with such other terms, as the Court or Judge may direct."

⁹ *Wheat v. Graham*, 5 Sim. 570.

¹⁰ For form of petition, see Vol. III.

¹¹ The Court (U. States C. C.) may, for the purpose of avoiding unnecessary delays, entertain a motion to amend a bill in Equity, at the same time that exceptions to the answer are filed, and may require the defendants to answer the amended matter and the exceptions together. *Kittredge v. Claremont Bank*, 3 Story, 590.

*770 seen,¹² put in his further answer, and his answer *to the amendments, within fourteen days after service of the interrogatories to the amended bill.¹ The order must be served on the defendant's solicitor; and if the defendant can put in his further answer before he is served with the order, he will deprive the plaintiff of the benefit of it, and it will be discharged for irregularity,² notwithstanding the defendant has notice of the order at the time he files his further answer.³

If, after exceptions allowed or submitted to, the defendant puts in a second or third answer which the plaintiff considers insufficient, he may at once set down the old exceptions for hearing,⁴ and give notice thereof to the defendant.⁵ If the plaintiff does not set down the old exceptions within fourteen days after the further answer has been put in, it will, on the expiration of such fourteen days, be deemed sufficient.⁶

The plaintiff must state, in the notice of setting down the old exceptions, the particular exception or exceptions to which he requires a further answer;⁷ and if he does not do so, he may be ordered to pay the costs of the defendant appearing to object on account of the irregularity of the notice. Leave will, however, be given to the plaintiff, to amend the notice, and set down the exceptions again.⁸

The exceptions so set down come on for argument in Court as before explained; and previously thereto the Judge should be furnished with a printed copy of the further answer, in addition to the former papers.

If the defendant submits to the old exceptions, which have been set down after a further answer has been put in, an application for time to put in a further answer should not be made at Chambers: because, by consenting to that course, the plaintiff might be held to have waived the exceptions; but the exceptions should be allowed to come on for hearing before the Court, and a time will then be fixed within which the defendant must put in his further answer.⁹

No new exceptions can be taken to a second or third answer. Where, however, the bill has been amended, and an answer is subsequently filed, the plaintiff may file new exceptions, specifying * the interrogatories to the amended bill which he does not think sufficiently answered; but such new exceptions must not extend to any matter which was contained in the interrogatories to the original bill.¹

¹² *Ante*, p. 738.

¹ Ord. XXXVII. 6; see *Bennington Iron Co. v. Campbell*, 2 Paige, 160.

² *Mayne v. Hochin*, 1 Dick. 255; *Bethuen v. Bateman*, *ib.* 296; *Knox v. Symmonds*, 1 Ves. J. 87, 88; *Paty v. Simpson*, 2 Cox, 392; *Partridge v. Haycraft*, 11 Ves. 570, 578; *Hemming v. Dingwall*, 8 Beav. 102.

³ *Pariente v. Bensusan*, 13 Sim. 522; 7 Jur. 618.

⁴ Ord. XVI. 13.

⁵ For form of notice, see Vol. III.

⁶ Ord. XVI. 13, 16.

⁷ Ord. XVI. 17. See notice in Vol. III.

⁸ *Tanner v. Strutton*, 15 Jur. 457, V. C. Ld. C.; *Thomas v. Rawlings*, 28 Beav. 346.

⁹ *Manchester, Sheffield, and Lincolnshire Railway Company v. The Workop Board of Health*, 2 K. & J. 25. It would seem, however, that the plaintiff and defendant may agree that, to save expense, the application shall be made by summons at Chambers: in which case, the order should state that, by consent, the exceptions shall not be deemed to be waived or prejudiced.

¹ *Partridge v. Haycraft*, 11 Ves. 570, 581.

Where the bill has been amended, the plaintiff must go before the Court upon the old exceptions, as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments; in such case, however, he may have the judgment of the Court upon the answer to the amendments, with reference to such parts of the original bill as apply to them; and if the original words apply to the amendments, the Court, in considering whether the answer is sufficient as to the amendments, will take into consideration every thing in the amended bill that gives a construction to the amendments.²

The proceedings in Court upon exceptions to a second or third answer for insufficiency are precisely the same as those upon exceptions to a first. The Court, however, in deciding upon the exceptions, will not look at the second or third answer only, but will look at it in connection with the preceding answer.³ If the Court, upon looking into the answers in the manner above stated, is still of opinion that no sufficient answer is given to the matter originally excepted to, judgment will be given accordingly, and the exceptions will be allowed.

If a first or second answer is held insufficient, the Court will, as we have seen, appoint a time within which the further answer must be put in;⁴ but in the case of a third insufficient answer, this is unnecessary: for, in such a case, the Court may order the defendant to be examined upon interrogatories to the point as to which it is held to be insufficient, and to stand committed until he shall have perfectly answered the interrogatories; and the defendant must pay such costs as the Court shall think fit to award.⁵ After a third answer has been held insufficient, a fourth answer is irregular, and will be ordered to be taken off the file.⁶

If the defendant is ordered to stand committed, a copy of the order of committal must be delivered to the Tipstaff of the Court, who will proceed to arrest the defendant. If the defendant is *ar- *772 rested, he should, in strictness, be taken to Whitecross Street Prison;¹ but in *Farquharson v. Balfour*,² the defendant, being a gentleman advanced in years, was, by the order of the Court, allowed to remain at an hotel in the neighborhood of Lincoln's Inn, in the custody of the Tipstaff, till his examination should be completed.

If a defendant should, after plea overruled, put in two answers which are insufficient, it seems the plea is not treated as an answer, and he will not be liable to the consequences of a third insufficient answer.³

² *Ib.* 581.

³ *Farquharson v. Balfour*, T. & R. 189.

⁴ Ord. XVI. 14; *ante*, p. 769.

⁵ Ord. XVI. 19. This order does not apply to a third insufficient affidavit as to documents. *Harford v. Lloyd*, 2 W. R. 537, V. C. W.; and as to the practice in the case of an insufficient answer to interrogatories, exhibited in prosecuting a decree at Chambers, see *Hayward v. Hayward*, Kay Ap. 31; see also *Allfrey v. Allfrey*, 12 Beav. 620; [*Rish-ton v. Grissell*, 14 W. R. 578, 789. But see

Danell v. Page, 16 W. R. 1080.] By the 19th Rule for the Reg. of Prac. in Chan. in Mass., upon a second answer being adjudged insufficient, costs shall be doubled by the Court; and the defendant may be examined upon interrogatories and committed until he shall answer them.

⁶ *Liverpool v. Chippendall*, 14 Jur. 301, V. C. E.

¹ 25 & 26 Vic. c. 104, § 2.

² See T. & R. 184, 191, 193.

³ *Clotworthy v. Mellish*, 1 Cha. Ca. 279.

If a plaintiff, having obtained the order that the defendant be examined upon interrogatories, means to exhibit interrogatories, he must, if the defendant is in custody, do so immediately.⁴ The interrogatories are drawn by counsel, but must be settled by the Judge:⁵ care being taken that they go directly to the points as to which the exceptions are sustained; and the Judge must determine whether they have a direct reference to those points or not.⁶ The subsequent proceedings would seem to be as follows: The interrogatories having been settled by the Judge, a fair copy thereof is made by the plaintiff, on paper of the same description and size as that on which bills are printed;⁷ and the signature of the Judge's Chief Clerk is obtained to a memorandum of allowance in the margin thereof.⁸ The copy so allowed is left at the Judge's Chambers, and notice thereof is given to the defendant by the plaintiff.⁹ The defendant may then procure a copy of the interrogatories from the Chambers; and he should prepare a written answer thereto;¹⁰ and obtain at Chambers an appointment to proceed thereon. On attending such appointment, the defendant will be examined on oath by the Judge, who will compare the proposed answer with the interrogatories, and determine whether or not it is sufficient. If the proposed answer, or examination as it is called, is considered insufficient in any respect, the defect will be supplied by the personal examination of the defendant by the Judge, until the Judge is of opinion that the examination is sufficient. The examination, when completed, will be authenticated by the signature of the Judge's Chief Clerk; and he will transmit the interrogatories and examination to the Record and Writ Clerks' Office, to be there filed;¹¹ and notice of the filing * thereof must be given by the defendant to the plaintiff.¹ The defendant is entitled to be attended by his counsel at his examination, but the plaintiff is not entitled to notice of the defendant's being under examination, and has no right to attend.²

The defendant having passed his examination to the satisfaction of the Judge, may apply to be discharged out of custody. He is not, however, entitled to be discharged until the plaintiff has had an opportunity of perusing the examination, in order that he may be satisfied that it is sufficient.³ The plaintiff has also a right, before the defendant is discharged, to see all the documents mentioned in the schedules, or referred to in the examination, if they are so mentioned or referred to that, in the case of an answer, they would have made part of the answer.⁴

⁴ Farquharson v. Balfour, T. & R. 191.

⁵ See 15 & 16 Vic. c. 80, § 26; Hayward v. Hayward, Kay Ap. 31. For form of interrogatories, see Vol. III.

⁶ Farquharson v. Balfour, T. & R. 203.

⁷ Ord. 6 Mar. 1860, r. 16. As to such paper, see Ord. IX. 3; *ante*, p. 396.

⁸ For form of memorandum, see Vol. III.

⁹ For form of notice, see Vol. III.

¹⁰ For the formal parts, see Vol. III.

¹¹ See Ord. XXXV. 31. The examination does not require the signature of counsel; Braithwaite's Pr. 45.

¹ For form of notice, see Vol. III.

² Farquharson v. Balfour, T. & R. 202, 203; see Hayward v. Hayward, Kay Ap. 31.

³ Farquharson v. Balfour, T. & R. 201.

⁴ *Ib.* 202.

The application for the discharge of the defendant from custody is made on motion, notice of which must be given to the plaintiff;⁶ and the order will be made upon payment of the costs, charges, and expenses occasioned to the plaintiff by the insufficient answer.⁶

Where the defendant submits to exceptions for insufficiency which have not been set down for hearing, he must pay to the plaintiff 20s. costs; and where a plaintiff obtains a decree with costs, the costs occasioned to the plaintiff by the insufficiency of the answer of any defendant, who has submitted to exceptions for insufficiency, will be deemed to be part of the plaintiff's costs in the cause: such sum being deducted therefrom as shall have been paid by the defendant, upon the exceptions to the said answer being submitted to.⁷ It must be recollected, however, that this rule will only apply where the question of the extra costs has not been disposed of by the Court in the course of the suit.⁸

Under the old practice of the Court, if the answer was reported insufficient, the defendant was, if it was a first answer, to pay 40s. costs, when the answer was put in by the defendant in person, but if put in by commission, 50s.; if it was a second answer, the defendant was to pay 60s. costs; upon the third answer, 80s. costs, and upon the fourth answer 5*l.*,⁹ with the costs of the contempt, if the plaintiff availed himself of the right of commitment.¹⁰ It seems, that the present practice is to tax the costs of exceptions, and they are considered to be in the discretion of the Court.¹¹ Where, however, the exceptions are allowed, the costs will, in *general, be ordered to follow the de- *774 cision: because the defendant can always prevent the costs, or the greater part of them, by submitting to the exceptions.¹ Where the exceptions are overruled, the costs will also, in general, be directed to follow the decision.² If they are partially allowed, and partially overruled, the costs of those allowed will be ordered to be set off against those overruled.³ If no direction as to the costs is given, they will, under the present practice, be costs in the cause.⁴

Application must be made for the costs on the hearing of the exceptions;⁵ and where the exceptions are allowed, the costs may be ordered

⁶ For form of notice, see Vol. III.

⁷ T. & R. 200.

⁸ Ord. XL. 13.

⁹ Poole v. Gordon, C. P. Coop. 433; 8 L. J. N. S. Ch. 265.

¹⁰ Beames' Ord. 182, 183.

¹¹ *Ibid.*; and Beames on Costs, 227.

¹ 13 & 14 Vic. c. 35, § 32; Morgan & Davey, 27.

² Newton v. Dimes, 3 Jur. N. S. 583, V. C. W.

³ Stent v. Wickens, 5 De G. & S. 384; B. v. W., 31 Beav. 342, 346; S. C. *nom.* A. v. B., 8 Jur. N. S. 1141. By the 65th Equity Rule of the United States Courts, it is provided, that "if, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged

insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the Court, or the Judge thereof, at the hearing upon the exceptions."

⁴ Willis v. Childe, 13 Beav. 454; Dally v. Worham, 32 Beav. 69; Bridgewater v. De Winton, 9 Jur. N. S. 1270, 1272; 12 W. R. 40, V. C. K.; see Order in Seton, 1256, No. 8; see as to costs, where several questions were contained in the interrogatory and some answered. Langton v. Waite, 1 W. N. 328; 15 W. R. 53, V. C. K.

⁵ Crossley v. Stewart, 11 W. R. 636, V. C. K.

⁶ Earp v. Lloyd, 4 K. & J. 58; Crossley v. Stewart, 11 W. R. 636, V. C. K.; Betts v. Rimell, 1 W. N. 22, V. C. W.

to be paid immediately.⁶ Where a married woman, living separate from her husband, filed an insufficient separate answer, leave was given to the plaintiff to apply for part of the costs out of any sums which might come to her, on account of her separate estate, as the order could not be personally enforced against her.⁷

Where, on a sufficient answer being filed, the plaintiff has been ordered to pay the costs of a bill of discovery,⁸ the costs of exceptions which have been allowed to the first answer, may be ordered, on the plaintiff's *ex parte* application, to be deducted from the costs payable to the defendant.⁹

The costs of insufficient answers are recoverable by the usual process of *subpœna* and attachment, or by *feri facias*, or *elegit*; and if a first or second answer is held insufficient, the plaintiff will not, by accepting a further answer, waive his right to the costs already due to him for the insufficiency of the former answer.¹⁰

An order of the Court, allowing or overruling exceptions, may be appealed from in the usual manner.¹¹

*775 *SECTION V. — *Further Answers — Answers to Amended Bills.*

If a defendant, not being in contempt, submits to exceptions to his answer for insufficiency before they are set down for hearing, he has, as we have seen,¹ fourteen days from the date of the submission within which to put in his further answer; and if he does not answer within such time, or obtain further time and answer within such further time,² the plaintiff may sue out process of contempt against him.³

If the defendant is in contempt, no time is allowed him to put in his further answer, beyond the eight days from the filing of the exceptions: before the expiration of which time the plaintiff cannot, as we have seen, set them down for hearing;⁴ a defendant may however put in a further answer, at any time, pending the exceptions.⁵

If, after the exceptions are set down for hearing, a defendant, not being in contempt, submits to answer, or if the Court holds the first or second answer to be insufficient, the Court may, as we have seen, appoint a time within which he must put in his further answer; and if he does not put in his further answer within the time so appointed, or obtain further time and answer within such further time, the plaintiff may sue out process of contempt against him.⁶

If the defendant submits to the exceptions after they are set down, it

⁶ *Thomas v. Rawling*, 27 Beav. 375.

⁷ *Pemberton v. McGill*, 1 Jur. N. S. 1045, V. C. W.

⁸ See *post*, Chap. XXXIV. § 2, *Bills of Discovery*.

⁹ *Hughes v. Clerk*, 6 Hare, 195; but see *now*, *Thomas v. Rawling*, 27 Beav. 375.

¹⁰ *Brotherton v. Chance*, Bunb. 34.

¹¹ See *post*, Chap. XXXII., *Rehearing and Appeals*.

¹ *Ante*, p. 767.

² See *ibid*.

³ Ord. XVI. 9, 15; *ante*, p. 767 note.

⁴ Ord. XVI. 8, 11; *ante*, p. 767.

⁵ *Ingham v. Ingham*, 9 Sim. 363; 2 Jur. 886.

⁶ Ord. XVI. 14, 15; *ante*, p. 769.

seems that they should be allowed to come on for hearing, and an application be then made to the Court to appoint a time within which the defendant must put in his further answer.⁷ If the exceptions are allowed, the Court will, at the request of the parties, at the time of giving its decision, appoint a time within which the defendant is to put in his further answer.⁸

If, after the exceptions are allowed or submitted to, the defendant desires to amend his bill, he may obtain on petition, as of course, at the Rolls, an order that he may be at liberty to amend his bill, and that the defendant may answer the amendments and exceptions together.⁹ The defendant must then, as we have seen,¹⁰ put in his further answer and his answer to the amended bill, within fourteen days after service on him of the interrogatories * to the amended bill.¹ If *776 the defendant put in a further answer only, or an answer to the amended bill only, the plaintiff may move to have it taken off the file, unless he is desirous that it should remain there: in which case, he should move for leave to issue an attachment.² If the defendant, after exceptions allowed, put in his further answer to the original bill, before the plaintiff serves the order for him to answer the amendments and exceptions at the same time, he will deprive the plaintiff of the benefit of the order.³

A further answer, as well as an answer to an amended bill, is in every respect similar to, and is considered as part of, the answer to the original bill; ⁴ therefore, a further answer should only extend to the interrogatories which have not been answered already; and if a defendant, in a further answer, or an answer to an amended bill, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, or is otherwise necessary or expedient, will be considered as impertinent; ⁵ and the defendant may be ordered to pay the costs occasioned by the introduction of such impertinent matter.⁶

The defendant need not answer any interrogatories to the amended bill which have been,⁷ or might have been,⁸ put to the original bill, unless the plaintiff has amended his bill, stating an entirely new case: for then the defendant must answer that case, even though in so doing he answers some of the interrogatories which were or might have been filed to the original bill.⁹

⁷ Manchester, Sheffield, and Lincolnshire Railway Company v. Workop Board of Health, 2 K. & J. 25; but see *ante*, p. 770, n. (9).

⁸ *Ante*, p. 769.

⁹ *Ante*, p. 769.

¹⁰ *Ante*, pp. 739, 769.

¹ Ord. XXXVII. 6.

² *De Tastet v. Lopez*, 1 Sim. 11.

³ *Mayne v. Hochin*, 1 Dick. 255; *Bethuen v. Bateman*, *ib.* 296; *Knox v. Symmonds*, 1 Ves. J. 87, 88; *Paty v. Simpson*, 2 Cox, 392; *Partridge v. Haycraft*, 11 Ves. 570, 578; *Hemming v. Dingwall*, 8 Beav. 102; *Pariente v. Bensusan*, 13 Sim. 522; 7 Jur. 613

⁴ Story Eq. Pl. § 868; *Bennington Iron Co. v. Campbell*, 2 Paige, 160; *Mitford Eq. Pl.* by Jeremy, 318.

⁵ *Bowen v. Idley*, 6 Paige, 46; *Trust & Fire Ins. Co. v. Jenkins*, 8 Paige, 590.

⁶ 15 & 16 Vic. c. 86, § 17. For the practice as to impertinence, see *ante*, pp. 349, 350.

⁷ *Wich v. Parker*, 22 Beav. 59; 2 Jur. N. S. 583; *ante*, p. 729.

⁸ *Drake v. Symes*, 2 De G., F. & J. 81; *Dennis v. Rochussen*, 4 Jur. N. S. 298, V. C. W.

⁹ *Mazzerredo v. Maitland*, 3 Mad. 66, 72.

The form of a further answer and of an answer to an amended bill, is nearly the same as that of an answer to an original bill. If it be an answer to amendments as well as to exceptions, it must be entitled "the further answer of A. B., the above-named defendant, to the bill of complaint of the above-named plaintiff, and the answer of the same defendant to the amended bill of complaint of the said plaintiff."¹⁰ If, after exceptions to the original bill are allowed, the plaintiff amends his bill, and the defendant puts in a further answer to the original bill and an answer to the amended bill, and the answer is again held insufficient,

whereupon the bill is again amended, the answer should be entitled *...the further answer of A. B., the above-named defendant, to the original and first amended bill of complaint of the above-named plaintiff, and the answer of the same defendant to the secondly amended bill of complaint of the said plaintiff."¹ It is not necessary, in answering a bill which has been amended before answer, to call it an answer to the original and amended bill; the most correct way is to call it the answer to "the amended bill," or to "the secondly (or thirdly) amended bill," only: as the original bill has become nugatory by the amendment, and the defendant is not bound to notice it, either in an answer or a demurrer.²

Further answers, and answers to amended bills, must be prepared, signed, taken, filed, and printed in the same manner as answers to original bills.³

If the plaintiff has vexatiously required an answer to the amended bill, and the defendant claims the costs of it in such answer, and asks for them at the hearing, the Court will order them to be paid at once.⁴

A defendant who is required to answer an amended bill, must put in his plea, answer, or demurrer thereto, not demurring alone, within twenty-eight days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer;⁵ and if an answer is not required to the amended bill, a defendant who has appeared to and answered, or has not been required to answer, the original bill, but desires to answer the amended bill, must put in his answer thereto within fourteen days after the expiration of the time within which, if an answer had been required, he might have been served with interrogatories for his examination in answer to such amended bill, or within such further time as the Judge may allow.⁶ An application for further time must be made by special summons, in the manner before explained.⁷

¹⁰ *Peacock v. Duke of Bedford*, 1 V. & B. 186; *Braithwaite's Pr.* 42; see *Bennington Iron Co. v. Campbell*, 2 Paige, 160; see forms in Vol. III.

¹ See *Braithwaite's Pr.* 42, and forms in Vol. III.

² *Smith v. Bryon*, 3 Mad. 428. It may be called "The answer to the bill of complaint." *Rigby v. Rigby*, 9 Beav. 311, 313.

³ See *ante*, §§ 2, 3, of this chapter.

⁴ *Cocks v. Stanley*, 4 Jur. N. S. 942; 6 W. R. 45, V. C. S.

⁵ Ord. XXXVII. 4; *ante*, p. 738.

⁶ Ord. XXXVII. 7. This gives thirty days from the date of service of the amended bill, where the service is effected within the jurisdiction; see *ante*, p. 740.

⁷ *Ante*, p. 741.

SECTION VI. — *Amending Answers — and Supplemental Answers.*

After an answer has been put in upon oath, the Court will not, for obvious reasons, readily suffer any alteration to be made in it.⁸ * There are, however, many instances in the books in which *778 it appears that the Court, upon special application, has allowed the defendant to reform his answer.¹ Thus, where, in answer to a title bill, the defendant has sworn that a certain close contained nine acres, he was permitted to amend it by stating the close to contain seventeen acres, even though issue had been joined;² so where, owing to the mistake of the engrossing clerk, the words "*her* shares" had been introduced into an answer instead of "*ten* shares," the answer was allowed to be taken off the file and amended, though a service had been made;³ and where there has been a mistake in the title of the answer,

⁸ See *Howe v. Russell*, 36 Maine, 115; *American Life Ins. & Trust Co. v. Bayard*, and *Same v. Sackett*, 3 Barb. Ch. 610; *Vandervere v. Reading*, 1 Stockt. (N. J.) 446. [But the discretionary power of the inferior Court to refuse leave to file a supplemental answer will be supervised where it deprives the defendant of the opportunity to set up a meritorious defence. *Brooks v. Moody*, 25 Ark. 452.] In Maine, answers, pleas, and rules may be amended at any time on the like terms as a bill. Rule 3, Maine Chancery Practice; but see *Howe v. Russell*, 36 Maine, 115.

¹ *Campion v. Kille*, 1 McCarter (N. J.), 229, 232. In matters of form, or mistakes of dates, or verbal inaccuracies, Courts of Equity are very indulgent in allowing amendments of answers; but it is only under very special circumstances, that a defendant can be allowed to make any material alteration in his answer, after it has been put in. See *McKim v. Thompson*, 1 Bland, 162; *Bowen v. Cross*, 4 John. Ch. 375; 1 Barb. Ch. Pr. 163, 164; *Smith v. Babcock*, 3 Sumner, 583; *Burden v. McElmoyle*, 1 Bailey Eq. 375; *Western Reserve Bank v. Stryker*, 1 Clarke, 380; *Cock v. Evans*, 9 Yerger, 287, 288; *Giles v. Giles*, 1 Bailey Eq. 428; *Caster v. Wood*, 1 Bald. 289; *Culloway v. Dobson*, 1 Brock. 119; *Liggon v. Smith*, 4 Hen. & M. 405; *Coffman v. Allin*, Litt. Sel. Ca. 201; *Mason v. Debow*, 2 Hayw. 178; *Flora v. Rogers*, 4 Hayw. 202; *Jackson v. Cutright*, 5 Munf. 308; *Beach v. Fulton Bank*, 3 Wend. 574; *Hennings v. Conner*, 4 Bibb, 299; *Taylor v. Bogert*, 5 Paige, 33. This subject is treated at length in *Story Eq. Pl.* §§ 896-901; also in *Smith v. Babcock*, *ubi supra*; *Williams v. The Savage Manuf. Co.*, 3 Md. Ch. Dec. 418; *Tillinghast v. Champlin*, 4 R. I. 128; *Howe v. Russell*, 36 Maine, 115; *Vandervere v. Reading*, 1 Stockt. (N. J.) 446. [And see *Dearth v. Hide and Leather Natl.*

Bk., 100 Mass. 540; *Webster Loom Co. v. Higgins*, 13 Blatchf. 349; *Huffman v. Hummer*, 2 C. E. Green, 271.]

By the 60th of the Equity Rules of the United States Courts, it is provided that, "after an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or by reference to a document, or other small matter, and be resworn at any time before a replication is put in, or the cause is set down for a hearing, upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the Court, or the Judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the Court or the Judge granting the same, may in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom." An amendment changing the whole ground of defence set up in the first answer will not be allowed. *Western Reserve Bank v. Stryker*, 1 Clarke, 380. Where an answer is amended, the old answer must remain on file as originally put in. *Ibid.*

Where the defendant has obtained leave to file an amended answer, he is not to be considered as having put in any answer, until such amended answer has been filed. *White v. Hampton*, 9 Iowa (1 With.), 181.

² *Berney v. Chambers*, Barb. 248; but see *Montague v. —*, cited *ib. n.*, and 2 Gwil. 674, n. (b).

³ *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424, 427; but see *Vandervere v. Reading*, 1 Stockt. (N. J.) 446.

an amendment of it has been permitted,⁴ even though opposed by the plaintiff.⁵

The Court has also allowed a defendant to amend his answer where new matter has come to his knowledge since it was put in,⁶ or in cases of surprise, as where an addition has been made to the draft of the answer after the defendant has perused it.⁷ In like manner, *779 where a plaintiff, having drawn the defendant into an *agreement, whereby, for 300*l.*, he was to relinquish to the plaintiff all his right and interest in a certain estate which had been left to him, filed a bill to have the agreement performed, to which the defendant put in an answer confessing the agreement, and submitting to have it performed, but, afterwards discovering that the estate was of several thousand pounds' value, he applied for leave to take his answer off the file, and to put in another, leave was granted.¹ The Court has also permitted a defendant to amend an answer, by limiting the admission of assets contained therein, where it was clearly established that such admission had been made by mistake, and through the carelessness of the solicitor's clerk.²

The Court, however, has never permitted amendments of this nature, where the application has been made merely on the ground that the defendant, at the time he put in his answer, was acting under a mistake in point of law; and not on the ground of a fact having been incorrectly stated.³ Thus, where a defendant, who was an executor, had admitted himself accountable for the surplus, and it was afterwards found that the circumstances of the case were such that he would have been entitled to it himself, permission to amend was refused.⁴ So, where a defendant had, by his answer, admitted the receipt of a sum of money from his father by way of advancement, and refused to bring it into hotchpot, he was not permitted to amend his answer as to the admission, although he swore that he made it under a mistake as to the law of the case.⁵

The Court will also refuse to permit an amendment of an answer, after an indictment for perjury preferred or threatened, even though it

⁴ *White v. Godbold*, 1 *Mad.* 269; *Peacock v. Duke of Bedford*, 1 *V. & B.* 186; *Thatcher v. Lambert*, 5 *Hare*, 228.

⁵ *Attorney-General v. Corporation of Worcester*, 2 *Phil.* 3; 1 *C. P. Coop. t. Cott.* 18.

⁶ *Patterson v. Slaughter*, *Amb.* 292; *Wells v. Wood*, 10 *Ves.* 401; and see remarks on *Patterson v. Slaughter*, in *Fulton v. Gilmore*, 1 *Phil.* 528; *Tillinghast v. Champlin*, 4 *R. L.* 128.

⁷ *Chute v. Lady Dacre*, 1 *Eq. Ca. Ab.* 29, pl. 4. Especially where the answer has not been sworn to. *Taylor v. Dodd*, 5 *Ind.* (Porter) 246.

¹ *Alpha v. Payman*, 1 *Dick.* 33. So where an order, granting to the plaintiff the right to surcharge and falsify an account, was appealed from, and the Appellate Court re-

manded the cause for the purpose of having the pleadings amended, and for further proceedings, and extended the right to surcharge and falsify the account to both parties, provided the defendant's amended pleadings should warrant such extension, it was held that the defendant could amend his answer so as to surcharge and falsify in respect to matters known to him at the time of filing his original answer. *Williams v. The Savage Manuf. Co.*, 3 *Md. Ch. Dec.* 418.

² *Dagly v. Crump*, *ib.* 35; and see *Cooper v. Uttoxeter Burial Board*, 1 *H. & M.* 680; *Hughes v. Bloomer*, 9 *Paige*, 269.

³ *Branch v. Dawson*, 9 *Geo.* 592.

⁴ *Rawlins v. Powell*, 1 *P. Wms.* 298; see, however, *Brown v. Lake*, 1 *De G. & S.* 144.

⁵ *Pearce v. Grove*, *Amb.* 65; 3 *Atk.* 522.

consider it to be clear that the defendant did not intend to perjure himself, and had no interest in so doing.⁶

From the above cases it appears, that it was formerly the general practice of the Court, if it saw a sufficient ground for so doing, to permit the defendant to amend his answer. Lord Thurlow, however, as it seems, introduced a better course in cases of mistake: * not *780 taking the answer off the file, but permitting a sort of supplemental answer to be filed, and by that course leaving to the parties the effect of what has been sworn before, with the explanation given by the supplemental answer.¹

This practice has been since adopted, in all cases in which it is wished to correct a mistake in an answer as to a matter of fact;² and it is not confined to cases of mistake only, but has been extended to other analogous cases: as where a defendant, at the time of putting in his original answer, was ignorant of a particular circumstance, he has been permitted to introduce that circumstance by supplemental answer,³ even though the information was obtained by a violation of professional confidence.⁴ And where a defendant had wished to state a fact in his original answer, but had been induced to leave it out by the mistaken advice of his solicitor, he was allowed to state it by supplemental answer.⁵ Again, where, subsequently to the filing of the answer, events had occurred which the defendant was advised ought, for the purposes of his defence, to appear on the record, he was allowed to state them by means of a supplemental answer.⁶

Although the Court will, in cases of mistake, or other cases of that

⁶ *Earl Verney v. Macnamara*, 1 Bro. C. C. 419; *Phelps v. Prothero*, 2 De G. & S. 274.

¹ Per Lord Eldon, in *Dolder v. Bank of England*, 10 Ves. 285; and see *Jennings v. Merton College*, 8 Ves. 79; *Wells v. Wood*, 10 Ves. 401; *Phelps v. Prothero*, 2 De G. & S. 274; 12 Jur. 733; see *Bowen v. Cross*, 4 John. Ch. 375; *Vandervere v. Reading*, 1 Stockt. 446; *Howe v. Russell*, 36 Maine, 124; *Edwards v. McLeay*, 2 V. & B. 256. A supplemental answer, to correct an error in the original answer, will not be allowed except with great caution, and always on equitable terms as to costs and furnishing copies gratis. *Western Reserve Bank v. Stryker*, 1 Clarke, 380. When a supplemental answer is put in, the old answer must remain on file as it was originally put in. *Murdock's Case*, 2 Bland, 261; *Western Reserve Bank v. Stryker*, 1 Clarke, 380. An application will not be entertained to file a supplemental answer to change the whole ground of defence set up in the first answer. *Murdock's Case*, 2 Bland, 261; *Western Reserve Bank v. Stryker*, 1 Clarke, 380. The defendant will not be allowed to amend his answer after the opinion of the Court, and the testimony have indicated in what respect it may be modified so as to effect his purpose. *Colloway v. Dobson*, 1 Brock. 119. A defendant is not allowed to file a supplemental answer for the purpose

of setting up an important fact, which has arisen since the filing of the original answer. He should file a bill in the nature of a supplemental bill. *Taylor v. Titus*, 2 Edw. Ch. 135.

² *Strange v. Collins*, 2 V. & B. 163, 167; *Taylor v. Obce*, 3 Pri. 83; *Ridley v. Obce*, *Wightw.* 32; *Swallow v. Day*, 2 Coll. 133; 9 Jur. 805; *Bell v. Dunmore*, 7 Beav. 283, 287; *Cooper v. Uttoxeter Burial Board*, 1 H. & M. 680; *Mounce v. Byars*, 11 Geo. 180; *Tillinghast v. Champlin*, 4 R. I. 128.

³ *Jackson v. Parish*, 1 Sim. 505, 509; *Tidswell v. Bowyer*, 7 Sim. 64; see *Const v. Barr*, 2 Mer. 57, 60; *Frankland v. Overend*, 9 Sim. 365; *Fulton v. Gilmore*, 8 Beav. 154; 9 Jur. 1; 1 Phil. 522, 528; *Chadwick v. Turner*, 34 L. J. Ch. 62, M. R.; *Talmage v. Pell*, 9 Paige, 410; *Snydam v. Truesdale*, 6 McLean, 459.

⁴ *Raincock v. Young*, 16 Sim. 122.

⁵ *Nail v. Punter*, 4 Sim. 474, 483; [*Burgin v. Giberson*, 8 C. E. Green, 403. Or where by oversight of the solicitor the fact was omitted from the answer. *Arnaud v. Grigg*, 2 Stew. Eq. 1.]

⁶ *Stamps v. Birmingham & Stour Valley Railway Company*, 2 Phil. 673, 677; *Anon.*, *Hopk.* 27; *Smith v. Smith*, 4 Paige, 132; [*Southall v. British Mut. Life Ass. Co.*, 38 L. J. Ch. 711. See *ante*, 409, n. 4.]

description, permit a defendant to correct his answer by supplemental answer, it always does so with great difficulty, where an addition *781 is to be put upon the record prejudicial to the plaintiff,⁷ * though it will be inclined to yield to the application, if the object is to remove out of the plaintiff's way the effect of a denial, or to give him the benefit of a material admission.¹ Therefore, where the application was made for the purpose of enabling the defendant to raise the Statute of Limitations as a defence, leave to file a supplemental answer was refused;² and where the defendant had, by his original answer to a bill for the specific performance of a contract, admitted that he took possession of the whole property in pursuance of the contract, but afterwards applied for leave to put in a supplemental answer to limit the admission to part of the premises only, upon affidavits of mistake, the motion was refused: unless the defendant would state upon oath, that when he swore to the original answer, he meant to swear in the sense in which he, by the application, desired to be permitted to swear to it.³

An application for leave to file a supplemental answer is made upon motion or by summons.⁴ The summons or notice of motion must be served on the plaintiff, and must specify the facts intended to be stated in the proposed supplemental answer, and be supported by affidavit verifying the truth of the proposed supplemental answer, specifically stating the facts intended to be placed on the record,⁵ and showing a sufficient reason why they were not introduced into the original answer.⁶ The defendant must also, it seems, produce a full copy of the intended supplemental answer,⁷ for the inspection of the plaintiff.⁸

⁷ Where the purpose of the amendment is not to correct any mistake or misstatement in the original answer, but to set up substantially a new ground of defence at the hearing, it will not be permitted. *Campion v. Kille*, 1 McCarter (N. J.), 229, 232. [Or an unconscientious defence, as that the plaintiff, a corporation, was acting *ultra vires* in making the contract sued on. *Third Avenue Sav. Bk. v. Dimock*, 9 C. E. Green, 26.]

¹ *Edwards v. McLeay*, 2 V. & B. 256. Lord Eldon in this case, as well as in *Strange v. Collins*, *ib.* 166, appears to have been of opinion, that a supplemental answer ought not to have any effect upon an indictment for perjury upon the original answer; but see *King v. Carr*, 1 Sid. 418; 2 Keb. 516; see *Phelps v. Prothero*, 2 De G. & Sm. 278; *Swallow v. Day*, 2 Coll. 133; *Hughes v. Bloomer*, 7 Paige, 269.

² *Percival v. Caney*, 14 Jur. 473, V. C. K. B.; [Stull v. Goode, 10 Heisk. 58; *Cock v. Evans*, 9 Yerg. 287. Especially after a decree for an account. *McKea v. David*, 7 Rich. Eq. 375. So, when the object was to set up the defence of the statute of frauds. *Cook v. Bee*, 2 Tenn. Ch. 344.]

³ *Livesey v. Wilson*, 1 V. & B. 149; see also *Greenwood v. Atkinson*, 4 Sim. 54, 64; *Murdock's Case*, 2 Bland. 461; *Vandervere v. Reading*, 1 Stockt. (N. J.) 446. A defend-

ant will not be allowed to file a supplemental answer contradicting the statements in the first answer. *Greenwood v. Atkinson*, 4 Sim. 61; see *Thomas v. Visitors of Frederick Co. School*, 7 Gill & J. 389.

⁴ For forms of notice of motion and summons, see Vol. III.; for order or summons, see *Bovill v. Clark*, V. C. W., at Chambers, 23 Nov., 1865, Reg. Lib. A. 2221; and see *Seton*, 45. It seems, however, from *Churton v. Frewen*, L. R. 1 Eq. 238, V. C. K., that the application should be made by motion only.

⁵ *Curling v. Marquis Townshend*, 19 Ves. 628, 631; *Smith v. Hartley*, 5 Beav. 432; *Haslar v. Hollis*, 2 Beav. 236; *Fulton v. Gilmore*, 8 Beav. 154; 9 Jur. 1; 1 Phil. 522, 527; 9 Jur. 265. Where the application is founded on documentary evidence, it must be produced. *Churton v. Frewen*, L. R. 1 Eq. 238, V. C. K.

⁶ *Tennant v. Wilmore*, 2 Anst. 362; *Scott v. Carter*, 1 Y. & J. 452; *Podmore v. Skipwith*, 2 Sim. 565; *Smallwood v. Lewin*, 2 Beasley (N. J.), 123; *Smith v. Babcock*, 3 Sumner, 585; *Vandervere v. Reading*, 1 Stockt. (N. J.) 446.

⁷ *Bell v. Dunmore*, 7 Beav. 283; *Fulton v. Gilmore*, *ubi sup.*

⁸ *Fulton v. Gilmore*, *ubi sup.*

In making an application for leave to file a supplemental answer, the defendant must also make a case, showing that justice requires that he should be permitted to alter the defence already on record; and even where a defendant applied for leave to file a supplemental answer for the purpose of making an admission in * favor of the plaintiff, upon an affidavit that, from certain cir- *782 cumstances which had since occurred, he was satisfied he ought to have admitted a fact which he had denied,¹ Lord Eldon held, that the affidavit ought to have stated that, at the time of putting in the answer, the defendant did not know the circumstances upon which he made the application, or any other circumstances upon which he ought to have stated the fact otherwise.²

Where a defendant has obtained permission to file a supplemental answer, for the purpose of correcting a mistake in his original answer, he must confine his supplemental answer strictly to the correction of the mistake sworn to. If he goes beyond that, and makes any other alteration in the case than what arises from the correction of such mistake, his supplemental answer will be taken off the file.³

Where a defendant has, at the time of putting in his original answer, mistaken facts, he cannot contravene his own admission in any other way than by moving to correct his answer, either by amendment or supplemental answer. He cannot do so by filing a cross-bill.⁴

There appears to be no particular limit to the time within which an application for leave to file a supplemental answer, to correct a mistake in an original answer, will be complied with: provided the cause is in such a state that the plaintiff may be placed in the same situation that he would have been in, had the answer been correct at first.⁵ Accordingly, we find several instances in the books in which such applications have been granted after replication,⁶ and even after the cause has been set down, and in the paper for hearing.⁷ Where, however, the plaintiff cannot be placed in the same situation that he would have been in, had the defence been stated on the record in due time, the Court will not permit a supplemental answer to be filed. Therefore, where, after the cause had been set down for hearing, an application was made for leave

¹ The motion for leave to file a supplemental answer must be accompanied with an affidavit. *Thomas v. Doub*, 1 Md. 252; *McKim v. Thompson*, 1 Bland, 150.

² *Wells v. Wood*, 10 Ves. 401.

³ *Strange v. Collins*, 2 V. & B. 163, 167.

⁴ *Berkley v. Ryder*, 2 Ves. S. 533, 537; *Graham v. Tankersley*, 15 Ala. 634.

⁵ *Martin v. Atkinson*, 5 Geo. 390. [But an application to amend a sworn answer made more than two years after the discovery of the alleged mistake and filing of the answer, without excuse for the delay, was refused. *Wilson v. Wintermute*, 12 C. E. Green, 63. And see where the application was to amend after the hearing in a patent case, with a view to contest the question of infringement before the Master, or, at any rate, the

extent of infringement, and was refused. *Ruggles v. Eddy*, 11 Blatchf. 524.]

⁶ *Jackson v. Parish*, 1 Sim. 505, 509; *Raincock v. Young*, 16 Sim. 122; *Parsons v. Hardy*, 21 L. J. Ch. 400, V. C. T.

⁷ *Fulton v. Gilmore*, 8 Beav. 154, 158; 9 Jur. 1; 1 Phil. 522, 525, 530; 9 Jur. 265; *Chadwick v. Turner*, 34 L. J. Ch. 62, M. R.; [*Arnaud v. Griggs*, 2 Stew. Eq. 1; *Podmore v. Skipwith*, 2 Sim. 565. But an amendment to a sworn answer by the addition of material facts known to the defendant at the time the original answer was sworn to, was not permitted on final hearing. *Marsh v. Mitchell*, 11 C. E. Green, 497. Nor, *a fortiori*, after an agreement to try at a fixed time, on the existing pleadings. *Furman v. Edwards*, 3 Tenn. Ch. 365.]

to file a supplemental answer, which set up a totally new defence, while it admitted the facts as stated in the original answer to be true, the Court refused the motion with costs.⁸

But although the rule of practice now is, that, in cases of mistake in the statement or admissions in an answer, or in analogous cases, the
*783 defendant will not be permitted to amend his answer, * but must apply for leave to file a supplemental answer, for the purpose of correcting the mistake, the old course of amending the answer may still be pursued in cases of error or mistake in matters of form. Thus, in *White v. Godbold*,¹ where the title of an answer was defective, a motion by the defendant to take it off the file and amend and reswear it, was granted; and so, where, in the title of an answer, the name of the plaintiff was mistaken, a similar order was made.² The addition of the name of a party omitted in the title has also been permitted.³ Where, however, an answer had been prepared for certain defendants, but only sworn to by some of them, it was directed to be received as the answer of those who had sworn it, without striking out the names of those who had not.⁴ A defendant has, also, been permitted to add the schedules referred to in his answer, where they had been accidentally omitted;⁵ and in several cases, where verbal inaccuracies have crept into answers, they have been ordered, at the hearing, to be struck out.⁶ In like manner, where, in filing an answer, one skin had, by accident, been omitted, leave was given to the defendant to take it off the file, for the purpose of rectifying the omission, upon condition, however, of his re-swearing it immediately.⁷ A similar order was made, in a case where the defendant had omitted to sign some of the skins;⁸ and, in general, the Court will not permit such amendments as those above mentioned, without making it part of the order that the answer shall be resworn, or, in case of a peer, again attested upon honor.⁹ The Court has also permitted an answer to be amended, by adding to the record the name of the counsel who signed the draft.¹⁰

An order to amend an answer must state the particular amendment to be made; and may, by consent, be obtained on petition, as of course, at the Rolls.¹¹ If the plaintiff will not consent, it seems that a special

⁸ *Macdougall v. Purrier*, 4 Russ. 486; see *Smallwood v. Lewin*, 2 Beasley (N. J.), 123.

¹ 1 Mad. 269; the order was, however, made by consent in this case.

² *Peacock v. Duke of Bedford*, 1 V. & B. 186; *Woodger v. Crumpton*, 1 Fowl. Ex. Pr. 388; *Lloyd v. Mytton*, *ib.* 389; *Keen v. Stanley*, *ibid.*; *Rabbeth v. Squire*, 10 Hare Ap. 3; but see *Fry v. Mantell*, 4 Beav. 485; *S. C. nom. Fry v. Martell*, 5 Jur. 1194; [Attorney-General v. Worcester, 2 Phil. 3; 1 Cooper t. Cott. 18.]

³ *Wright v. Campbell*, 1 Fowl. Ex. Pr. 389.

⁴ *Done v. Read*, 2 V. & B. 310; and see *Lyons v. Read*, *Braithwaite's Pr.* 51; see also *ante*, p. 733.

⁵ *Bryan v. Truman*, 1 Fowl. Ex. Pr. 389.

⁶ *Ellis v. Saul*, 1 Anst. 332, 338, 341; and see *Jesus College v. Gibbs*, 1 Y. & C. Ex. 145, 162.

⁷ *Browning v. Sloman*, 6 Law J. N. S. Ex. Eq. 48; 1 Jur. 58.

⁸ *Lord Moncaster v. Braithwaite*, 1 You. 382.

⁹ *Peacock v. Duke of Bedford*, 1 V. & B. 186.

¹⁰ *Harrison v. Delmont*, 1 Pri. 108; *Whitehead v. Cunliffe*, 2 Y. & C. Ex. 3; *ante*, p. 733.

¹¹ *Braithwaite's Pr.* 312; and see *Wyatt's P. R.* 19; *Hinde*, 206. For form of petition, see Vol. III.

application must be made by the Court, on motion, of which notice must be given, specifying the proposed amendment.¹²

* The amendment will be made by the Clerk of Records and *784 Writs, on the draft of the answer, as amended and signed by counsel, together with the order to amend, being left with him for that purpose. Any official printed copies of the answer which may have been taken should also be left, in order that they may be altered, so as to agree with the amended answer.¹

A supplemental answer cannot be excepted to without leave; so that, for the purpose of determining the time at which the defendant may move to dismiss the bill, a supplemental answer is to be deemed, *prima facie*, sufficient when it is filed.²

SECTION VII. — *Taking Answers off the File.*

If any irregularity has occurred, either in the frame or form of an answer, or in the taking or filing of it, the plaintiff may take advantage of such irregularity, by moving to take the answer off the file.³ Instances in which such motions may be made have been before pointed out.⁴ If, however, the plaintiff intends to apply to the Court to take an answer off the file for irregularity, he must do so before he accepts the answer: otherwise, he will have waived his right to make the

¹² Attorney-General v. Corporation of Worcester, 2 Phil. 3; 1 C. P. Coop. t. Cott. 18. For form of notice, see Vol. III.

¹ Braithwaite's Pr. 312.

² Barnes v. Twiddle, 10 Sim. 481, 483.

³ See Littlejohn v. Munn, 3 Paige, 280; Supervisors, &c. v. Mississippi, &c. R. R. Co., 21 Ill. 338; Spivey v. Frazee, 7 Ind. 661; McLure v. Colclough, 17 Ala. 89. An answer, taken by commission, will be taken off the file, if the *jurat* does not state where it was sworn. Henry v. Costello, 1 Hogan, 130. The answer of a foreigner, who does not understand English, must be sworn in the language he speaks, and be filed with an English translation; and if he files an answer in English only, it will be taken off the file. Hayes v. Lequin, 1 Hogan, 274. But a mistake in the English translation of an answer is no ground for taking it off the file. *Ibid.* An answer was taken off the file for irregularity, one skin only out of six skins having been signed by the defendant. Lord Moncaster v. Braithwaite, 1 You. 382; Carter v. Bosanquet, 13 Price, 604; Bailey v. Forbes, McClell. & Y. 462. So where the answer has not been signed at all. Denison v. Bassford, 7 Paige, 370. A bill amended without leave was ordered to be taken off the file. Thomas v. Frederick Co. School, 7 Gill & J. 369. If the plaintiff waives an answer on oath, he cannot apply to have it taken off the files on the ground that the defendant knows it to be

wholly untrue. Denison v. Bassford, 7 Paige, 370. In a suit against husband and wife, the filing of a separate answer by the husband, was held irregular, and no act of waiver on the part of the plaintiff appearing, the Court held that it must be taken off the file. Leavitt v. Cruger, *et ux.* 1 Paige, 422; Collard v. Smith, 2 Beasley (N. J.), 43; *ante*, 754, note. For other cases where an answer will be taken from the files, see Perine v. Swaine, 1 John. Ch. 24; Trumbull v. Gibbons, Halst. Dig. 172; Nesbitt v. Dellam, 7 Gill & J. 494; Fulton Bank v. Beach, 6 Wend. 36; New York Chem. Co. v. Flowers, 6 Paige, 654. An application to take an answer off the file, in order to prosecute for perjury, is made to the discretion of the Court, and will not be granted unless some ground is laid to enable the Court to judge of the propriety of such a proceeding. Daly v. Toole, 1 Irish Eq. 344; S. C. 2 Dru. & Wal. 599. The Court will not allow an answer to be taken off the file for this purpose, if it appear, that the alleged perjury is in a part wholly immaterial to the merits of the case. McGowan v. Hall, Hayes, 17; see Napier v. Napier, 1 Irish Eq. 414; S. C. 2 Dru. & Wal. 604.

⁴ *Ante*, pp. 731, 733, 748, 753, 771; and see Fry v. Mantell, 4 Beav. 485; S. C. *nom.* Fry v. Martel, 5 Jur. 1194; Raistrick v. Lisworth, 12 Jur. 782, V. C. K. B.; Liverpool v. Chippendall, 14 Jur. 301, V. C. E.

*785 application;⁵ unless in the case of an irregularity * in the jurat, or of an omission of the oath or attestation of honor of the defendant, without an order to warrant such omission: in which cases, as we have seen, there must be an express waiver of the irregularity.¹

The Court has sometimes also, as before stated,² allowed an answer to be taken off the file on an application on the part of the defendant, for the purpose of enabling him to correct a mistake in its form; but it does so only, as we have seen, upon condition that the defendant shall immediately cause the correction to be made, and reswear and file the answer; and it will never make such an order where the plaintiff can be at all prejudiced by it.

Where an answer is evidently, on the face of it, evasive, the Court will order it to be taken off the file, and not leave the plaintiff to his remedy by exceptions.³

The application to take an evasive answer off the file is made by motion, of which notice must be given to the defendant.⁴ The defendant will be ordered to pay the costs of the motion, and the costs of an office copy of the document filed as the answer, and all other costs properly incurred by the plaintiff in consequence of the filing of the evasive answer.⁵ The plaintiff cannot apply to take the answer off the file after he has excepted to it for insufficiency.⁶

Lastly, it may be here observed, that the Court will, upon the consent of all parties, order pleadings, affidavits, and other documents to be taken off the file, where they contain matter which is scandalous, or which it is desirable should not remain recorded.⁷

⁵ Taking an office copy of the answer, does not seem to be an acceptance for this purpose. *Fry v. Mantell*, *ubi sup.*; and see *Woodward v. Twinaine*, 9 Sim. 301; *Attorney-General v. Shield*, 11 Beav. 441, 445; 13 Jur. 330. [In pleading, a positive step on the basis of the regularity of a previous pleading, waives any irregularity therein. *Steele v. Plomer*, 2 Phil. 780; *Fulton Bank v. Beach*, 2 Paige, 307; S. C. 6 Wend. 36; *Seifried v. People's Bank*, 2 Tenn. Ch. 17; S. C. 1 Baxt. 200.]

¹ *Ante* p. 748; see *Trumbull v. Gibbons*, 1 Halst. Dig. 172; *Nesbitt v. Dellam*, 7 Gill & J. 494; *Scott v. Allett*, 1 Hogan, 375.

² *Ante*, p. 732.

³ *Lynch v. Lecesne*, 1 Hare, 626, 631; 7 Jur. 35; *Read v. Barton*, 3 K. & J. 166; 3 Jur. N. S. 263; see also *Tomkin v. Lethbridge*, 9 Ves. 179; *Smith v. Serle*, 14 Ves. 415; *Brooks v. Purton*, 1 Y. & C. C. 273; see *contra*, *Marsh v. Hunter*, 3 Mad. 437; *White v. Howard*, 2 De G. & S. 223. If an answer is so evasive that it is obviously a mere delusion,—if there is no answer to any of the material facts stated in the bill, and no reason assigned for not answering them,

—it will be considered as no answer, and the Court will order it to be taken from the file. If, on the other hand, it be an answer, however defective, the plaintiff must either file exceptions or a replication, or set down the cause for hearing upon bill and answer. *Travers v. Ross*, 1 McCarter (N. J.), 254; [*Squier v. Shaw*, 9 C. E. Green, 74;] see *Financial Corporation v. Bristol & North Somerset Railway Co.*, L. R. 3 Eq. 422.

⁴ For form of notice, see Vol. III.

⁵ *Read v. Barton*, 3 K. & J. 166; 3 Jur. N. S. 263; *Financial Corporation v. Bristol & North Somerset Railway Co.*, L. R. 3 Eq. 422.

⁶ *Glassington v. Thwaites*, 2 Russ. 458, 462; *Seaton v. Grant*, L. R. 2 Ch. Ap. 459.

⁷ *Tremaine v. Tremaine*, 1 Vern. 189; *Walton v. Broadbent*, 3 Hare, 334; *Jewin v. Taylor*, 6 Beav. 120; *Clifton v. Bentall*, 9 Beav. 105; *Barritt v. Tidswell*, 7 W. R. 85, V. C. K.; *Makepeace v. Romieux*, 8 W. R. 687, V. C. K.; see also *Goddard v. Parr*, 24 L. J. Ch. 783, V. C. K.; *Kernick v. Kernick*, 12 W. R. 335, V. C. W.; [*Seaton v. Grant*, L. R. 2 Ch. Ap. 459.]

*SECTION VIII. — *From what Time Answer deemed sufficient.* *786

The answer of a defendant is, generally, treated as being sufficient until it is found to be insufficient; ¹ and it will be deemed to be sufficient, —

1. Where no exceptions for insufficiency are filed thereto, within six weeks after the filing of such answer.²

2. Where, exceptions being filed, the plaintiff does not set them down for hearing within fourteen days after the filing thereof.³

3. Where, within fourteen days after the filing of a further answer, the plaintiff does not set down the old exceptions.⁴

We have before seen, that the vacations are not reckoned in the computation of the time allowed for filing or setting down exceptions, in cases where the time is not limited by notice given by the defendant in a case of election; ⁵ so that, in computing the above-mentioned periods, the vacations are not included.

Where, upon the hearing of exceptions, the answer is held sufficient, it will be deemed to be so from the date of the order made on the hearing: and where the defendant submits to answer without an order from the Court, the answer will be deemed insufficient from the date of the submission.⁶

It is important to fix with precision when an answer is to be deemed sufficient, because as we shall see hereafter, in treating of motions to dismiss,⁷ the date of the sufficiency of the answer constitutes the point of time from which is to be reckoned the period, at the expiration of which a motion to dismiss the bill for want of prosecution may be made.⁸

¹ *Sibbald v. Lowrie*, 2 K. & J. 277, n.; *Lafone v. Falkland Islands Company*, *ib.* 277.

² See 61st Equity Rule of the United States Courts, and the 17th of the Rules of Practice in Chancery in Massachusetts; *ante*, p. 765, note.

³ See 63d Equity Rule of the United States Courts.

⁴ Ord. XVI. 16.

⁵ Ord. XXXVII. 13 (2); XLII. 6; *ante*, p. 768.

⁶ Ord. XVI. 18.

⁷ See *post*, p. 801 *et seq.*

⁸ For the manner of computing the several periods, see *ante*, p. 786.

THE JOINDER OF SEVERAL DEFENCES.

ALL or any of the several modes of defence before enumerated may be joined in the defence to a bill;¹ thus, a defendant may demur to one part of the bill, plead to another, answer to another, and disclaim as to another.² A defendant may also, as we have seen, put in separate and distinct demurrers, to separate and distinct parts of the same bill;³ he may also plead different matters, to separate parts of the same bill.⁴ When the species of defence is adopted, the same rules which have been before laid down with reference to each mode of defence when adopted singly, must be observed when the same modes of defence are resorted to collectively. Lord Redesdale lays it down, that "all these defences must clearly refer to separate and distinct parts of the bill; for a defendant cannot plead to that part to which he has already demurred, neither can he answer to any part to which he has either demurred or pleaded: the demurrer demanding the judgment of the Court whether he shall make any answer, and the plea, whether he shall make any other answer than what is contained in the plea. Nor can the defendant, by answer, claim what, by disclaimer, he has declared he has no right to. A plea or answer⁵ will, therefore, *788 overrule a demurrer,⁶ and an answer a plea,⁷ and * if a dis-

¹ Provided each relates to a separate and distinct part of the bill. Mitford Eq. Pl. by Jeremy, 106, 319; *Livingston v. Story*, 9 Peters, 623; *Lubé Eq. Pl.* 319; *Clark v. Phelps*, 6 John. Ch. 214; *Beauchamp v. Gibbs*, 1 Bibb, 481; *Robertson v. Bingley*, 1 M'Cord Ch. 352.

² *Ld. Red.* 319; Rule 10 of Mass. Chancery Practice; Rule 6, Maine Ch. Practice. By the 32d Equity Rule of the United States Courts, the defendant may, at any time before the bill is taken as confessed, or afterwards with the leave of the Court, demur or plead to the whole bill, or to part of it; and he may demur to part, plead to part, and answer as to the residue. Or the defendant, in Massachusetts, may, instead of filing a formal demurrer or plea, insist on any special matter in his answer, and have the same benefit thereof as if he had pleaded the same, or demurred to the bill. Rule 14, Chancery Practice, Mass.

So in Maine, the defendant may have the benefit of a plea by inserting its substance in his answer. Rule 6, Chancery Practice; see 39th Equity Rule of the United States Courts; *ante*, pp. 589, 590, note; *Hartshorn v. Eames*, 31 Maine, 97; *Smith v. Kelley*, 56 Maine, 64, 65; Code of Tenn. § 4318.

³ *Ante*, p. 584.

⁴ *Ante*, p. 610.

⁵ See *Bolton v. Gardner*, 3 Paige, 273.

⁶ See *Spofford v. Manning*, 6 Paige, 383; *Clark v. Phelps*, 6 John. Ch. 214; *Miller v. Furze*, 1 Bailey Eq. 187; *H. K. Chase's Case*, 1 Bland, 217; *Souzer v. De Meyer*, 2 Paige, 574; *Robertson v. Bingley*, 1 M'Cord Ch. 352; Rule 10 of the Reg. of Prac. in Chanc. in Mass.; and 23d Equity Rule of the United States Courts. [*Ante*, 534, n. 1.]

⁷ *Bolton v. Gardner*, 3 Paige, 273; *H. K. Chase's Case*, 1 Bland, 217; *Souzer v. De Meyer*, 2 Paige, 574; *Ferguson v. O'Harra*,

claimer and answer are inconsistent the matter will be taken most strongly against the defendant upon the disclaimer."¹

The strict application of these principles has, as we have seen, been relaxed; and now, no demurrer or plea will be held bad and overruled on argument, only because such demurrer or plea does not cover so much of the bill as it might by law have extended to, or only because the answer of the defendant extends to some part of the same matter as is covered by such demurrer or plea.²

In all cases not coming strictly within these rules, the principles above quoted from Lord Redesdale still apply; and, in addition thereto, it is to be remarked that, where a defendant adopts this mode of defence, not only should each defence in words be applicable to the distinct part of the bill to which it professes to apply, but that it should also, in substance, relate peculiarly to that part of the bill which it professes to cover; so that a defence in words applicable to part of a bill only, but in reality applicable to the whole bill, is not good, and cannot stand, in conjunction with another distinct defence applicable and applied to another distinct part of the bill.³ Where, therefore, a defendant, put in a joint demurrer and plea, each of which went to the whole bill, the demurrer was overruled;⁴ and where a defendant, as to part of a bill, put in a plea that there was no outstanding term, and a demurrer as to the rest on the ground that the plaintiff had no title, Lord Langdale M. R., although he held the plea to be good, was of opinion that the demurrer being applicable to the whole bill, and consequently to that part of it which was covered by the plea, was bad.⁵

When a demurrer is to part only of the bill, and is accompanied by an answer or other defence to the remainder, it should be entitled "The demurrer of A. B., the above-named defendant, to part of the bill, and the answer of the said defendant to the remainder of the bill of complaint of the above-named plaintiff."⁶ The same rule is applicable to cases where the defence is partly by plea, and partly by answer;

¹ Peters C. C. 493; *Leaycraft v. Dempsey*, 4 Paige, 124; *Stearns v. Page*, 1 Story, 204. In Maine, "demurrers, pleas, and answers will be decided on their own merits, and one will not be regarded as overruling another." Rule 6 of Chancery Practice, 37 Maine, 583.

By the rules in Chancery cases in Maine, defendants may severally demur and answer to the merits of the bill at the same time. *Smith v. Kelley*, 56 Maine, 64, 65. In this case the defendants each put in a demurrer, and at the same time answered to the whole bill, and the demurrers were sustained. See also *Hartshorn v. Eames*, 31 Maine, 97.

[In Tennessee, by the Code, § 4319, the defendant may have the benefit of a demurrer, except for the want of jurisdiction of the subject-matter or of the person, by relying thereon in his answer; and, by § 4320, either party may set the matters of demurrer for hearing at the next term. *Harding v. Egin*,

2 Tenn. Ch. 39. And if the defendant neglects to have his demurrer, thus filed, disposed of before the hearing on the merits, he waives the benefit of it. *Kyle v. Riley*, 11 Heisk. 230.]

² *Ld. Red.* 319.

³ Ord. XIV. 8, 9; *ante*, pp. 584, 585, 617. These orders have been adopted in the 36th and 37th Equity Rules of the Supreme Court of the United States, January Term, 1842.

⁴ *Crouch v. Hickin*, 1 Keen, 385, 389.

⁵ *Lowndes v. Garnett and Moseley Gold Mining Company*, 2 J. & H. 282; 8 Jur. N. S. 694; see also *Mansell v. Feeney*, 2 J. & H. 313.

⁶ *Crouch v. Hickin*, *ubi sup.* His Lordship, however, allowed a demurrer *one tenens*, for want of equity, to that part of the bill which was not covered by the plea.

⁷ *Tomlinson v. Swinnerton*, 1 Keen, 9, 13; *Braithwaite's Pr.* 43.

*789 except in those cases where the answer is *in support of the plea; for then, the plea and answer form but one defence, and the title is properly "The Plea and Answer."¹

Where a defence of this nature has been put in, the first thing is to dispose of the demurrer, and also of the plea, if there is one (unless it is intended to admit that it is a valid defence, if true), and for this purpose, the demurrer and plea must be set down for argument in the usual way.² The plaintiff must, however, be careful not to amend his bill, or except to the answer for insufficiency, before the demurrer and plea have been disposed of: otherwise, they will be held sufficient.³

If, upon the argument, the demurrer and plea are, or either of them is, overruled, the plaintiff may deliver exceptions for insufficiency, extending not only to the answer, but to the parts of the bill which were intended to be covered by the demurrer and plea; but if the demurrer and plea are, or either of them is, allowed, the exceptions must not extend to the parts of the bill covered by them.⁴ The proper course to be pursued, where a partial demurrer has been allowed to a bill, appears to be, to amend the bill, either by striking out the part demurred to, or by making such alteration in the bill as will obviate the ground of demurrer. Thus, after a partial demurrer, *ore tenus*, for want of parties, has been allowed, the bill may be amended by adding the necessary parties, or stating them to be out of the jurisdiction of the Court; and it seems that such an amendment will not preclude the plaintiff from excepting to the answer to those parts of the bill which are not covered by the demurrer.⁵

After a plea has been allowed, no amendment of the bill can be made without a special order of the Court; and in applying for such order, the plaintiff must specify the amendments he intends to make.⁶ After the allowance of the plea, the plaintiff must reply to the plea as well as to the answer, and proceed with the case in the usual manner.

¹ *Ante*, p. 682. If an answer commences as an answer to the whole bill, it overrules a plea or demurrer to any particular part of the bill, although such part is not in fact answered. *Leaycraft v. Dempsey*, 4 Paige, 124; *Summers v. Murray*, 2 Edw. Ch. 205.

² *Ante*, pp. 594, 693.

³ *Ante*, pp. 594, 691, 760.

⁴ *Ante*, p. 760.

⁵ *Taylor v. Bailey*, 3 M. & C. 677, 683; 3 Jur. 308; *Foster v. Fisher*, 4 Law J. N. S. 237, M. R. In *Osborne v. Jullion*, 3 Drew. 596, 609, the Court, on allowing a demurrer, refused leave to amend the bill.

⁶ *Ante*, pp. 419, 699; *Taylor v. Shaw*, 2 S. & S. 12; *Neck v. Gains*, 1 De G. & S. 223; 11 Jur. 763.

DISMISSING BILLS, OTHERWISE THAN AT THE HEARING,
AND STAYING PROCEEDINGS.

SECTION I. — *Generally.*

BEFORE a defendant has appeared to the bill, the plaintiff may dismiss the bill, as against him, without costs: on an order to be obtained upon motion of course, or upon petition of course, at the Rolls.¹ Where, however, such an order was obtained in breach of faith of a compromise entered into with the defendant, it was discharged with costs.²

After appearance, and before decree, the plaintiff may, generally, obtain an order to dismiss the bill, but only upon payment of costs:³ unless the parties against whom it is dismissed consent to its being dismissed without costs.⁴ The order may be obtained either on petition of course or motion,⁵ and if the defendant's consent is required, it is signified by the appearance of counsel on his behalf on the motion, or by his solicitor subscribing his consent to the prayer of the petition. The application is usually made by petition.⁶ Where, however, there has been any proceeding in the cause which has given the defendant a right against the plaintiff, the plaintiff cannot dismiss his bill as of course; thus, where a general demurrer had been overruled on argument, Lord Cottenham was of opinion that the plaintiff could not dismiss his bill as of course: the defendant having a right to appeal against the order overruling the demurrer: which right he ought not to be deprived of, on an *ex parte* application.¹

¹ Thompson v. Thompson, 7 Beav. 350; Wyatt's Pr. 60, 61; Braithwaite's Pr. 566. For form of order, see Seton, 1277, No. 1; and for forms of motion paper and petition, see Vol. III.

² Betts v. Barton, 3 Jur. N. S. 154, V. C. W.

³ The plaintiff cannot dismiss his bill, as to part of the relief prayed, and proceed with the residue; he must apply to amend. The Camden & Amboy R. R. Co. v. Stewart, 4 C. E. Green (N. J.), 69; see New Jersey Rule in Chancery, 94.

⁴ Dixon v. Parks, 1 Ves. J. 402; Wyatt's Pr. 61; Braithwaite's Pr. 566. These rules also apply where the plaintiff is suing on behalf of himself and others. Handford v. Storie, 2 S. & S. 196, 198; Armstrong v.

Storer, 9 Beav. 277, 281; *ante*, pp. 239, 240. But a bill will not be dismissed "without prejudice," when the plaintiff has had ample opportunity to hunt up his testimony, and prepare his case on the merits. Rumbly v. Stanton, 24 Ala. 712; see Rochester v. Lee, 1 M'N. & G. 467, 469, 470.

⁵ But a bill will not be dismissed upon a mere suggestion. Wiswell v. Starr, 50 Maine, 381, 384.

⁶ For form of order, see Seton, 1277, Nos. 1, 2; and for forms of motion paper and petition, see Vol. III.

¹ Cooper v. Lewis, 2 Phil. 178, 181; and see Ainslie v. Sims, 17 Beav. 174; see also Booth v. Leicester, 1 Keen, 247, 255, where a bill and cross-bill had been set down to be heard together.

It seems once to have been the privilege of the plaintiff to dismiss his bill, when the defendant had answered, upon payment of 20s. costs;² but that rule was altered;³ and the Statute of Anne has since enacted,⁴ that, upon the plaintiff's dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their full costs, to be taxed by the Master.⁵ It seems, formerly, to have been considered, that the Court had no power to make an order, on the application of the plaintiff, dismissing the bill without costs, except upon the defendant's consent actually given in Court.⁶ It has now, however, been decided, that the Court has power to make such an order in a proper case; and such orders have been made: where the defendant surrendered a lease, to obtain an assignment of which the bill was filed, and absconded;⁷ where the bill was filed under a mistake, under which both plaintiffs and defendants were at the time;⁸ where the defendants had assigned their interests to co-defendants, after the bill was filed, and had joined in an answer with such other defendants and disclaimed;⁹ where the suit was rendered nugatory by the subsequent passing of an Act of Parliament, or by the reversal of a case on the authority of which the bill was filed, or by any subsequent matter;¹⁰ and where the plaintiff had been misled by the act of the Court.¹¹

The application to dismiss, in these cases, is usually made by special motion, of which notice must be served on the defendants, or such of them as are affected by the motion.¹²

*792 * Where, however, the matters in dispute have been disposed of by an independent proceeding, but the bill has been dismissed for want of prosecution, with costs, as against some of the defendants, the plaintiff can no longer move to dismiss it, as against the others, without costs: the Court not being able to adjudicate as to the costs, in the absence of the dismissed parties, who might be prejudiced by the

² Gilb. For Rom. 110; 2 Atk. 288.

³ Anon., 1 Vern. 116; Anon., *ib.* 334.

⁴ 4 & 5 Anne, c. 16, § 23.

⁵ The plaintiff seems to have been liable, notwithstanding the statute, to the payment of only 40s. costs where the cause was set down and dismissed on bill and answer; see *Newsham v. Gray*, 2 Atk. 288; but by General Order of 27th April, 1748, *ib.* 289; *Sand. Ord.* 628, it is provided, that, in such a case, the Court may dismiss the bill, either with 40s. costs, or with taxed costs, or without costs. This Order appears, in this respect, to be abrogated by the Cons. Ord.

⁶ *Dixon v. Parks*, 1 Ves. J. 402; Anon., *ib.* 140; *Fidelle v. Evans*, 1 Bro. C. C. 267; 1 Cox, 27; *Fisher v. Quick*, 1 Stockt. (N. J.) 312.

⁷ *Knox v. Brown*, 2 Bro. C. C. 186; 1 Cox, 359; and see *Goodday v. Sleight*, 1 Jur. N. S. 201; 3 W. R. 87, V. C. S.; *Wright v. Barlow*, 5 De G. & S. 43; 15 Jur. 1149.

⁸ *Broughton v. Lashmar*, 5 M. & C. 136, 144.

⁹ *Hawkins v. Gardiner*, 17 Jur. 780, V. C. S.

¹⁰ *Sutton Harbor Company v. Hitchens*, 15 Beav. 161; 1 De G., M. & G. 161, 169; and see *ib.* 16 Beav. 381; *Robinson v. Rosher*, 1 Y. & C. C. C. 7, 12; 5 Jur. 1006; but see *South Staffordshire Railway Company v. Hall*, 16 Jur. 160, V. C. K.; *Lancashire and Yorkshire Railway Company v. Evans*, 14 Beav. 529; *Ventilation and Sanitary Improvement Company v. Edleston*, 11 W. R. 613, V. C. S.; *Elsev v. Adams*, 10 Jur. N. S. 459; 12 W. R. 586, L. J.J.; 2 De G., J. & S. 147; *Riley v. Croydon*, 10 Jur. N. S. 1251; 13 W. R. 223, V. C. K.

¹¹ *Lister v. Leather*, 1 De G. & J. 361; 3 Jur. N. S. 848. But not where the object of the suit has been defeated by the plaintiff's own act or procurement. *Hammersley v. Barker* 2 Paige, 372.

¹² For form of notice, see Vol. III.

other defendants being entitled to add their costs to their securities, or otherwise. In such a case, the bill can only be dismissed with costs.¹

Where the plaintiff moved to dismiss the bill with costs against some of the defendants who had disclaimed, without prejudice to the question by whom the costs should ultimately be borne, it was held by Sir James Wigram V. C. that the order might be made without serving the other defendants, as they could not be prejudiced;² but Sir J. L. Knight Bruce V. C. refused to make such an order, unless the other defendants were served.³

Where the plaintiff has been admitted to sue *in formâ pauperis*, he may move to dismiss his bill without costs: except in cases in which his admission *in formâ pauperis* has taken place subsequently to the filing of the bill;⁴ but the motion must not be made *ex parte*.⁵

The course of proceeding to obtain the dismissal of the bill by a plaintiff who disavows the suit, has been before pointed out.⁶ Where the suit is not disavowed, one co-plaintiff may, with the consent of the defendant, dismiss a bill with costs, so far as concerns himself, if it will not in any way injure the other plaintiffs: otherwise, the Court will refuse the order, unless upon terms so framed as to protect the other plaintiffs in the suit from injury.⁷ The mere circumstance that the rights of the plaintiff applying to be dismissed are concurrent with those of the plaintiffs who remain, will not be a sufficient reason for refusing the application: since any defect which his withdrawal may make in the record may be supplied by making him a defendant, by amendment.⁸

A plaintiff may, in general, obtain an order to dismiss his own bill, with costs, as a matter of course, at any time before decree, * and notwithstanding a pending motion which has been ordered *793 to stand over.¹ Thus, in *Curtis v. Lloyd*,² after the cause had

¹ Troward v. Attwood, 27 Beav. 85.

² Baily v. Lambert, 5 Hare, 178; 10 Jur. 109; and see Collis v. Collis, 14 L. J. Ch. 56, V. C. K. B.; Styles v. Shipton, 3 Eq. Rep. 224, V. C. W. Similar orders made on *ex parte* motion in Clements v. Clifford, 11 Jur. N. S. 851; 14 W. R. 22, V. C. K.; Beradston v. Churchill, 1 W. N. 8, V. C. W.

³ Wigginon v. Pateman, 12 Jur. 89.

⁴ Ante, p. 42.

⁵ *Ibid.*; Parkinson v. Hanbury, 4 De G. M. & G. 508; and see Wilkinson v. Belsher, 2 Bro. C. C. 272. Where an executor or administrator has commenced a wrong suit by mistake, or has ascertained that it would be useless to proceed, in consequence of facts subsequently discovered, he will be permitted to discontinue without payment of costs. Arnoux v. Steinbrenner, 1 Paige, 82.

⁶ Ante, p. 307.

⁷ Holkirk v. Holkirk, 4 Mad. 50; Winthrop v. Murray, 7 Hare, 152; 13 Jur. 955; and see ante, p. 309; but see Langdale v. Langdale, 13 Ves. 167; see Muldrow v. Du Bose, 2 Hill Ch. 375, 377; Bank v. Rose, 1 Rich. CL 292.

⁸ Holkirk v. Holkirk, *ubi sup.*

¹ Markwick v. Pawson, 33 L. J. Ch. 703; 4 N. R. 528, L. J. It is a matter of course to permit the plaintiff to dismiss the bill at any time before decree, upon payment of costs, but the order for such leave is conditional, and the suit not be absolutely discontinued so as to authorize the filing a new bill, till the costs of the first suit are paid. Cummins v. Bennett, 8 Paige, 79; see Thomas v. Thomas, 3 Litt. 9; Bassard v. Lester, 2 McCord Ch. 421; Smith v. Smith, 2 Blackf. 232; Simpson v. Brewster, 9 Paige, 245; Elderkin v. Fitch, 2 Carter (Ind.) 90; Mason v. York & Cumberland R.R. Co., 52 Maine, 82, 107. [The right of the plaintiff to dismiss is not defeated by the fact that the defendant has answered, and given the discovery sought. Kean v. Lathrop, 58 Ga. 355. But is by the commencement of the trial. Wilder v. Boynton, 63 Barb. 547. The right to discontinue a suit after testimony taken is not absolute, but may be controlled by the Court; as where a witness who had been ex-

² 4 M. & C. 194; 2 Jur. 1058.

been called on for hearing, and had stood over at the request of counsel, the plaintiff obtained, as of course, an order to dismiss his bill with costs; the defendant afterwards objected to this course; but Lord Cottingham held, that the plaintiff was entitled to the order: observing, that he could not see why a plaintiff should be in a worse situation, because he informs the Court that he does not intend to proceed with the hearing of his cause, than if he made default.

If, however, the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application, such dismissal is, unless the Court otherwise directs, equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.³

After a decree, or decretal order,⁴ however, the Court will not suffer a plaintiff to dismiss his own bill, unless upon consent: for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it.⁵ The proper form of order after decree is not to dismiss the bill, but to stay all further proceedings.⁶ If, however, the decree merely directs accounts and inquiries,⁷ in order to enable the Court to determine what is to be done, the bill may be dismissed.⁸ And where, upon the hearing of the cause, the Court has merely directed an issue, the plaintiff may, before trial of the issue, obtain an order to dismiss the bill with costs: because the directing of an issue is only to satisfy the conscience of the Court, prefatory to its giving judgment. If, however, the issue has been tried, *794 and determined in *favor of the defendant, the plaintiff cannot move to dismiss: because the defendant may have it set down on the Equity reserved, in order to obtain a formal dismissal of

amined died, the plaintiff was permitted to dismiss only upon the terms of allowing the deposition to be read as evidence in any future suit for the same cause. *Young v. Bush*, 36 How. Pr. 240. The plaintiff's right to dismiss revives upon the reversal of a decree by the appellate Court and remand. *Mohler v. Wiltberger*, 74 Ill. 163.] After a voluntary dismissal of a bill by the plaintiff, he will not be allowed to reinstate it. *Orphan Asylum v. McCartee*, 1 Hopk. 372. [And the rescinding of an order of dismissal as to certain parties will not bring those parties in again, and hold them bound by the previous proceedings and the decree. *Johnson v. Shepard*, 35 Mich. 115. And it is within the discretion of the Court to refuse to permit a plaintiff to dismiss his bill, if the dismissal would work a prejudice to other parties, as where one defendant had established his claim against a co-defendant. *Bank v. Rose*, 1 Rich. Eq. 292. Or a cross-bill. *Booth v. —*, cited in that case.] In New Jersey, by Rule of Chancery, when a replication has been filed, and the taking of proofs begun by either party, the plaintiff shall not be allowed to dismiss his bill, except upon special motion and notice to the defendants. Rule 15; *Dick. Prac.* 4

³ Ord. XXIII. 13.

⁴ *Post*, 806; *Anon.*, 11 Ves. 169; *Biscoe v. Brett*, 2 V. & B. 377; *Bluck v. Colnaghi*, 9 Sim. 411; *Collins v. Greaves*, 5 Hare, 596; *Gregory v. Spencer*, 11 Beav. 143.

⁵ *Guilbert v. Hawles*, 1 Cha. Ca. 40; *Carrington v. Holly*, 1 Dick. 280.

⁶ *Egg v. Devey*, 11 Beav. 221; see also *Lashley v. Hogg*, 11 Ves. 602; *Bluck v. Colnaghi*, 9 Sim. 411; *Handford v. Storie*, 2 S. & S. 196, 198.

⁷ *Barton v. Barton*, 3 K. & J. 512; 3 Jur. N. S. 808.

⁸ *Anon.*, 11 Ves. 169; *Barton v. Barton*, *ubi sup.*; and see *post*, pp. 810, 811; see *Clarkson v. Scrogins*, 2 Monr. 52. After an order to account, and report made, the plaintiff cannot dismiss on payment of costs. *Bethia v. McKay*, Cheves Ch. Ca. 93; see also *Hall v. McPherson*, 3 Bland, 529; but see *Bassard v. Lester*, 2 M'Cord Ch. 421. A bill by trustees to marshal assets and call in creditors, after a decree made directing money to be paid, and creditors' claims established, will not be dismissed at the instance of one of the plaintiffs, his co-plaintiff and the creditors objecting. *Muldrow v. Du Bose*, 2 Hill Ch. 375, 377; see *Jones v. Lansing*, 7 Paige, 583.

the bill, so as to enrol it as a final judgment, and thereby make it pleadable.¹

After a decree has been made of such a kind that other persons, besides the parties on the record, are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill.² Thus, where a plaintiff sues on behalf of himself and all other persons of the same class: although he acts upon his own mere motion, and retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure, yet, after a decree, he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. "The reason of the distinction is, that, before decree, no other person of the class is bound to rely upon the diligence of him who has first instituted his suit, but may file a bill of his own; and that, after a decree, no second suit is permitted."³

Where a defendant submits to the whole demand of the plaintiff, and to pay the costs, he has a right to apply to the Court to dismiss the bill, or stay all further proceedings.⁴ The application is usually made on motion, of which notice must be given.⁵ The Court will not, on such an application, go into the merits of the case; but will only consider the conduct of the parties in conducting the cause. It will not, therefore, entertain such an application, unless the defendant submits to pay the costs, as well as comply with all the plaintiff's demands:⁶ though it has, in some cases, determined the question whether particular costs, incurred in proceedings collateral to the suit, are to be paid by the defendant.⁷ The costs of suit which the defendant must submit to pay, include the costs of co-defendants, for which the plaintiff is liable.⁸

Where there are several defendants, and the plaintiff claims only part of the relief against one defendant, that defendant may apply, by special motion, to stay all further proceedings, on satisfying the

¹ *Carrington v. Holly*, 1 Dick. 280.

² *Udlike v. Doyle*, 7 R. I. 446, 462.

³ *Handford v. Storie*, 2 S. & S. 196, 198; *York v. White*, 10 Jur. 168, M. R., *ante*, p. 239; and see *post*, p. 795; *Udlike v. Doyle*, 7 R. I. 446, 462; *Collins v. Taylor*, 3 Green Ch. 163; *Williamson v. Wilson*, 1 Bland, 418; *Waring v. Robinson*, Hoff. Ch. 524, 529, 530; *Muldrow v. Du Bose*, 2 Hill Ch. 375, 377; *Jones v. Lansing*, 7 Paige, 583; *Shewen v. Vanderhorst*, 2 R. & M. 75; *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Mass. St. 1862, c. 218, § 8*; *ante*, p. 239, and cases in note.

[And see *Pimbley v. Molyneux*, W. N. (1867) 250, where the conduct of a creditor's suit was given to a residuary legatee, on his paying the plaintiff's debt and costs.]

⁴ Per Lord Langdale in *Sivell v. Abraham*, 8 Beav. 599; see also *Pemberton v. Topham*, 1 Beav. 316; 2 Jur. 1009; *Holden v. Kynaston*, 2 Beav. 204, 206; *Field v.*

Robinson, 7 Beav. 66; *Hennet v. Luard*, 12 Beav. 479; *Damer v. Lord Portarlington*, 2 Phil. 30, 35; 1 C. P. Coop. t. Cott. 223, 234; 10 Jur. 673; *Manton v. Roe*, 14 Sim. 353; *Paynter v. Carew*, Kay Ab. 36; 18 Jur. 417; *Orton v. Bainbrigge*, 22 L. J. Ch. 979; 1 W. R. 487, M. R.

⁵ For form of notice, see Vol. III.

⁶ *Wallis v. Wallis*, 4 Drew. 458; *Hennet v. Luard*, *ubi sup.*; see, however, *Holden v. Kynaston*, *ubi sup.*

⁷ *Penny v. Beavan*, 7 Hare, 133; 12 Jur. 936.

⁸ *Pemberton v. Topham*, and *Paynter v. Carew*, *ubi sup.* [It seems, however, that where the defendant is willing to comply with the plaintiff's demand, and would have done so without suit if he had been asked, he may obtain an order staying all proceedings without costs. *Wallis v. Wallis*, 4 Drew. 458, 463; *Rudd v. Rowe*, 18 W. R. 977.]

*795 * whole demand made against him, and paying the plaintiff's costs incurred up to the time of making the application.¹

In a foreclosure or redemption suit, the bill may be dismissed on the special motion of a subsequent incumbrancer, as against all the defendants except himself, on his paying into Court, by a specified day, a sum sufficient to cover the mortgage debt and interest, and the costs of the plaintiff and other defendants.² Where discovery is sought from the defendant, the plaintiff is entitled to continue his suit for that purpose; and an application by the defendant before answer to stay proceedings, upon his submission to the plaintiff's demand and payment of the costs of the suit, is premature, and will not be entertained.³

The defendant may also, by submitting to pay the plaintiff's demands, and his costs of the suit, obtain an order to stay the proceedings, under a decree in which other persons are interested, as well as the parties to the suit; but, in such a case, any one of the persons so interested may subsequently, on special motion or summons,⁴ with notice to the parties to the cause, obtain an order that the applicant may have either the conduct of the cause, or liberty to carry on the proceedings under the decree, or the prosecution of particular accounts or inquiries.⁵

Orders to stay proceedings, on the ground that the defendant has submitted to the plaintiff's demands, have also been made on the application of the plaintiff, hostilely to the defendant;⁶ but it seems that the defendant has a right to have the cause brought to a hearing, for the purpose of determining the question of costs; and that such an application by the plaintiff can, therefore, only be made by consent.⁷ Where the question in dispute has been settled by compromise out of Court, without providing for the costs, the Court will not determine the question of costs, either on motion or at the hearing.⁸

*796 * By consent, the bill may be dismissed or the proceedings stayed, on motion of course, or petition of course at the Rolls,

¹ *Sawyer v. Mills*, 1 M'N. & G. 390, 395; 13 Jur. 1061; see also *Holden v. Kynaston*, *ubi sup.* For form of notice of motion, see Vol. III.

² *Jones v. Tinney*, Kay Ap. 45; *Challie v. Gwynne*, *ib.* 46, where the forms of the orders are given; see also *Paynter v. Carew*, *ib.* 36; 18 Jur. 417; and *Paine v. Edwards*, 8 Jur. N. S. 1200, 1202; 10 W. R. 709, V. C. S., where the motion was refused, the priorities being in dispute; *Wainwright v. Sewell*, 11 W. R. 560, V. C. S. For forms of notice, see Vol. III.

³ *Stevens v. Brett*, 12 W. R. 572, V. C. W.

⁴ 15 & 16 Vic. c. 80, § 26. For forms of notice of motion and summons, see Vol. III.

⁵ See *Salter v. Tildesley*, 13 W. R. 376, M. R.; see also *ante*, pp. 239, 240, 794.

⁶ *Nichols v. Elford*, 5 Jur. N. S. 264, V. C. W.; *North v. Great Western Railway Co.*, 2 Giff. 64; 6 Jur. N. S. 244; *Thompson*

v. Knight, 7 Jur. N. S. 704; 9 W. R. 780, V. C. W.; *Brooksbank v. Higginbottom*, 31 Beav. 35; and see *Sivell v. Abraham*, 8 Beav. 598; *Hennet v. Luard*, 12 Beav. 479, 480.

⁷ *Langham v. Great Northern Railway Company*, 16 Sim. 173; 12 Jur. 574; *Burgess v. Hills*, 26 Beav. 244, 249; 5 Jur. N. S. 233; *Burgess v. Hately*, 26 Beav. 249; *M'Naughtan v. Hasker*, 12 Jur. 956, V. C. K. B.; *Wilde v. Wilde*, 10 W. R. 503, L. J.J.; *Morgan v. Great Eastern Railway Company*, 1 H. & M. 78; and see *Chester v. Metropolitan Railway Company*, 11 Jur. N. S. 214, M. R.; 13 W. R. 333; *Hudson v. Bennett*, 12 Jur. N. S. 519; 14 W. R. 911, V. C. S.

⁸ *Gibson v. Lord Cranley*, 6 Mad. 365; *Roberts v. Roberts*, 1 S. & S. 39; *Whalley v. Lord Suffield*, 12 Beav. 402; *Nichols v. Elford*, 5 Jur. N. S. 264, V. C. W.

or on special motion or petition,¹ or on summons, on any terms which may be agreed upon;² and where an agreement to dismiss a bill was entered into at the trial of an action directed to be brought, and made a rule of the Court of Law, the Court of Chancery enforced it against the parties, on motion in the cause.³ Where any of the parties are not *sui juris*, or are executors or trustees, the Court must be satisfied of the propriety of the agreement.⁴

Where a plaintiff has made default in payment of the costs of a former suit against the same defendant, or the person whom he represents, for the same purpose, the defendant may obtain an order, on motion, with notice to the plaintiff, staying all further proceedings until the plaintiff has paid such costs;⁵ and where, after great delay, the costs still continue unpaid, the Court will order the plaintiff to pay them within a limited time, or, in default, that the second bill stand dismissed.⁶ Where, however, the two suits are not for the same matter, and the second bill could not be produced by a fair amendment of the first, such an order will be refused;⁷ nor can it be obtained, where the plaintiff sues by his next friend;⁸ nor, it seems, where the defendant has taken any step in the new cause, before making the application.⁹

Where the same object may be attained under two different modes of proceeding: if the first is adopted, and then abandoned and the second adopted, the proceedings in the second may be stayed until the costs of the first are paid.¹⁰ It would seem that the amount of the costs should be ascertained by taxation or otherwise, before the application to stay proceedings, is made.¹¹

* Where a plaintiff is in contempt for non-payment of costs *797

¹ Where the terms are complicated, or a fund in Court is dealt with, the application is usually made on special petition. See *Winthrop v. Winthrop*, 1 C. P. Coop. t. Cott. 201; *Richardson v. Eyton*, 2 De G., M. & G. 79; *Harrison v. Lane*, 2 Sm. & G. 249; *Dawson v. Newsome*, 2 Giff. 272; 6 Jur. N. S. 625; *post*, Chap. XXXV., § 1, *Interlocutory Applications*; or on summons.

² See *North v. Great Western Railway Company*, 2 Giff. 64; *Troward v. Attwood*, 27 Beav. 85. For forms of motion paper, notice of motion, petition, and summons, see Vol. III.

³ *Tebbutt v. Potter*, 4 Hare, 164; see also *Warwick v. Cox*, 9 Hare Ap. 14; *Dawson v. Newsome*, *ubi sup.*; see, however, *Askew v. Millington*, 9 Hare, 65; 15 Jur. 532.

⁴ *Warwick v. Cox*, *ubi sup.*; and see *Lippiat v. Holley*, 1 Beav. 423; *Seton*, 691.

⁵ *Pickett v. Loggan*, 5 Ves. 706; *Altree v. Hordern*, 5 Beav. 623, 628; 7 Jur. 247; *Lautour v. Holcombe*, 10 Beav. 256; *Spies v. Sewell*, 5 Sim. 193; *Onge v. Truelock*, 2 Moll. 41; *Long v. Storie*, 13 Jur. 1091, V. C. E.; *Sprye v. Reynell*, 1 De G., M. & G. 712; *Ernest v. Partridge*, 8 L. T. N. S. 762, V. C. W.; see, however, *Wild v. Hobson*, 2 V. & B. 105, 108; see *Cummins v. Bennett*, 8 Paige, 79; *Rathbone v. Eckford*,

cited 1 Hoff. Ch. Pr. 328, n. (1); *Simpson v. Brewster*, 9 Paige, 245. The application should not be made until the amount of the costs has been ascertained by taxation. *Ernest v. Partridge*, *ubi sup.* For form of notice of motion, see Vol. III.

[Where after the dismissal of a bill by consent, the plaintiff filed a new bill which was, with trifling alterations, a verbatim copy of the former bill, all proceedings in the second suit were ordered to be stayed. *Parker v. Simpson*, 18 W. R. 204.]

⁶ *Princess of Wales v. Lord Liverpool*, 3 Swanst. 567; *Lautour v. Holcombe*, 11 Beav. 624; *Ernest v. Govett*, 2 N. R. 486, V. C. W. For form of notice of motion, see Vol. III.

⁷ *Budge v. Budge*, 12 Beav. 385, 387. [And where the plaintiff sues in a representative capacity in the second suit. *Partington v. Reynolds*, 6 W. R. 307.]

⁸ *Hind v. Whitmore*, 2 K. & J. 428.

⁹ *Onge v. Truelock*, 2 Moll. 41.

¹⁰ *Foley v. Smith*, 12 Beav. 154; *Davey v. Durrant*, 24 Beav. 411; 4 Jur. N. S. 368; 2 De G. & J. 596; see also *Oldfield v. Cobbett*, 12 Beav. 91, 95.

¹¹ *Ernest v. Partridge*, 8 L. T. N. S. 762, V. C. W.; and see *Foley v. Smith*, 12 Beav. 154; *Davey v. Durrant*, 24 Beav. 411;

in the suit, an order to stay proceedings until the costs have been paid may be obtained on special motion;¹ and where he has failed to give security for costs pursuant to an order, the defendant may obtain, on motion with notice, an order that he give security within a limited time, or the bill be dismissed.²

[Neither in the Court of Chancery nor in the Court of Exchequer has the practice prevailed of compelling the plaintiff to consolidate his different suits against several defendants.³]

But there are several cases in which, where there are two suits relating to the same subject-matter, the Court will, under certain cir-

Altree v. Hordern, 5 Beav. 623, 628; *Spire v. Sewell*, 5 Sim. 193; *Long v. Storie*, 13 Jur. 1091, V. C. E.

¹ *Bradbury v. Shawe*, 14 Jur. 1042, V. C. K. B.; *Wilson v. Bates*, 3 M. & C. 197, 204; 9 Sim. 54; *Futvoye v. Kennard*, 2 Giff. 533; and see *Wild v. Hobson*, 4 Mad. 49; cited 3 M. & C. 202. For form of notice of motion, see Vol. III.

² *Kennedy v. Edwards*, 11 Jur. N. S. 153, For form of notice, see Vol. III.

³ [*Manchester College v. Isherwood*, 2 Sim. 476. In this case, which was a motion by the defendants to consolidate sixteen bills for tithes against different persons, all of whom made the same defence, the Vice-Chancellor reviewed the authorities, printed and in manuscript, and refused the motion with costs. It seems that the practice of consolidating causes was recognized in the Court of Exchequer at one time, but was afterwards disapproved. In *Forman v. Blake*, 7 Price, 654, upon the hearing of a similar motion, Chief Baron Richards said: "I never heard of an order, in the course of my experience, for consolidating causes in Equity, nor can I conceive upon what principle it can be done." His refusal to sustain the motion was followed in *Foreman v. Southwood*, 8 Price, 572, and by Lord Eldon in the manuscript case of *Kynaston v. Perry*, cited in 2 Sim. His Lordship had previously intimated his ignorance of any such practice in Equity in *Keighly v. Brown*, 16 Ves. 344. Following these rulings, it was held by Chancellor Cooper of Tennessee, in *Knight Brothers v. Ogden Brothers*, 3 Tenn. Ch. 409, that the Court of Chancery has, ordinarily, no power to interfere with the rights of parties, *in invitum*, by an order directing the consolidation of independent suits of purely equitable cognizance, the complainants in one suit seeking to reach the recovery in the other. And it has been repeatedly held by the Supreme Court of that State, that the consolidation of causes, either by consent, or by order of Court acquiesced in, will not change the rules of Equity pleading, nor the rights of the parties, which rights must still turn on the pleadings, proof, and proceedings in the respective causes. *Brevard v. Summar*, 2 Heisk. 105; *Loffand v. Coward*, 12 Heisk. 546; *Masson v. Anderson*, 3 Baxt. 290.

In *Burnham v. Dalling*, 1 C. E. Green, 310, where three suits by different wards against the same guardian were, after decrees in

each, consolidated by consent, Chancellor Green expressed the opinion that it was within the power of the Court of Equity to consolidate actions with or without the consent of the plaintiffs. While Chancellor Runyon has suggested that one of several suits between the same parties should be tried, the others to await the result. *Lehigh, &c. R. Co. v. McFarlan*, 3 Stew. Eq. 144. And this was done, by consent, in *Andrews v. Speer*, 4 Dill. 470, and *Amos v. Chadwick*, 4 Ch. Div. 869. In *Wilson v. Riddle*, 48 Ga. 609, three suits in favor of different parties against the same defendant on the same claim, two of them being for the whole claim, and the third for a large portion thereof, and each involving long and complicated accounts, were consolidated. In *Beech v. Woodyard*, 5 W. Va. 231, although the motion to consolidate was refused, the Court considered that the rule for the consolidation of suits is alike in Equity and at Law, the matter being addressed to the discretion of the Court.

In *Foxall v. Webster*, cited *ante*, 339, n. 3, where 134 suits were brought by a patentee against separate defendants for infringements of the patent, Vice-Chancellor Kindersley refused an application of seventy-seven of the defendants that the plaintiff be directed to proceed with one suit, either to try all the questions, or at any rate the validity of the patent, the proceedings in the other suits to be stayed in the meantime. 2 Dr. & Sm. 250; 12 W. R. 94; 10 Jur. 137. The Vice-Chancellor thought the motion premature before answer by the defendants, and refused it with leave to move again on the coming in of the answers, saying that the Court would "put the matter in a course of decision to save a multiplicity of suits." 12 W. R. 96. Upon appeal, the Lord Chancellor made an order for a trial of the validity of the patent as between the plaintiff and seventy of the defendants then before the Court, the case to be conducted by one or more of the defendants for the rest. 12 W. R. 186; 10 Jur. 137. The order seems to have been made by consent, 2 Dr. & Sm. 250, note at end of case.

By Order LI, § 4, under the Judicature Acts, it is expressly provided: "Actions in any division or divisions may be consolidated by order of the Court, or a Judge, in the manner heretofore in use in the Superior Courts of Common Law." *Morgan's Acts and Orders*, 593.]

cumstances, make an order staying the proceedings in one of them.⁴ Thus, as we have seen, where two or more suits are instituted in the name of an infant by different persons, each acting as his next friend, the Court, on being satisfied by an inquiry, or otherwise, which suit is most for his benefit, will stay the proceedings in the other suit.⁵ So, also, where two suits are instituted, for the administration of an estate: when the decree has been obtained in one suit, proceedings will be stayed in the other.

Where the second suit embraces an object not provided for in the decree pronounced in the first suit, the proceedings in the second suit will not be stayed:⁶ as for instance, where the decree is made in a creditors' suit, and a bill is filed by a legatee.⁷ But even in this case, it is often desirable to obtain a transfer and amalgamation of the two suits.⁸ Where the second suit prayed additional relief, the Court stayed proceedings in it, on the parties to the first suit undertaking to introduce into the decree in that suit, the additional relief which might be obtained in the second suit.⁹ In another case, the Court stayed proceedings in the second *suit, only so far as the relief sought *798 could be obtained in the first suit;¹ and recently, the Court, on the parties consenting that an immediate decree should be made in the second suit, ordered the two suits to be consolidated, and decreed the further relief which could be obtained in the second suit;² but where, after a bill had been filed by one executor against his co-executor for administration, and asking special relief, but, before decree, the latter obtained, on summons, an order against the former to administer the same estate, the Court refused to discharge the order.³ Where a decree has been made in both suits, the Court will direct the administration to proceed in that branch of the Court in which the decree is in the most perfect state, notwithstanding that it may be posterior in point of date.⁴

It is the duty of the personal representative to make the application, as soon as a decree has been made in one suit;⁵ but if he neglects to do so, the plaintiff in the suit in which the decree has been made,⁶ or

⁴ *Smith v. Guy*, 2 C. P. Coop. t. Cott. 289, 296; 2 Phil. 159; *Rigby v. Strangeways*, 2 Phil. 175, 177; 10 Jur. 998; *Underwood v. Jee*, 1 M. & G. 276; 17 Sim. 119; 15 Jur. 99; and see *Seton*, 889.

⁵ *Ante*, pp. 69, 70.

⁶ *Underwood v. Jee*, *ubi sup.*; *Menzies v. Connor*, 3 M. & G. 648, 652; *Anson v. Towgood*, 6 Mad. 374; *Pickford v. Hunter*, 5 Sim. 122, 129; *Ladbroke v. Sloane*, 3 De G. & S. 291; *Smith v. Guy*, *ubi sup.*; *Rump v. Greenhill*, 20 Beav. 512; *Whittington v. Edwards*, 3 De G. & J. 243; *Taylor v. Southgate*, 4 M. & C. 203, 209.

⁷ *Golder v. Golder*, 9 Hare, 276; *Earl of Portarlington v. Damer*, 2 Phil. 262; *Plunkett v. Lewis*, 11 Sim. 379.

⁸ See *Cumming v. Slater*, 1 Y. & C. C. C. 484; *Godfrey v. Maw*, *ib.* 485; *Pott v. Gal-*

lini, 1 S. & S. 206, 209; *Budgen v. Sage*, 3 M. & C. 683, 687.

⁹ *Gwyer v. Peterson*, 26 Beav. 89; *Mathews v. Palmer*, 11 W. R. 619, V. C. K.

¹ *Dryden v. Foster*, 6 Beav. 146.

² *Hoskins v. Campbell*, 2 H. & M. 43.

³ *Vaurenen v. Piffard*, 13 W. R. 425, V. C. S.; *sed qu.* if the plaintiff in the summons suit was entitled so to do: see 15 & 16 V. c. 86, § 45.

⁴ *Littlewood v. Collins*, 11 W. R. 387, L. J.J.

⁵ *Therry v. Henderson*, 1 Y. & C. C. C. 481, 483; 6 Jur. 386; *Stead v. Stead*, 2 C. P. Coop. t. Cott. 311; *Packwood v. Middleton*, 1 S. & S. 232, 234; 2 C. P. Coop. t. Cott. 312.

⁶ *Earl of Portarlington v. Damer*, 2 Phil. 262; and see *Swale v. Swale*, 22 Beav. 401.

any person interested,⁷ may obtain the order: although he is not a party to the other suit.

Where two suits for the administration of the same estate, one by the executor, and the other by the residuary legatee, come on together, the proceedings in the executor's suit will be stayed, and the decree made in the residuary legatee's suit.⁸

Where an administration decree has been obtained in the Court of the Duchy of Lancaster, a suit for the same purpose in the Court of Chancery will be stayed, if the whole subject-matter is within the jurisdiction of the Duchy Court, but not otherwise.⁹

Where the concurrent suits are in different branches of the Court, a difference of opinion prevailed with reference to the Judge by whom the order staying proceedings should be made;¹⁰ but the practice now adopted is: to obtain from the Lord Chancellor, or Lords Justices, on special motion, with notice to the other parties to the suits,¹¹ an order transferring the cause in which it is desired to stay further proceedings, to the Judge who has pronounced the decree; and then to obtain *799 from him an order, *entitled in both causes, staying further proceedings in the transferred cause, and providing for the costs.¹ The order to stay may be obtained on special motion, or, where the decree is in prosecution at Chambers, on special summons; and notice of the motion, or the summons, must be served on all parties to each cause.²

Where such an order is made, the costs of all parties to the second suit who are parties to the first suit, up to notice of the decree, are usually made costs in that suit, and the costs of any party who is not a party to the first suit, are ordered to be paid by the executor, and added to his own.³ If the executor has no assets to pay them, liberty will be given such party to go in and prove for them in the first suit.⁴

If the plaintiff in the second suit proceed, after notice of the decree in the first suit, he will not be allowed the costs of such subsequent proceedings; but he will not be made to pay costs.⁵ Where, however, the Court considered that the second suit was improperly instituted, the

⁷ *Smith v. Guy*, 2 C. P. Coop. t. Cott. 289, 297.

⁸ *Kelk v. Archer*, 16 Jur. 605, M. R.; and *Miller v. Powell*, V. C. K. B., 14 July, 1849, there referred to.

⁹ *Wynne v. Hughes*, 26 Beav. 377; 5 Jur. N. S. 165; and see 26 Beav. 384 n.; 28 L. J. Ch. 485, L. J.; see also *Seton*, 881; *Bradley v. Stelfox*, 1 N. R. 221, L. C.

¹⁰ *White v. Johnson*, 2 Phil. 689; *Ladbroke v. Bleadon*, 15 Beav. 457; 16 Jur. 851; *Scotto v. Stone*, 17 Jur. 588, V. C. K.

¹¹ *Bond v. Barnes*, 2 De G., F. & J. 387; and see *ante*, pp. 70, n., 398. For form of notice of motion, see Vol. III.

¹ *Duffort v. Arrowsmith*, 7 De G., M. & G. 434; *Harris v. Gandy*, 1 De G., F. & J. 13; *Swale v. Swale*, 22 Beav. 401; and see *ante*, pp. 70, 398.

² For form of order, see *Seton*, 887; and for forms of notice of motion and summons, see Vol. III.

³ *Seton*, 888; *Golder v. Golder*, 9 Hare, 276, 279; *West v. Swinburne*, 14 Jur. 360, V. C. K. B.; and see *Therry v. Henderson*, 1 Y. & C. C. C. 481, 483; 6 Jur. 386; *Frowd v. Baker*, 4 Beav. 76, 78; *Littlewood v. Collins*, 11 W. R. 387, L. J.; and see form of order, *Seton*, 887.

⁴ *Canhan v. Neale*, 26 Beav. 266; 5 Jur. N. S. 52; *Ladbroke v. Sloane*, 3 De G. & S. 291; *West v. Swinburne*, *ubi sup.*; see form of order, *Seton*, 887. [If there is a fund in Court, the costs may be ordered to be paid out of it. *Jackson v. Leaf*, 1 J. & W. 229, 233.]

⁵ *Earl of Portarlington v. Damer*, 2 Phil. 262; and see *Seton*, 888.

plaintiff in it was ordered to pay the costs of the order of transfer, and of the motion to stay proceedings.⁶

The rule, that when two suits are instituted for the administration of the same estate, that shall be prosecuted in which the earlier decree has been obtained, does not apply when it has not been obtained fairly; and the Court held this to have been the case where, on the same day on which notice had been given to an executor to appear to an administration summons, he appeared of his own accord at an earlier hour in the Chambers of another Judge, and consented to an order on a summons then, and not previously, applied for, by another plaintiff.⁷ But the Court, by consent, made an immediate decree in a cause not in the paper, for administration of the real and personal estate of an intestate, at the suit of a creditor, after a summons in Chambers for the administration of the personal estate had been taken out by another creditor, and which was returnable before the first day on which the cause could be heard as a short cause.⁸

Where the suit in which the decree was made was instituted by * two executors against a third, the Court refused to stay the pro- * 800 ceedings in a suit by a creditor, whose case depended on vouchers and documents in the executors' hands, until they had put in their answer; and directed the motion to stay proceedings to stand over until that had been done: observing, that the Court would then know who ought to have the conduct of the litigation.¹

When the order staying proceedings is made, if a sufficient reason for so doing appears, the Court will give the conduct of the decree to the plaintiff in the suit in which the proceedings are stayed;² but the mere fact that the plaintiff and defendants, in the suit in which the decree has been made, appear by the same solicitor, is not a sufficient reason for so doing; and where a creditors' and legatees' suit are amalgamated, the Court prefers giving the conduct of the cause to the legatee, who is interested in reducing the expenses as much as possible, all persons being at liberty to attend and assert their claims: considering it very important that administration suits should be conducted in a friendly spirit.³ Where there are no special circumstances giving the preference to either plaintiff, the plaintiff in the first suit in point of time will have the conduct of the proceedings.⁴

Where a decree or judgment has been obtained in a foreign country, in respect of the same matter for which a suit has been commenced in

⁶ *Salter v. Tildesley*, 13 W. R. 376, M. R.

⁷ *Harris v. Gandy*, 1 De G., F. & J. 13; and see *Frost v. Wood*, 12 W. R. 285, L. J.L. S. C. *nom.* *Frost v. Ward*, 2 De G., J. & S. 70.

⁸ *Furze v. Hennet*, 2 De G. & J. 125.

¹ *Macrae v. Smith*, 2 K. & J. 411; see also *Budgen v. Sage*, 3 M. & C. 683, 687.

² See *Macrae v. Smith*, *ubi sup.*; *Norvall v. Pascoe*, 10 W. R. 338, V. C. K.; *Hawkes v. Barrett*, 5 Mad. 17; *Kelk v. Archer*, 16 Jur. 605, M. R.; *M'Hardy v. Hitchcock*, 12

Jur. 781, L. C.; *Smith v. Guy*, 2 Phil. 159; 2 C. P. Coop. t. Cott. 289; *Wheelhouse v. Calvert*, cited *Saton*, 888; *Frost v. Wood*, *ubi sup.*; *Belcher v. Belcher*, 2 Dr. & Sm. 444, where the other suit was by the personal representatives.

³ Per Sir J. Romilly M. R. in *Penny v. Francis*, 7 Jur. N. S. 248; 9 W. R. 9; see also *Kelk v. Archer*, *ubi sup.*; *Harris v. Lightfoot*, 10 W. R. 34, V. C. K.

⁴ *Norvall v. Pascoe*, *ubi sup.*; and see *Salter v. Tildesley*, 13 W. R. 376, M. R.

the Court of Chancery. proceedings in such suit will be stayed, if the Court is satisfied that the decree or judgment in the foreign Court does justice, and covers the whole subject of the suit.⁵

A party to a suit in the Court of Chancery, wherein a decree has been made under which he may obtain relief, will be restrained from prosecuting a suit in a foreign Court for the same object.⁶

Proceedings in a suit may also be stayed, pending a rehearing or appeal.⁷

*801 * It may also be mentioned here, that where an oppressive number of bills has been filed, for infringement of the same patent, the Court will appoint some of the infringers to represent the others, and stay the proceedings in the remaining suits.¹

Where a suit had been compromised, and the proceedings therein stayed, the Court, on setting aside the compromise as against one of the plaintiffs, gave him permission to proceed with the suit, although it remained stayed as against the other plaintiffs.²

[Where a plaintiff, after an order for the production of documents, persists in not filing a sufficient affidavit as to documents, the Court may fix a time at which the bill shall, in default of a sufficient affidavit, stand dismissed.³

A bill may also be dismissed, on motion of the defendant, or *mero motu* by the Court, for want of equity on its face.⁴]

SECTION II. — *For Want of Prosecution.*

Any defendant may, upon notice,⁵ move the Court that the bill may

⁵ *Ostell v. Le Page*, 2 De G., M. & G. 892, 894; 16 Jur. 1134, V. C. S.; see also *Stainton v. Carron Company* (No. 3), 21 Beav. 500; *ante*, pp. 658, 659, 664, and note; *Low v. Mussey*, 41 Vt. 393; *Brown v. Lexington & Danville R. R. Co.*, 2 Beas. (N. J.), 191.

⁶ *Harrison v. Gurney*, 2 J. & W. 563; *Bushby v. Munday*, 5 Mad. 297; *Beauchamp v. Marquis of Huntley*, Jac. 546; *Booth v. Leicester*, 1 Keen, 579; *Wedderburn v. Wedderburn*, 2 Beav. 208, 214; 4 Jur. 66; 4 M. & C. 585, 594, 596; *Graham v. Maxwell*, 1 M.N. & G. 71; 13 Jur. 217; *Maclaren v. Stainton*, 16 Beav. 279; overruled by H. L., 5 H. L. Ca. 416; see also *Stainton v. Carron Company*, 21 Beav. 152, 500; 2 Jur. N. S. 49, L. C. & L. JJ.; and upon conflict of jurisdiction, generally, see *Venning v. Loyd*, 1 De G., F. & J. 193, 200; 6 Jur. N. S. 81; and *Seton*, 881.

⁷ See *post*, Chap. XXXII. § 1, *Rehearings and Appeals*.

¹ *Foxwell v. Webster*, 10 Jur. N. S. 137, L. C.; 2 Dr. & S. 250; 9 Jur. N. S. 1189.

² *Brooke v. Lord Mostyn*, 13 W. R. 248, L. JJ.

³ [*Republic of Liberia v. Imperial Bank*, L. R. 9 Ch. Ap. 569.]

⁴ [*Speidall v. Jervis*, 2 Dick. 632; *Molesworth v. Lord Verney*, 2 Dick. 667; *Mayse v. Biggs*, 3 Head, 36; *Earles v. Earles*, 3 Head, 366; *Webster v. Thompson*, 55 Ga. 546; *Hickey v. Stone*, 60 Ill. 458. See also *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 282; *Hine v. New Haven*, 40 Conn. 478. But a bill ought not to be dismissed by the Court on its own motion because brought in the firm name, without naming the partners, no objection having been taken by the parties to the omission. *Alderson v. Henderson*, 5 W. Va. 182. Nor where the bill discloses equity, although defectively stated. *Thompson v. Paul*, 8 Hum. 114; *Henderson v. Mathews*, 2 Tenn. Leg. Rep. 181; *Quinn v. Leake*, 1 Tenn. Ch. 67.]

⁵ See *Hoxey v. Carey*, 12 Geo. 534. A rule to speed the cause should precede a motion to dismiss for want of prosecution. *Dixon v. Rutherford*, 26 Geo. 153. [So in Tennessee, a rule must be made on the plaintiff to take any step necessary to the progress of the cause, after which the Court may make a peremptory rule, fixing the time within which the step shall be taken or the cause be dismissed. Code, § 4389, 4390; *Hicks's Ch. Pr.* 126; *Kain v. Ross*, 1 Lea, 76.]

be dismissed with costs, for want of prosecution, and the Court may order accordingly, in the following cases:—

(1.) Where the plaintiff, having obtained no order to enlarge the time,⁶ does not within four weeks⁷ after the answer, or the last of the answers, required to be put in by such defendant, is held or deemed to be sufficient,⁸ or after the filing of a traversing note against such defendant,⁹ file replication,¹⁰ or set down the cause to be heard on bill and answer,¹¹ or serve a notice of motion for a decree,¹² or obtain and serve an order for leave to amend the bill;¹³ or

(2.) Where the plaintiff, having undertaken to reply to a plea filed by such defendant to the whole bill, does not file his replication within four weeks after the date of his undertaking;¹⁴ or

(3.) Where the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a *subpœna* to hear judgment, within four weeks after the evidence has closed.¹⁵

Where the plaintiff obtains an order for leave to amend his bill, and, having obtained no order to enlarge the time,¹⁶ does not amend * the bill within the time limited by the order to amend, or, if no *802 time be so limited, within fourteen days from the date of such order, the order to amend is void, and the cause as to dismissal stands in the same position as if the order to amend had not been made.¹

Any defendant may, upon notice, move to dismiss the bill with costs for want of prosecution, where the plaintiff, after answer, amends his bill without requiring an answer to the amendments from any of the defendants,² and, having obtained no order to enlarge the time,³ does not file the replication,⁴ or set down the cause to be heard on bill and answer,⁵ or serve a notice of motion for a decree,⁶ within the times following, *viz.*:—

(1.) Within one week after the expiration of the time within which

⁶ *Ante*, p. 421.

⁷ These four weeks expire at 12 o'clock at night on the last day. *Preston v. Collett*, 20 L. J. N. S. Ch. 228, V. C. Ld. C.

⁸ *Ante*, pp. 412, 786; see *Leite v. Johnston*, L. R. 5 Eq. 266.

⁹ *Ante*, p. 514 *et seq.*

¹⁰ *Post*, p. 828 *et seq.*; see 66th Equity Rule of the United States Courts; and Rule 17 of the Chancery Rules in Massachusetts.

¹¹ *Post*, 828 *et seq.*; and Chap. XXIII., *Setting down Causes*; see Rule 17 of the Chancery Rules in Massachusetts.

¹² *Post*, p. 819 *et seq.*

¹³ *Ante*, p. 412.

¹⁴ *Ante*, p. 696.

¹⁵ Ord. XXXIII. 10; as varied by Ord. 22 Nov., 1866, r. 1; see *Ponsardin v. Stear*, 32 Beav. 666; 9 Jur. N. S. 885; *Ernest v. Govett*, 2 N. R. 486, V. C. W.; see also *Hart v. Roberts*, 32 Beav. 231; 7 Jur. N. S. 669;

post, Chap. XXIII., *Setting down Causes*; and see *Braithwaite's Manual*, 193, n. (135).

¹⁶ *Ante*, p. 421.

¹ Ord. XXXIII. 11. This order applies to all orders to amend, whether of course or not; *Armistead v. Durham*, 11 Beav. 428; 14 Jur. 330; *Bainbrigg v. Baddeley*, 12 Beav. 152; 13 Jur. 997.

² *Brown v. Butter*, 21 Beav. 615. This case appears to be inconsistent with *Bramston v. Carter*, 2 Sim. 458; *Cooke v. Davies*, 1 Russ. 153, n. (c); and *Raistrick v. Elsworth*, 2 De G. & S. 95; 12 Jur. 281, none of which were cited in *Brown v. Butter*; and see *Forbes v. Preston*, 11 Jur. N. S. 198, V. C. S.

³ *Ante*, p. 421.

⁴ *Post*, p. 828 *et seq.*

⁵ *Post*, p. 828 *et seq.*; and Ch. XXIII., *Setting down Causes*.

⁶ *Post*, p. 819 *et seq.*

the defendant might have put in an answer,⁷ in cases where the defendant does not desire to answer the amendments.⁸

(2.) Within fourteen days after the refusal to allow further time, in cases where the defendant, desiring to answer, has not put in his answer within the time allowed for that purpose, and the Judge has refused to allow further time.

(3.) Within fourteen days after the filing of the answer, in cases where the defendant has put in an answer to the amendments, unless the plaintiff has, within such fourteen days, obtained a special order for leave to except to such answer or to re-amend the bill.⁹

In cases where the defendant puts in an answer to amendments to which the plaintiff has not required an answer, vacations are not reckoned in computing the times for filing replication, setting down the cause, or setting down a motion for a decree.¹⁰

If the plaintiff fails to set down a motion for decree within one week after the expiration of the time allowed to him to file his affidavits in reply, in case the defendant has filed any affidavit, or within one week after the expiration of the time allowed to the defendant to file his affidavits in answer, in case the defendant has not filed any affidavit, or in case the time allowed for either of the * purposes aforesaid shall be enlarged, then within one week after the expiration of such enlarged time, the defendant may move to dismiss the bill for want of prosecution.¹

If the plaintiff amends his bill, and requires an answer, the defendant cannot move to dismiss the bill for want of prosecution until four weeks from the expiration of the time when his answer, or the last of his answers, to the amended bill is held or deemed sufficient, except upon the same contingencies as are mentioned above, with respect to answers to original bills.²

A defendant to a suit commenced by bill, who has not been required to answer the bill, and has not answered it, may apply for an order to dismiss the bill for want of prosecution, at any time after the expiration of three months from the time of his appearance, unless a notice of motion for a decree has been served in the mean time, or the cause has been set down to be heard; and the Court may, upon such application, if it shall think fit, make an order dismissing the bill, or make such other order and impose such terms as may appear just and reasonable.³ In computing the three months, vacations are reckoned.⁴

⁷ See Ord. XXXVII. 7, which fixes the time at thirty days from service of the amended bill; and see *ante*, p. 740.

⁸ This applies, although an answer to the amended bill may have been required from another defendant. *Forbes v. Preston, ubi sup.*

⁹ Ord. XXXIII. 12; as varied by Ord. 22 Nov., 1866, r. 1; *ante*, p. 765.

¹⁰ Ord. XXXVII. 13 (4). It is assumed that the words "setting down causes," in Ord. XXXVII. 13 (4), include setting down motions for decree. As to the vacations, see

ante, p. 412; and Braithwaite's Manual, 186, n. (109).

¹ Ord. 22 Nov., 1866, rr. 2, 3.

² *Ante*, p. 801.

³ Ord. XXXIII. 13; as varied by Ord. 22 Nov., 1866, r. 1. A bill was dismissed with costs under this order, in *Haddon v. Pegler*, 5 Jur. N. S. 1123, V. C. W.

⁴ *Bothomley v. Squire*, 7 De G., M. & G. 246; Ord. XXXVII. 13 (14th of May, 1845, Sand. Ord. 984) does not apply to this case. *Ibid.* As to the vacations, see *ante*, p. 412.

Where, at the expiration of the three months, the evidence had not closed, so that the plaintiff could not set down the cause, the Court, upon a motion to dismiss for want of prosecution, gave the plaintiff leave to set down the cause after the expiration of the three months.⁵

The orders do not appear to be framed to meet the case of a defendant who files a voluntary answer; but it was said by Sir W. P. Wood V. C., in *Bentley v. Mercer*,⁶ that it must have been intended that such a defendant should, in some way, be able to get rid of a suit, after having put in a voluntary answer; and it would seem that a defendant may, in such a case, move to dismiss for want of prosecution, after the expiration of three months from the date of his appearance, and four weeks from the filing of his answer, and possibly even after the expiration of the four weeks, although the three months have not expired.⁷

The right of a defendant to move to dismiss depends, in all cases, upon the proceedings of the plaintiff relative to the particular defendant making the motion, and not to the general proceedings in the cause as to other defendants.⁸ The form of order to be made *upon such a motion is, however, within the discretion of the *804 Court: which will, of course, be guided by the conduct of the cause relative to all the defendants.

The plaintiff, by obtaining and serving an order for leave to amend the bill, precludes the defendant from moving to dismiss; and the order to amend is in time, if drawn up and served before the motion to dismiss is actually made, although after notice of the motion has been served.¹ And if, after service of the notice, the plaintiff files replication, it is also a complete answer to the motion.² But in such cases, and in others where a defendant's title to dismiss is intercepted by a step taken by the plaintiff between the notice of motion and its being heard, the plaintiff has to pay the costs of the defendant's application to dismiss the bill.³ It must be remembered, however, that after service of a notice of motion to dismiss, in a case where the defendant is entitled to move, an order of course to amend cannot be obtained.⁴

An order to amend, if irregularly obtained, has been held to be a nullity, and not, therefore, to stop a motion to dismiss;⁵ but this decis-

⁵ *Bates v. Brothers*, 2 W. R. 388, V. C.
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⁶ 4 Jur. N. S. 407; 6 W. R. 265.

⁷ *Bentley v. Mercer*, 4 Jur. N. S. 407; 6 W. R. 265, V. C. W.; see also *Weeks v. Heward*, 11 W. R. 79, V. C. W.; *Semple v. Holland*, 1 N. R. 504, M. R.; and *Nugent v. Jenkinson*, cited *Braithwaite's Pr.* 572.

⁸ See *Nicholl v. Jones*, 14 W. R. 79, V. C. W.; *Semmes v. Mott*, 27 Geo. 92. A bill cannot be dismissed for failure to prosecute, if the defendants have caused or acquiesced in the delay. *Dixon v. Rutherford*, 26 Geo. 153.

¹ *Peacock v. Sievier*, 5 Sim. 553; *Jones v. Lord Charlemont*, 12 Jur. 389, V. C. E. As to orders to amend, see *ante*, p. 409 *et seq.*

² *Story v. Official Manager of the National Insurance Society*, 2 N. R. 351, V. C. W.; and see *post*, p. 805.

³ *Ibid.*; *Waller v. Pedlington*, 4 Beav. 124.

⁴ Ord. IX. 12; see *Briggs v. Beale*, 12 W. R. 934, V. C. W.; and *ante*, pp. 412, 416.

⁵ *De Geneve v. Hammam*, 1 R. & M. 494.

ion would seem to be overruled: the rule of the Court now being to treat all orders that have been made as valid, until they have been regularly discharged.⁶

If, upon the hearing of a cause, it is ordered to stand over, with liberty to the plaintiff to amend his bill by adding parties: in pursuance of which the plaintiff amends, but does not proceed any further, the defendant may move specially to dismiss the bill for want of prosecution, and is not bound to set the cause down again.⁷ And where the order directs the cause to stand over for a limited time, within which the plaintiff is to add necessary parties, and that in default thereof the bill is to stand dismissed with costs, without further order: if the plaintiff does not add the parties within the limited time, no further application need be made to dismiss the bill, as it is already out of Court;⁸ but if the order does not contain a direction for taxation and payment of costs, an *ex parte* application for an order for such direction must be made.⁹ Where the order does not direct the bill to be dismissed

*805 in case * the bill is not amended within the time specified in the order, and the plaintiff omits to amend, the defendant may move, upon notice, that unless the bill be amended within a certain time, it may be dismissed with costs.¹

Where, at the time of service of the notice upon the plaintiff, the defendant had a right to move to dismiss the bill, yet, if the plaintiff files a replication, or serves an order to amend the bill, before the hearing of the motion, the defendant's right is intercepted, and the plaintiff will be allowed to retain his bill.²

Where, however, the plaintiff adopts this course, the Court usually orders him to pay the costs of the application for dismissal; and even though the defendant had notice that the plaintiff, by taking a step in the cause, had prevented any order being made upon the motion to dismiss, yet, where the plaintiff had not tendered the costs of preparing and serving the notice of motion, it was held, that the defendant had a right to bring his motion before the Court, for the purpose of obtaining his costs; where the plaintiff had tendered the costs of preparing and serving the notice of motion, there seems to have been some difference of opinion as to the right of the defendant to bring on the motion to obtain taxed costs;³ but the practice would now seem to be that the defendant is entitled to the costs actually incurred, and that he may in

⁶ Blake v. Blake, 7 Beav. 514; Petty v. Lonsdale, 4 M. & C. 545; 3 Jur. 1186, reversing *ib.* 1070; Chuck v. Cremer, 2 Phil. 113, 115; 1 C. P. Coop. t. Cott. 338, 342; and see observations in report last cited; Whittington v. Edwards, 3 De G. & J. 243, 249.

⁷ Mitchel v. Lowndes, 2 Cox. 15.

⁸ See Stevens v. Praed, *ib.* 374.

⁹ Dobede v. Edwards, 11 Sim. 454. *Quære*, if the application should not be on notice, see Seton, 1116. For form of motion paper, see Vol. III.

¹ Emerson v. Emerson, 6 Hare, 442 12 Jur. 973.

² Waller v. Pedlington, 4 Beav. 124; Corry v. Curlew, 8 Beav. 606; Heanley v. Abraham, 5 Hare, 214; Young v. Quincey, 9 Beav. 160; and see *ante*, p. 804.

³ Attorney-General v. Cooper, 9 Sim. 379; 2 Jur. 917; Piper v. Gittens, 11 Sim. 282; Wright v. Angle, 6 Hare, 109; 12 Jur. 34; Hughes v. Lewis, John. 696; 6 Jur. N. S. 804.

all cases, if necessary, bring on his motion for the purpose of obtaining them.⁴ It would seem, however, that if the plaintiff tenders the costs which have been incurred, it is improper for the defendant to bring on his motion, and that he would not be allowed subsequent costs.⁵

Where there is an irregularity in the notice of motion to dismiss, the Court will not make the plaintiff pay the costs of the application for dismissal.⁶

An order to dismiss a bill for want of prosecution, operates from the time of its being pronounced; and it would seem, therefore, that the filing of replication on the same day does not prevent its effect;⁷ although the contrary has been held, under the old practice, where the order was made *ex parte*.⁸

*The defendant is not prevented, by an interlocutory applica- *806
tion, from moving to dismiss for want of prosecution; and even the obtaining an injunction does not prevent the bill being dismissed.¹ The same was also held of showing cause, successfully, against dissolving an injunction;² and an order to dismiss a bill for want of prosecution was held to be regular, although made after a notice had been given by the defendant of a motion to dissolve an injunction, but which motion was not made, in consequence of the state of business in the Court.³

There is one case, however, in which an order made upon an interlocutory application is considered as a sufficient proceeding to prevent the dismissal of a bill for want of prosecution; *viz.*, where the bill having been filed for the specific performance of a contract, and the title only being in dispute, a reference is made, upon motion, to inquire into the title.⁴ In such case, the order being in the nature of a decree, made upon the hearing of the cause, prevents the dismissal of the bill. The same rule applies to all decretal orders.⁵

It has always been a general rule, that if notice of motion to dismiss for want of prosecution be given for too early a day, the defect is not

⁴ Hughes v. Lewis, 6 Jur. N. S. 442; John. 696, 698; and see note by Registrars there set out. Findlay v. Lawrence, 11 Jur. 705, V. C. K. B.

⁵ Newton v. Ricketts, 11 Beav. 164.

⁶ Steedman v. Poole, 10 Jur. 979; 11 Jur. 555, V. C. W.

⁷ Lorimer v. Lorimer, 1 J. & W. 284, 288; and see note of Registrars in Hughes v. Lewis, John. 698.

⁸ Reynolds v. Nelson, 5 Mad. 60; Fox v. Morewood, 2 S. & S. 325. The filing of a replication after notice given of a motion to dismiss the bill for want thereof, is good cause against the motion; but it will be allowed only on payment of costs. Griswold v. Inman, 1 Hopk. 86. Where a cause is at issue as to one of the defendants, by filing a replication to his answer, and the plaintiff has neglected to proceed against the other parties so that such defendant cannot proceed to exam-

ine witnesses and close the proofs, he may move to dismiss the plaintiff's bill for want of prosecution. Vermilyea v. Odell, 4 Paige, 121; S. C. 1 Edw. Ch. 617; Whitney v. Mayor, &c., of New York, 1 Paige, 548; Hastings v. Palmer, 1 Clarke, 52.

¹ Day v. Snee, 3 V. & B. 170; James v. Bion, 3 Swanst. 234, 239; Bliss v. Collins, cited 2 Mer. 62.

² Earl of Warwick v. Duke of Beaufort, 1 Cox, 111.

³ Farquharson v. Pitcher, 3 Russ. 383. Motion refused where defendant had filed interrogatories for the examination of the plaintiff. Jackson v. Ivinney, L. R. 1 Eq. 693, V. C. W.

⁴ Biscoe v. Brett, 2 V. & B. 377; Collins v. Greaves, 5 Hare, 596; Gregory v. Spencer, 11 Beav. 143.

⁵ Bluck v. Colnaghi, 9 Sim. 411; *ante*, p. 793; *post*, p. 810; Anon., 11 Ves. 169.

cured by the motion being accidentally postponed to a day when it might have been regularly made.⁶

It is to be recollected, that a defendant who is in contempt for non-payment of the costs of an attachment, for not putting in his answer in due time, will not be in a situation, even after answer, to move to dismiss the bill for want of prosecution: unless, indeed, the plaintiff has replied to the answer, or taken any other step amounting to an acceptance of it.⁷

After an order to stay proceedings until the plaintiff had cleared his contempt, a motion to dismiss was held to be irregular, and was refused.⁸

Where the defendant has obtained an order for security for costs, which has not been complied with, he should not move to dismiss the bill for want of prosecution, but that, unless security is given within a limited time, the bill may be dismissed.⁹

*807 * A defendant can only have the bill dismissed as against himself: not as against all the defendants;¹ and the notice of motion should be framed accordingly.

An order to dismiss a bill can only be drawn up on the production of the Record and Writ Clerk's certificate of the proceedings in the cause, for the purpose of showing what proceedings have been had. This certificate ought to be produced in Court at the time of the motion being made, or at all events before the rising of the Court on that day;² and the Registrar will not draw up the order until he sees that the certificate has been granted.³ Sometimes, the certificate has been applied for, and obtained, after the order has been pronounced by the Court; so that it was dated subsequently to the order: which, although drawn up and entered afterwards, is always dated on the day that it is pronounced by the Court.⁴ This practice would seem to have been irregular, and, if objected to, not now to be permitted.⁵

Where either party does not appear on the motion, an office copy of the affidavit of service of the notice of motion⁶ must also be in Court; and where the defendant fails to move, the plaintiff may obtain an order for payment of his costs of the abandoned motion.⁷

Upon hearing the motion, the Court usually either dismisses the bill with costs, or orders the plaintiff to pay the costs of the motion, and to enter into an undertaking to amend the bill, file replication, or set down the cause to be heard on motion for decree, or on bill and answer,

⁶ *De Geneve v. Hannam*, 1 R. & M. 494; and see *Ponsardin v. Stear*, 32 Beav. 666; 9 Jur. N. S. 885; *Ernest v. Govett*, 2 N. R. 486, V. C. W.

⁷ *Anon.*, 15 Ves. 174; *Herrett v. Reynolds*, 2 Giff. 409; 6 Jur. N. S. 880.

⁸ *Futvoye v. Kennard*, 2 Giff. 533; 7 Jur. N. S. 958.

⁹ *Kennedy v. Edwards*, 11 Jur. N. S. 153, V. C. W.; *ante*, pp. 35, 36.

¹ *Ward v. Ward*, 11 Beav. 159, 162; 12 Jur. 592.

² *Freeston v. Claydon*, 17 Jur. 435, V. C. W.

³ *Wills v. Pugh*, 10 Ves. 402, 403.

⁴ *Ibid.*; *M'Mahon v. Sisson*, 12 Ves. 465; *Attorney-General v. Finch*, 1 V. & B. 368; *King v. Noel*, 5 Mad. 13; *Re Risca Coal Company*, 10 W. R. 701, L. C.

⁵ *Bell v. Bell*, 14 Jur. 1129, V. C. Ld. C.; *Freeston v. Claydon*, *ubi sup.*

⁶ For forms of affidavit, see Vol. III.

⁷ See *post*, Chap. XXXV. § 2, *Motions*; Ord. XL. 23.

within a limited period, according to the state of the suit; ⁸ or, as it is usually expressed, to "speed the cause."

The Court, however, sometimes directs the motion to stand over, in order to give the plaintiff an opportunity of taking a step in the cause, and so preventing the bill being dismissed; and upon his doing so, makes no other order on the motion than that the plaintiff pay the costs; ⁹ or, if satisfied that the plaintiff has used reasonable diligence, it has refused to make any order on *the motion; ¹ and after replica- *808 tion has been filed, the Court will, in a proper case, give the plaintiff further time.²

Notwithstanding the enactment that, upon the defendant's dismissing a bill for want of prosecution the plaintiff shall pay to the defendant his costs, to be taxed by the Master,³ the Court has a discretion to make such order in respect of costs, as well as in other respects, as it thinks fit; and though, in most cases, where the defendant was in a position to move to dismiss at the time the notice was served, the Court orders the plaintiff to pay the costs, whatever order it may make in other respects, it has refused to make any order upon the motion: ⁴ has dismissed the bill, without costs: ⁵ and has even gone the length of dismissing the motion with costs.⁶

Where the plaintiff becomes bankrupt,⁷ or has filed his bill *in formâ pauperis*,⁸ the rule is to dismiss the bill without costs. Where the defendant becomes bankrupt, it seems to have been formerly considered that the bill, if dismissed for want of prosecution, ought to be dismissed without costs; ⁹ but it has since been held, that the fact of a defendant becoming a bankrupt, is not of itself a sufficient reason for departing from the ordinary rule that, a bill dismissed for want of prosecution, is dismissed with costs.¹⁰

⁸ *Stinton v. Taylor*, 4 Hare, 608; 10 Jur. 386; *Earl of Mornington v. Smith*, 9 Beav. 251; *Hardy v. Hardy*, 1 C. P. Coop. t. Cott. 16; *Williams v. Rowland*, 3 Jur. N. S. 658, V. C. W.; *Hancock v. Rollison*, 5 Jur. N. S. 1199; 8 W. R. 18, V. C. S.; *Hand v. King*, 10 Jur. N. S. 91, V. C. W.; *Jones v. Jones*, 10 Jur. N. S. 1167, L. J.J.; *Forbes v. Preston*, 11 Jur. N. S. 198, V. C. S.; *Southampton, &c. Steamboat Company (Limited) v. Rawlins*, 13 W. R. 512, L. J.J. [Where several defendants, who appeared separately, moved, the Court, to save costs, made an order for dismissal on all the motions. *Jones v. Perrott*, 36 L. J. Ch. 488.]

⁹ *Young v. Quincy*, 9 Beav. 160; *Stinton v. Taylor*, 4 Hare, 608, 609; 10 Jur. 386. [See *London and Colonial Co. v. Elworthy*, 18 W. R. 246.]

¹ *Ingle v. Partridge*, 12 W. R. 65, M. R.; 33 Beav. 287.

² *Pollard v. Doyle*, 2 W. R. 509, V. C. K.; and see *Forbes v. Preston*, 11 Jur. N. S. 198, V. C. S.

³ 4 & 5 Anne, c. 16, § 23, *ante*, p. 791. As to the form of order, where the suit is by an official manager or liquidator, see *Grand Trunk Company v. Brodie*, 3 De G., M. &

G. 146; 17 Jur. 309; 9 Hare, 823; 17 Jur. 205; *Official Manager of Consols Insurance Company v. Wood*, 13 W. R. 492, V. C. K.; 2 Dr. & Sm. 353; and see *Morgan & Davey*, 226.

⁴ *Vent v. Pacey*, 3 Sim. 382; and see *Ingle v. Partridge*, *ubi sup.*

⁵ *Pinfold v. Pinfold*, 9 Hare Ap. 14; 16 Jur. 1081, V. C. T.; and see *South Staffordshire Railway Company v. Hall*, 16 Jur. 160, V. C. K.; *Lancashire and Yorkshire Railway Company v. Evans*, 14 Beav. 529; *Kemball v. Walduck*, 1 Sm. & G. Ap. 27; 18 Jur. 69, V. C. S.

⁶ *Partington v. Baillie*, 5 Sim. 667; *Winthrop v. Murray*, 7 Hare, 150; 13 Jur. 32; *Ingle v. Partridge*, 33 Beav. 287.

⁷ *Ante*, p. 64, *post*, p. 813; *Meiklam v. Elmore*, 4 De G. & J. 208; 5 Jur. N. S. 904; and see *post*, p. 814.

⁸ *Ante*, p. 792; and see p. 42.

⁹ *Blanchard v. Drew*, 10 Sim. 240; *Monteith v. Taylor*, 9 Ves. 615; 1 M'N. & G. 81, n.; *Kemball v. Walduck*, 1 Sm. & G. Ap. 27; 18 Jur. 69; *Findlay v. Lawrence*, 2 De G. & S. 303.

¹⁰ *Blackmore v. Smith*, 1 M'N. & G. 80; 13 Jur. 218; *Robson v. Earl of Devon*, 3 Sm.

The Court will not enter into the merits of the case, for the purpose of determining whether the bill shall be dismissed with or without costs; but will, for that purpose, only consider the conduct of the parties in the prosecution of the cause.¹¹

Where a defendant, knowing that the plaintiff has used due diligence and been unable to get in the answers of other defendants, moves to dismiss the bill for want of prosecution, the motion will be
*809 dismissed with costs;¹² and it is, therefore, prudent on the * part of the plaintiff to give a defendant who is in a position to move to dismiss, notice that the other answers have not been got in, if such is the fact.¹

Where the plaintiff undertakes to speed the cause, the order ought to go on to provide that, in default of his taking the appointed step within the prescribed period, the bill shall be dismissed with costs, without further notice.²

If the plaintiff makes default in taking the next step within the time limited, no further indulgence will in general be granted him.³ Where, however, the plaintiff considers he has a case entitling him to ask for further indulgence, he should make a special application for further time, by motion or summons, before the expiration of the period limited;⁴ or if the time has expired, the application must be to have the bill restored.⁵ It is not, however, the ordinary course of the Court to restore a bill which has once been dismissed; it must be shown that substantial justice requires that it should be done, and then, upon the particular circumstances, the Court will make the order.⁶ The Court will not restore a bill, which has been regularly dismissed, for the mere purpose of agitating the question of costs.⁷

It has been held, that it is no answer to a motion to dismiss that the

& G. 227; 2 Jur. N. S. 565; *Levi v. Heritage*, 26 Beav. 560; S. C. *nom. Lever v. Heritage*, 5 Jur. N. S. 215.

¹¹ *Stagg v. Knowles*, 3 Hare, 241, 244; *South Staffordshire Railway Company v. Hall*, 16 Jur. 160, V. C. K.; *Wallis v. Wallis*, 4 Drew. 458; [*Waring v. Lockett*, 18 W. R. 915].

¹² *Partington v. Baillie*, 5 Sim. 667; *Winthrop v. Murray*, 7 Hare, 150; 13 Jur. 32; and see *Ingle v. Partridge*, 12 W. R. 65, M. R.; 33 Beav. 287; *Nicholl v. Jones*, 14 W. R. 79, V. C. W.; *Barker v. Piele*, 12 W. R. 460, V. C. K.; [*Hurd v. Lupton*, W. N. (1869) 28].

¹ *Adair v. Barrington*, 2 W. R. 361; 2 Eq. Rep. 408, V. C. W.

² *Emerson v. Emerson*, 6 Hare, 442; 12 Jur. 973; *Stephenson v. Mackay*, 24 Beav. 252; *Pearce v. Wrigton*, *ib.* 253; and see *Bartlett v. Harton*, 17 Beav. 479; 17 Jur. 1019; *Stevens v. Praed*, 2 Cox, 374; *Dobede v. Edwards*, 11 Sim. 454. For form of order in such case, see *Seton*, 1278, No. 4.

³ *Lamert v. Stanhope*, 5 De G. & S. 247; *Stephenson v. Mackay*, *ubi sup.*; *Williams v. Page*, 24 Beav. 490; *Bartlett v. Harton*, *ubi sup.*

⁴ *La Mert v. Stanhope*, *ubi sup.* In an ordinary case the application should be made by summons. For forms of notice of motion and summons, see Vol. III.

⁵ *Bartlett v. Harton*, 17 Beav. 479; 17 Jur. 1019; *Jackson v. Purnell*, 16 Ves. 204; the application, in this case, should be made by motion. For form of notice of motion, see Vol. III.

⁶ See *Southampton Steamboat Company v. Rawlins*, 11 Jur. N. S. 230; 13 W. R. 512, L. J.J., where the delay had been occasioned by a mistake.

⁷ *Hannam v. South London Water Works Company*, 2 Mer. 63, 64; *Stone v. Locke*, 48 Maine, 425. Where a bill has been dismissed from the docket, for want of prosecution, on motion of the defendant, the suit cannot properly be brought forward at a subsequent term, on motion, to obtain an order for costs. It seems the proper proceeding for the defendant, after dismissal for want of prosecution, is to apply for an order to discharge the decree dismissing the bill. *Stone v. Locke*, *ubi supra*.

plaintiff has not been able to get in the answers of other defendants :⁸ or that the delay of the plaintiff was occasioned by difficulties in drawing up an order allowing a demurrer by other defendants, with leave to amend ;⁹ or that the plaintiff has applied for the production of documents, unless the application was made without delay :¹⁰ or that proceedings had been stayed, against other defendants, till the plaintiff should pay them certain * costs :¹ or that the plaintiff had offered *810 to dismiss the bill without costs : the decision on which it had been filed having been overruled ;² or that the defendant has become bankrupt.³

Where, however, in consequence of negotiations with the principal defendant, the plaintiff did not get in the answers of the other defendants, and the principal defendant, during the absence of the plaintiff abroad, moved to dismiss for want of prosecution, Lord Cottenham gave the plaintiff (on the 7th of July) till the 1st day of the ensuing Michaelmas term, to file replication.⁴ The omission on the part of the defendant to give notice of the filing of his answer,⁵ does not affect his right to move to dismiss the bill for want of prosecution : though, of course, it may materially affect the order which the Court will make upon the motion.⁶

A bill may be dismissed for want of prosecution, while the plaintiff is an outlaw.⁷

A defendant is not prevented from moving to dismiss by the suit having abated, through the death of another defendant.⁸

In bills to perpetuate testimony, it does not seem that the defendant has hitherto had, under any circumstances, a right to have the bill dismissed for want of prosecution. In *Beavan v. Carpenter*,⁹ a cause of this kind, a motion to dismiss before replication, was refused ; but Sir Lancelot Shadwell V. C. made an order, that the plaintiff should file a replication forthwith, and proceed to the examination of his witnesses, as prayed by his bill, and procure such examination to be completed on or before a certain day ; and that, in default thereof, he should pay to the

⁸ *Lester v. Archdale*, 9 Beav. 156; *Earl of Mornington v. Smith*, *ib.* 251; *Baldwin v. Damer*, 11 Jur. 723, V. C. E.; *Stinton v. Taylor*, 4 Hare, 608, 609; 10 Jur. 386; *Adair v. Barrington*, 2 W. R. 361; 2 Eq. Rep. 408, V. C. W.; *Briggs v. Beale*, 12 W. R. 934, V. C. W.; but see *ante*, p. 808.

⁹ *Jones v. Morgan*, 12 Jur. 388, V. C. E.; see also *Drili v. Sedgwick*, 15 Jur. 284, V. C. Ld. C.

¹⁰ *Franco v. Meyer*, 2 H. & M. 42.

¹ *Lautour v. Holcombe*, 10 Beav. 256.

² *Lancashire and Yorkshire Railway Company v. Evans*, 14 Beav. 529; the bill was, however, in this case, afterwards dismissed without costs. *South Staffordshire Railway Company v. Hall*, 16 Jur. 160, V. C. K.

³ *Levi v. Heritage*, 26 Beav. 560, and cases there cited; *S. C. nom. Lever v. Heritage*, 5 Jur. N. S. 215; or that a cross-bill at the

suit of another defendant is pending. *Windham v. Cooper*, 14 W. R. 8, V. C. W. [Or that a defendant, who has made an insufficient affidavit as to documents, has not complied with an order, not served, for a further affidavit. *Howe v. Grey*, W. N. (1867) 141.]

⁴ *Hardy v. Hardy*, 1 C. P. Coop. t. Cott. 16.

⁵ Ord. III. 9; see *ante*, p. 755.

⁶ *Jones v. Jones*, 1 Jur. N. S. 863; 3 W. R. 638, V. C. S.

⁷ *Knowles v. Rhydydefod Colliery Company*, John. 630; 6 Jur. N. S. 291.

⁸ *Williams v. Page*, 24 Beav. 490. [Nor by the death of a co-plaintiff, if no abatement has been occasioned thereby. *Wilson v. Wilson*, L. R. 9 Eq. 452.]

⁹ 11 Sim. 22; [L. R. 1 Eng. & Ir. Ap. 69.]

defendant his costs of the suit. And a similar order was made, on a like motion after replication.¹⁰

So, in the case of a bill for discovery, the defendant should not move to dismiss for want of prosecution, but should, after the time for excepting to his answer has elapsed, obtain, on petition as of course,

an order for the payment of his costs by the plaintiff.¹¹ And in *811 a suit for a receiver, *pendente lite*, the motion * should be for payment of costs, to stay proceedings, and, if necessary, to discharge the receiver.¹

After a decree, or even a decretal order, has been made, a bill cannot be dismissed for want of prosecution; thus, in the case of *Bluck v. Colnaghi*,² which was a suit for winding up the affairs of the partnership between the plaintiff and defendant, and in which an order had been made, by consent on motion, for taking the accounts of the partnership, but had not been drawn up, Sir Lancelot Shadwell V. C. said, that the order which had been pronounced was a decretal order; and though it had not been drawn up, yet, either party was at liberty to draw it up; and that an order in the nature of a decree having been made in the cause, the bill could not be dismissed. But after a decree merely directing accounts and inquiries, to enable the Court to determine what is to be done, a bill can always be dismissed.³

It has been before stated, that an order to dismiss a bill for want of prosecution cannot be pleaded in bar to a new bill for the same matter.⁴ Where, however, after a bill has been so dismissed, the plaintiff files another bill for the same purpose, the Court will suspend the proceedings on such new bill till the costs of the former suit have been paid; and where the defendant, in the suit which had been dismissed, died before he had received his costs, and the plaintiff filed a new bill against his executor for the same object, Sir Lancelot Shadwell V. C. ordered the proceedings on the new bill to be stayed, until the plaintiff had paid the executor the costs of the dismissed suit.⁵ This rule does not apply, where the plaintiff sues by a next friend.⁶

¹⁰ *Wright v. Tatham*, 2 Sim. 459; and *Barham v. Longman*, *ib.* 460; see also *Brigstocke v. Roch*, 7 Jur. N. S. 63, V. C. S.; and *post*, Chap. XXXIV. § 4, *Bills to Perpetuate Testimony*.

¹¹ *Woodcock v. King*, 1 Atk. 286; *Attorney-General v. Burch*, 4 Mad. 178; *Rhodes v. Hayne*, 9 Jur. 175, V. C. K. B.; *South Eastern Railway Company v. Submarine Telegraph Company*, 18 Beav. 429; 17 Jur. 1044; *Fitzgerald v. Butt*, 9 Hare Ap. 65; see *post*, Chap. XXXIV. § 2, *Bills of Discovery*. For form of petition, see *post*, Vol. III.

¹ *Edwards v. Edwards*, 17 Jur. 826, V. C. W.; *Anderson v. Guichard*, 9 Hare, 275; *Barton v. Rock* (No. 2), 22 Beav. 376; see now 20 & 21 Vic. c. 77, §§ 70, 71; but see *Williams v. Attorney-General, Seton*, 1003.

² 9 Sim. 411; *Egg v. Devey*, 11 Beav. 221; see also *ante*, pp. 793, 806; and *Collins*

v. Greaves, 5 Hare, 596; *Gregory v. Spencer*, 11 Beav. 143.

³ *Anon.*, 11 Ves. 169; *Barton v. Barton*, 3 K. & J. 512; 3 Jur. N. S. 808; and see *ante*, p. 793.

⁴ *Ante*, p. 659; *Story Eq. Pl.* § 793; *Mitford Eq. Pl.* by *Jeremy*, 238; see *Byrne v. Frese*, 2 Moll. 157. When a bill is dismissed for want of prosecution, it operates as a discontinuance, and is no more than a nonsuit, at law, and does not prevent the bringing of a new bill. *M'Broom v. Sommerville*, 2 Stewart, 515; *Porter v. Vaughan*, 26 Vt. 624. The dismissal absolutely of a bill by a Court which had no jurisdiction of the case, is no bar to another suit. *Lancaster v. Lair*, 1 Dana, 109.

⁵ *Long v. Storie*, 13 Jur. 1091, V. C. E.; and see *ante*, p. 796.

⁶ *Hind v. Whitmore*, 2 K. & J. 458.

An order to dismiss a bill for want of prosecution, effectually puts an end to every proceeding in the suit which has been dismissed, and no subsequent step can be taken in it, except such as may be necessary for carrying into effect the order of dismissal.⁷ Therefore, where a defendant obtains an order to dismiss a bill for want of prosecution, without the plaintiff's having made a motion of which he has given notice, the defendant cannot *afterwards obtain the costs of the *812 motion, as an abandoned motion.¹

Where a bill is dismissed with costs, they may be taxed without any order referring them for taxation, unless the Court prohibits the taxation; and they will be recoverable by *subpoena*, in the usual manner.² Where the dismissal takes place before the hearing, only those costs which are costs in the cause are included:³ therefore, when the costs of a motion or other application in the cause are reserved, they should be made costs in the cause, or reserved "until the hearing or further order," and not simply "until the hearing."⁴

Where a bill was dismissed for want of prosecution, in a suit in which the official manager of a company under process of winding up had, after institution of the suit, been substituted as plaintiff, the order provided that the defendants should be at liberty to prove for their costs in the winding up.⁵

The order dismissing a bill for want of prosecution, may be enrolled, although the only object in doing so be to prevent an appeal.⁶

Where a plea to the whole bill is not set down for argument within three weeks after the filing, and the plaintiff does not within such three weeks serve an order for leave to amend the bill, or by notice in writing undertake to reply to the plea, the defendant by whom such plea was filed may obtain, as of course, an order to dismiss the bill.⁷

SECTION III. — *Where the Suit has Abated, or become otherwise Defective.*

Where a suit abates by the death of a sole plaintiff, the Court, upon motion of any defendant, made on notice served on the legal representative of the deceased plaintiff, may order that such legal repre-

⁷ See *Lorimer v. Lorimer*, 1 J. & W. 284; *Bartlett v. Harton*, 17 Jur. 1019, M. R.

¹ As to abandoned motions, see *post*, Chap. XXXV. § 2, *Motions*; and Ord. XL. 23.

² Ord. XL. 38.

³ *Stevens v. Keating*, 1 M'N. & G. 659, 663; 14 Jur. 157.

⁴ *Rumbold v. Forteath*, 4 Jur. N. S. 608, V. C. W.

⁵ *Caldwell v. Ernest* (No. 2), 27 Beav. 42; 5 Jur. N. S. 667.

⁶ *Williams v. Page*, 1 De G. & J. 561.

⁷ Ord. XIV. 17; *ante*, p. 695. As to *laches* in applying, see *Campbell v. Joyce*, L. R. 2 Eq. 337, V. C. W. [And see, as to the discharge of the order, on the ground of bad faith: *Talbot v. Keay*, L. R. 8 Eq. 610; and as to the effect of a motion to dismiss for want of prosecution on the right to object for irregularity, to a previous order for the amendment of the bill: *Kettlewell v. Bristow*, L. R. 10 Eq. 210.]

sentative do revive the suit within a limited time, or that the bill be dismissed.⁸

*813 * The words legal representative mean heir, or devisee, or executor, or administrator, according as the suit relates to real or personal estate.¹

Where the sole plaintiff died after decree, and after an injunction to restrain waste, Lord Langdale M. R. made an order, that all further proceedings should be stayed, and the injunction dissolved, unless the suit were revived within a limited time;² but Sir R. T. Kindersley, V. C. declined to follow this case,³ on the ground that the defendant could himself revive.⁴ And where an injunction had been obtained, restraining an action at law, and the sole plaintiff died, Sir John Romilly M. R. said he had no jurisdiction to make an order that the suit be revived by the plaintiff's representatives, or the bill be dismissed.⁵ If the bill is dismissed, it will be dismissed without costs.⁶

A suit does not abate by the death of a sole plaintiff, who is the public officer of a joint-stock company:⁷ in such a case, therefore, the defendant should apply to dismiss the bill in the usual form, and not that it may be revived within a limited time or dismissed.⁸

Where a suit abates by the death of one of several co-plaintiffs, the defendant may, on motion,⁹ obtain an order that the surviving plaintiffs do revive within a limited time, or, in default, that the bill stand dismissed with costs;¹⁰ and it is no answer to such an application that there is no personal representative of the deceased plaintiff.¹¹ No order will be made as to the costs of the motion.¹²

Where a suit abates by the marriage of a female sole plaintiff, a

⁸ Ord. XXXII. 4. This rule is only applicable to an abatement or defect occurring before decree. As to proceedings in the suit, after an abatement, but in ignorance of it, see *Smith v. Horsfall*, 24 Beav. 331; *Houston v. Briscoe*, 7 W. R. 394, V. C. K. In Massachusetts, "when the death of any party shall be suggested in writing, and entered on the docket, the clerk, upon application, may issue process to bring into Court the representative of such deceased party." Rule 25 of the Rules for Practice in Chancery; see also 56th and 57th Equity Rules of the United States Courts. For form of order under r. 4, see *Seton*, 1278, No. 5; and for form of notice of motion, see Vol. III.

¹ See *Price v. Berrington*, 11 Beav. 90.

² *Ibid.*

³ *Mills v. Dudgeon*, 1 W. R. 514, V. C. K.

⁴ See *Devaynes v. Morris*, 1 M. & C. 213, 225.

⁵ *Oldfield v. Cobbett*, 20 Beav. 563.

⁶ *Chowick v. Dimes*, 3 Beav. 290, 492, n.; and cases in *ib.* 294, n.; *Hill v. Gaunt*, 7 Jur. N. S. 42; 9 W. R. 68, V. C. W.

⁷ See 7 Geo. IV. c. 46, § 9.

⁸ *Burnester v. Von Stenz*, 23 Beav. 32.

⁹ For form of notice, see Vol. III.

¹⁰ *Adamson v. Hall*, T. & R. 258, overruling *S. C. nom. Adamson v. Hull*, 1 S. & S. 249; *Chichester v. Hunter*, 3 Beav. 491; *Lord Huntingtower v. Sherborn*, 5 Beav. 380; *Holcombe v. Trotter*, 1 Coll. 654; *Norton v. White*, 2 De G., M. & G. 678; *Powell v. Powell*, *ib.* n.; *Pudge v. Pitt*, 3 W. R. 100, V. C. S.; *Pearce v. Wrigton*, 24 Beav. 253; *Hinde v. Morton*, 13 W. R. 401, V. C. W. See *Pells v. Coon*, 1 Hopk. 450, in which it was held in New York, that upon the abatement of a suit, by the death of one of several co-plaintiffs, it is at the election of the surviving co-plaintiffs whether they will revive the suit. The Court will limit the time within which they shall make that election. And if they do not revive the suit within the time limited, the Court will order that they be precluded from any further prosecution of it.

¹¹ *Saner v. Deaven*, 16 Beav. 30.

¹² *Hinde v. Morton*, *ubi sup.* According to the report of *Hinde v. Morton*, in 2 H. & M. 368, the order in the case of the death of a co-plaintiff, one of several residuary legatees, should be that the remaining plaintiffs proceed, or the bill be dismissed with costs; the death of the co-plaintiff being marked on the record.

similar order may be obtained against her husband;¹³ and it seems that the order will be made with costs.¹⁴

Where the abatement is caused by the death of a defendant, his representatives may move that the plaintiff do revive the suit * within a limited time, or, in default, that the bill may be dis- *814 missed as against them; and the order is, it seems, for the dismissal without costs.¹

Where a suit becomes defective by the bankruptcy of a sole plaintiff, the defendant may obtain, on special motion,² an order that the assignee do within a limited time (usually three weeks) take proper supplemental proceedings for the purpose of prosecuting the suit against the defendant, or, in default, that the bill be dismissed, without costs.³ And where one of several co-plaintiffs becomes bankrupt, a similar order may be obtained against the other co-plaintiffs;⁴ but in this case, the dismissal will be with costs.⁵

If the plaintiff become bankrupt after decree, the Court will, on the motion of the defendant, order that the assignees elect, within a limited time, whether they will prosecute the suit, and, in default, that all further proceedings be stayed.⁶ And a similar order has been made, with respect to a trustee under the act to facilitate arrangements with creditors.⁷

The order to dismiss on occasions of abatement, or of the suit becoming defective, must not be confounded with an ordinary order to dismiss for want of prosecution. The two orders differ from one another materially, both in the circumstances in which they may be obtained, and the form of the order when it is made. After a suit has abated, or after it has become defective by the bankruptcy of the plaintiff, it is irregular to move for the ordinary order to dismiss the bill for want of

¹³ *Johnson v. Horlock*, 3 Beav. 294, n.; *Wilkinson v. Charlesworth*, *ib.* 297, n.

¹⁴ *Johnson v. Horlock*, *ubi sup.*; see, however, *Wilkinson v. Charlesworth*, *ubi sup.*, *contra*.

¹ *Burnell v. Duke of Wellington*, 6 Sim. 461; *Norton v. White*, 2 De G., M. & G. 678; *Powell v. Powell*, *ib.* n.; *Cross v. Cross*, 11 W. R. 797, V. C. S.; *Reeves v. Baker*, 13 Beav. 115, is incorrectly reported; see 2 De G., M. & G. 679, n. (b). So the survivors upon the death of one of several defendants may move that the plaintiff revive, or the bill be dismissed. *Harrington v. Becker*, 2 Barb. Ch. 647. [See *Thompson v. Hill*, 5 Yerg. 418.]

² As to serving notice of the motion on the bankrupt, as well as on the assignees, see *Vestris v. Hooper*, 8 Sim. 570.

³ *Ante*, pp. 64, 808; *Sharp v. Hullett*, 2 S. & S. 496; *Wheeler v. Malins*, 4 Mad. 171; *Porter v. Cox*, 5 Mad. 80; *Lord Huntingtower v. Sherborn*, *ubi sup.*; *Robinson v. Norton*, 10 Beav. 484; *Fisher v. Fisher*, 6 Hare, 628; 2 Phil. 236; *Meiklam v. Elmore*, 4 De G. & J. 208; 5 Jur. N. S. 904; *Jackson v. Riga*

Railway, 28 Beav. 75; *Boucicault v. Delafield*, 10 Jur. N. S. 937; 12 W. R. 1025, V. C. W.; 10 Jur. N. S. 1063; 13 W. R. 64, L. J.J.; where the bankruptcy has occurred in a foreign country, see *Bourbaud v. Bourbaud*, 12 W. R. 1024, V. C. W. As to the effect of a trust deed by the plaintiff, under 24 & 25 Vic. c. 134, see § 197. For form of order, see *Seton*, 1278, No. 6; and for form of notice of motion, see Vol. III.

⁴ *Ward v. Ward*, 8 Beav. 397; 11 Beav. 159; 12 Jur. 592; *Kilminster v. Pratt*, 1 Hare, 632; see, however, *Caddick v. Mason*, 1 Sim. 501.

⁵ *Ward v. Ward*, and *Kilminster v. Pratt*, *ubi sup.* [Where the bankruptcy takes place between the hearing and judgment, the Court will not, before giving judgment, compel the trustee to revive. *Boucicault v. Delafield*, 12 W. R. 8.]

⁶ *Whitmore v. Oxborrow*, 1 Coll. 91; *Clarke v. Tipping*, 16 Beav. 12.

⁷ *Hardy v. Dartnell*, 4 De G. & S. 568; see 7 & 8 Vic. c. 70; 24 & 25 Vic. c. 134, § 197.

prosecution;⁸ and such an order, if made, will be discharged for irregularity.⁹

Where a suit becomes defective by the bankruptcy of a defendant, he may, as we have seen, notwithstanding his bankruptcy, obtain *815 the usual order to dismiss the bill for want of prosecution, * with costs;¹ but he cannot obtain an order of a similar kind to that granted on the bankruptcy of a plaintiff.²

SECTION IV. — *Cases of Election.*

Where the plaintiff is suing both at Law and in Equity, at the same time, for the same matter, the defendant is entitled to an order that the plaintiff do elect whether he will proceed with the suit in Equity, or with the action at Law.³ Thus, the Court will generally compel a plaintiff to elect between a suit in Equity for the specific performance of an agreement, and an action at Law brought in respect of the same agreement.⁴ So also, as a general rule, a party suing in Equity will not be allowed to sue at Law for the same debt. The case of a mortgagee is an exception to this rule; it is frequently said, that he may pursue all his remedies concurrently; at any rate, he can proceed on his mortgage in Equity, and on his bond or covenant at Law at the same time.⁵ In the case of *Barker v. Smark*,⁶ however, Lord Langdale M. R. refused to extend the exception to the case of a vendor, who had commenced an action at Law upon a bond for his unpaid purchase-money, and at the same time was suing in Equity to establish a lien upon the estate for the same sum.

The principle of election has also been applied where there was one

⁸ *Robinson v. Norton*, 10 Beav. 484.

⁹ *Boddy v. Kent*, 1 Mer. 361, 365; *Sellers v. Dawson*, 2 Dick. 738; *S. C. nom. Sellas v. Dawson*, 2 Anst. 458, n.

¹ *Blackmore v. Smith*, 1 M'N. & G. 80; 13 Jur. 218; *Robson v. Earl of Devon*, 3 Sm. & G. 227; 2 Jur. N. S. 565; *Levi v. Heritage*, 26 Beav. 560; *S. C. nom. Lever v. Heritage*, 5 Jur. N. S. 215; but see *Kemball v. Walduck*, 1 Sm. & G. 27; 18 Jur. 69, *V. C. S.*, where the dismissal was without costs.

² *Manson v. Burton*, 1 Y. & C. C. C. 626.

³ *Ld. Red.* 249; *Carlisle v. Cooper*, 3 C. E. Green (N. J.), 241; *Livingston v. Kane*, 3 John. Ch. 224; *Sanger v. Wood*, *ib.* 416; *Rogers v. Vosburgh*, 4 John. Ch. 84; *Gibbs v. Perkinson*, 4 Hen. & M. 415; *ante*, 634 note. Where the remedies at Law and in Equity are inconsistent, any decisive act of the party under either jurisdiction, with knowledge of his rights and of the facts, determines his election. *Sanger v. Wood*, *ubi supra*; see *Combs v. Tarlton*, 2 B. Mon. 194; *ante*, p. 634, note. For form of order, see 2 Seton Dec. (3d Eng. ed.) 947.

⁴ *Carrick v. Young*, 4 Mad. 437; *Ambrose v. Nott*, 2 Hare, 649, 651; see also *Fennings v. Humphery*, 4 Beav. 1; 5 Jur. 455; *Faulkner v. Llewellyn*, 10 W. R. 506, *V. C. K.*; *Gedye v. Duke of Montrose*, 5 W. R. 537; *S. C.* 26 Beav. 45, 47; [*Kerr v. Campbell*, 17 W. R. 155]. Where the plaintiff sued at Law and in Equity for the same debt, but the action was dismissed on payment of the debt and costs at Law, the Court ordered the suit to be stayed on payment of costs by the defendant. *Deane v. Hamber*, 14 W. R. 167, *V. C. S.*

⁵ *Schoole v. Sall*, 1 Sch. & Lef. 176; *Booth v. Booth*, 2 Atk. 343; *Willes v. Levett*, 1 De G. & S. 392; [*Dunkley v. Van Buren*, 3 John. Ch. 330; *Chadwell v. Jones*, 1 Tenn. Ch. 493. And the mortgagee may enforce his lien in Equity after judgment at Law and taking the body of the debtor in execution: *Davis v. Battine*, 4 R. & M. 76; and after the debtor has been discharged of the debt in bankruptcy: *Lewis v. Hawkins*, 23 Wall. 119. And see *Harris v. Vaughn*, 2 Tenn. Ch. 483.]

⁶ 3 Beav. 64.

suit in this country, and another for the same matter in a foreign Court of competent jurisdiction.⁷

It seems that, in a particular case, the plaintiff may be allowed to proceed partially in Equity, and partially at Law, and compelled to enter into a special election.⁸

* If the defendant's answer is not excepted to, or set down *816 for hearing on former exceptions, he may, on an allegation that the plaintiff is prosecuting him in this Court, and also at Law, for the same matter, obtain, at the expiration of eight days after his answer, or further answer is filed, as of course, on motion or petition, the usual order for the plaintiff to make his election in which Court he will proceed. If his answer is excepted to, he may, by notice in writing, require the plaintiff to set down the exceptions, within four days from the service of the notice;¹ and if the plaintiff does not set down the exceptions within such four days, or if they are not allowed, the defendant is entitled as of course, on motion or petition, to obtain the usual order for the plaintiff to make his election in which Court he will proceed.² Where the plaintiff has amended his bill, the defendant cannot obtain the order to elect until the time for excepting to his answer to the amendments has expired, notwithstanding the time for excepting to his answer to the original bill has expired.³

If the defendant is not required to answer, he may, at the expiration of the time within which he might have been served with interrogatories to the bill, in like manner obtain a similar order to elect.⁴

We have before seen that, for some purposes, a plea is included in the term answer;⁵ but under the old practice it was decided, that neither a plea nor a joint plea and answer was so far an answer to the bill as to entitle a defendant to move for an order for the plaintiff to elect;⁶ and it does not seem that there is any thing in the present practice to affect this decision.

The order must be served on the plaintiff or his solicitor, and attorney at Law; and within eight days after such service, the plaintiff must make his election in which Court he will proceed;⁷ and if he elect to proceed in this Court, then his proceedings at Law are thereby stayed by injunction; but if he elect to proceed at Law, or in default of his making his election within the specified time, then his bill from thence-

⁷ *Pieters v. Thompson*, G. Coop. 294.

⁸ *Barker v. Dumaresque*, 2 Atk. 119; *Seton*, 949; *Anon.*, 1 Vern. 104; 3 Atk. 129; *Trinleston v. Kemmis*, Ll. & Goold. 29; *Mills v. Fry*, G. Coop. 107; 19 Ves. 277; [*Franklin v. Hersch*, 2 Tenn. Ch. 467]. For form of the order, see 3 *Seton*, Dec. (3d Eng. ed.) 948.

¹ For form of notice, see Vol. III.

² Ord. XLII. 5, 6; *ante*, pp. 766, 767; *Royle v. Wynne*, C. & P. 252, 255; 5 Jar. 1002; the vacations are not excluded. Ord. XXXVII. 13. For form of order to elect, see *Seton*, 947, No. 1; and for forms of motion paper and petition, see Vol. III.

³ *Leicester v. Leicester*, 10 Sim. 87, 89; *Affid. ib.* 91, n.; 3 Jur. 308.

⁴ Ord. XLII. 7; and see *Braithwaite's Manual*, 156, n. (5). For forms, see Vol. III.

⁵ See *ante*, p. 690.

⁶ *Fisher v. Mee*, 3 Mer. 45, 47; *Vaughan v. Welsh*, Mos. 210; [*Soule v. Corning*, 11 Paige. 412].

⁷ The Court will allow the party a reasonable time to make his election. *Bracken v. Martin*, 3 Yerger, 55; see *Houston v. Sadler*, 4 Stew. & Port. 130; *Rogers v. Vosburg*, 4 John. Ch. 84.

forth stands dismissed out of this Court, with costs to be taxed by the Taxing Master, without further order: such costs to be paid by the plaintiff to the defendant.⁸ It is not the practice to issue an injunction: the service of the order being sufficient.¹

When the defendant has obtained such an order, the plaintiff may move, on notice to the defendant, to discharge it, either for irregularity or upon the merits confessed in the answer, or proved by affidavit.² If, upon such a motion, there should be any doubt as to whether the suit in Equity, and the action at Law, are for the same matter, it is the usual course to direct an inquiry into that fact.³ In the event of such an inquiry being directed, it seems that all the proceedings in both Courts are stayed in the mean time,⁴ unless the plaintiff can show that justice will be better done by permitting proceedings to some extent: in which case, special leave will be given him to proceed.⁵

If the common order cannot, under the circumstances, be obtained, it seems that the Court will, if necessary, make a special order, and grant an injunction in the mean time.⁶

The election must be in writing, and signed by the plaintiff or his solicitor,⁷ and be filed at the Report Office; and notice thereof must be given to the defendant's solicitor: who thereupon obtains an office copy.⁸

The dismissal of the bill, in consequence of an election by the plaintiff to proceed at Law, cannot be pleaded in bar to another suit for the same matter.⁹

If the plaintiff requires further time to make his election, he must apply to the Court by motion, on notice, to have the time enlarged.¹⁰

After decree, it is not the practice to make an order to elect; but the plaintiff will be restrained, on the motion of the defendant, from proceeding in another Court, in respect of the same matter: even though such proceedings are merely auxiliary to the proceedings in Equity.¹¹

If the plaintiff elect to proceed in Equity, the defendant will either

⁸ See the order in *Seton*, 947, No. 1; see also *Boyd v. Heinzelman*, 1 V. & B. 381; *Mousley v. Basnett*, *ib.* 382, n.; *Jones v. Earl Strafford*, 3 P. Wms. 90, n (B.); see *Livingston v. Kane*, 3 John. Ch. 224; *Rogers v. Vosburg*, 4 John. Ch. 84.

¹ *Braithwaite's Pr.* 229; see *Fennings v. Humphery*, 4 Beav. 1, 7, 8; 5 Jur. 455.

² Ord. XLII. 8. For form of notice of motion, see Vol. III.

³ *Mousley v. Basnett*, 1 V. & B. 382, n.; and for form of order for inquiry, see *Seton*, 948 No. 3.

⁴ *Mills v. Fry*, 3 Ves. & B. 9; *Anon.*, 2 Mad. 395.

⁵ *Amory v. Brodrick*, Jac. 530, 533; *Carwick v. Young*, 2 Swanst. 239, 243; *Mousley v. Basnett*, *ubi sup.*; see, however, *Fennings v. Humphery*, 4 Beav. 1, 8; 5 Jur. 455.

⁶ *Hogue v. Curtis*, 1 J. & W. 449.

⁷ Ord. III. 1.

⁸ For forms of election and notice, see Vol. III.

⁹ *Countess of Plymouth v. Bladon*, 2 Vern. 32.

¹⁰ For form of order enlarging the time, see *Seton*, 948, No. 2; and for form of notice of motion, see Vol. III.

¹¹ *Wilson v. Wetherherd*, 2 Mer. 406, 408; *Frank v. Basnett*, 2 M. & K. 618, 620; *Wedderburn v. Wedderburn*, 2 Beav. 208, 213; 4 Jur. 66; 4 M. & C. 585, 596; *Phelps v. Prothero*, 7 De G., M. & G. 722; 2 Jur. N. S. 173. [And although the decree in Equity is adverse to the right. *Lord Tredegar v. Windus*, L. R. 19 Eq. 607.] Going in under an administration decree to prove a debt, is not such an election to proceed in Equity as prevents an action at Law. *Sexton v. Smith*, 3 De G. & S. 694.

be allowed to recover the costs of the action in the Court of
 * Law,¹ or the plaintiff will be directed by the Court of Chancery *818
 to pay them;² and if he elect to proceed at Law, the bill is, as
 we have seen, by the order dismissed with costs.³

¹ *Simpson v. Sadd*, 3 W. R. 191, L. C.; ² See *Carwick v. Young*, 2 Swanst. 239,
 see also S. C. 16 C. B. 26; 1 Jur. N. S. 736; 242.
 and *Mortimore v. Soares*, 5 Jur. N. S. 574, ³ *Ante*, p. 816.
 Q. B.; [S. C. 1 Ell. & Bl. 390.]

[The proceedings under this chapter are purely statutory, and not applicable to the practice in the United States.]

*819

*CHAPTER XX.

MOTION FOR A DECREE.

At any time after the expiration of the time allowed to the defendant for answering,¹ but before replication, the plaintiff may move the Court for such decree or decretal order as he may think himself entitled to.² Of this motion, one month's, or twenty-eight days' notice must be given to the defendant.³

If further time is granted to the defendant for pleading, answering, or demurring, the plaintiff cannot move for a decree until such further time has expired;⁴ and where there are several defendants, and the plaintiff is in a position to serve a notice of motion for a decree, or to file replication, or set down the cause on bill and answer, as to some of them, but the time for so doing as to the others has not arrived, he should, to avoid an application to dismiss the bill for want of prosecution,⁵ obtain further time, on special summons, to serve the notice or file the replication.⁶

The filing of a traversing note against a defendant, does not preclude the plaintiff from moving for a decree.⁷

Where, at the hearing, a cause was ordered to stand over for the purpose of adding parties by amendment, the cause was allowed to be heard on motion for decree against the new defendants: though replication had been filed against the original defendants.⁸

An order of course to amend the bill may be obtained after notice of motion for a decree has been served, but before it has been set down: although the defendant has filed affidavits in opposition.⁹

¹ Or, by consent, before the expiration of the time. Braithwaite's Pr. 429. For form of consent, see Vol. III.

² 15 & 16 Vic. c. 86, § 15. If the plaintiff moves for a decree, replication need not afterwards be filed. Duffield v. Sturges, 9 Hare Ap. 87; Blake v. Cox, 1 W. R. 124, V. C. W.

³ Ord. XXXIII. 4; XXXVII. 10.

⁴ 15 & 16 Vic. c. 86, § 13.

⁵ See *ante*, p. 801 *et seq.*

⁶ Ord. XXXVII. 17. For form of summons, see Vol. III.

⁷ Manière v. Leicester, Kay Ap. 48: 13 Jur. 320; 5 De G., M. & G. 75; Jones v. Howell, 3 W. R. 559, V. C. W. As to traversing notes, see *ante*, p. 513, *et seq.* The causes of Gohegan v. Barlow (1863, G. 132), and Leite v. Vicini (1863, L. 46), were set down on motion for decree as to some of the defendants, and on orders to take the bill *pro confesso* as to others.

⁸ Gwyon v. Gwyon, 1 K. & J. 211.

⁹ Gill v. Rayner, 1 K. & J. 395.

*The form of notice of motion for decree commonly adopted is *820 to the effect, that the Court will be moved for a decree, "according to the prayer of the plaintiff's bill;" and where this form is used the plaintiff is entitled to have the same relief as he might have had if the cause had been brought to a hearing in the ordinary way.¹

The notice of motion may be served out of the jurisdiction; but an order allowing this to be done is necessary.² Such an order may be obtained on an *ex parte* motion or summons, supported by an affidavit showing where the defendant is resident, or may probably be found.³ In such a case, the order giving leave to serve the notice out of the jurisdiction must specify the time allowed for filing affidavits in answer and reply, and must be drawn up and served with the notice of motion;⁴ and the notice of motion must be given for a day sufficiently distant to include the whole time limited for service, and the times limited for the defendant to file affidavits in answer, and the plaintiff to file affidavits in reply, and so as to allow the defendant proper time to obtain copies of the plaintiff's affidavits in support and in reply. These times must, therefore, be regulated by the place where the service is to be effected.⁵ In some cases the order giving leave to effect the service has directed copies of the plaintiff's affidavits in support of the motion for decree to be served with the notice;⁶ but it seems this cannot be required.⁷

Where an application was made to the Court for leave to advertise in the Gazette a notice of motion for a decree, against an absconding defendant, for whom an appearance had been entered,⁸ it was refused by Sir John Romilly M. R.: who observed, that the 6th Rule of the 10th Consolidated Order had no application to such a case; but he gave leave to advertise the filing of replication in the Gazette.⁹

By giving notice of motion for a decree, the plaintiff abandons his claim to a further answer: although the answer has, upon exceptions, been held insufficient.¹⁰

The plaintiff and defendant respectively are at liberty to file affidavits in support of, and in opposition to, the motion; and to *use the same on the hearing thereof.¹ The evidence in chief *821 on such motion is ordinarily taken upon affidavit;² and where

¹ Norton v. Steinkopf, Kay, 45; *ib.* Ap. 10. For form of notice, see Vol. III.

² Meek v. Ward, 10 Hare Ap. 55; 1 W. R. 504; and see Middleton v. Chichester, 1 N. R. 255, M. R.

³ For form of order, see Seton, 1246, No. 11; and see *ib.* 1247; and for forms of motion paper, summons, and affidavit, see Vol. III.

⁴ Meek v. Ward, *ubi sup.*; Seton, 28, 1247; as to evidence of the service, see Mendes v. Guedalla, 5 L. T. N. S. 308, V. C. W.

⁵ Seton, 28, 1247, where a list of times is given.

⁶ Meek v. Ward, 10 Hare Ap. 55.

⁷ Seton, 28, 1247; and for form of order containing such direction, see Seton, 1246, No. 11.

⁸ Under Ord. X. 6.

⁹ Lechmere v. Clapp, 29 Beav. 259; see *post*, pp. 831, 832.

¹⁰ Boyse v. Cokell, 18 Jur. 770, V. C. W.

¹ 15 & 16 Vic. c. 86, § 15.

² See *post*, Chap. XXII. § 10. Affidavits for general rules as to the form, and mode of framing affidavits. [See also Coles v. Morris, L. R. 2 Ch. Ap. 701, 705.]

motion is made after answer filed, the answer is, for the purposes of the motion, to be treated as an affidavit;³ and the plaintiff has been allowed to cross-examine the defendant thereon.⁴

The plaintiff must file his affidavits, in support of the motion for decree, before he serves the notice, and must set forth a list of the affidavits he intends to use at the foot of the notice.⁵ Where an answer has been filed, the plaintiff may read it on the motion against the defendant by whom it was filed, without giving any notice of his intention to do so; but he cannot read it against any other defendants, unless he has included it in the list at the foot of his notice of motion.⁶

The defendant must file his affidavits, in support of his defence, within fourteen days after service of the notice of motion, and deliver to the plaintiff or his solicitor a list thereof.⁷

The time for filing the defendant's affidavits will, however, be enlarged, on special application to the Judge in Chambers, by summons,⁸ where a sufficient reason is shown for so doing;⁹ but the desire of the defendant to cross-examine the plaintiff's witnesses on their affidavits, before filing his own, on the ground that by so doing it might not be necessary for him to file any, is not a sufficient reason.¹⁰

Where the defendant is served out of the jurisdiction, the special order allowing such service will, as we have seen,¹¹ fix the time within which the defendant's affidavits are to be filed; but further time may, in a proper case, be obtained on special application by summons at Chambers.

If, after the times allowed for filing affidavits have elapsed, it is desired to file an affidavit, or a further affidavit, an order for leave to do so will be necessary. Such order may be obtained on a special application by summons,¹² supported by an affidavit showing a case for the indulgence; and the applicant will usually have to pay the costs of the application.

*822 * If the defendant desires to read his own, or a co-defendant's answer in support of his case, he must give notice thereof to the plaintiff;¹ but if the plaintiff reads part of a defendant's answer against

³ 15 & 16 Vic. c. 86, § 15. *Seemle*, an answer put in by a deceased defendant cannot be read. *Moore v. Harper*, 1 W. N. 56; 14 W. R. 306, V. C. W.

⁴ *Wightman v. Wheelton*, 23 Beav. 397; 3 Jur. N. S. 124; *Rehden v. Wesley*, 26 Beav. 432; *Brumfit v. Hart*, 9 Jur. N. S. 12; 11 W. R. 53, V. C. S.; and see *post*, p. 822.

⁵ Ord. XXXIII. 5, see form of notice, Vol. III.

⁶ *Cousins v. Vasey*, 9 Hare Ap. 61; *Dawkins v. Mortan*, 1 J. & H. 339; *Stephens v. Heathcote*, 1 Dr. & S. 138; 6 Jur. N. S. 312.

⁷ Ord. XXIII. 6. As to the defences which may be set up, where an answer has

not been filed, see *ante*, pp. 656, 712; and *Green v. Sneed*, 30 Beav. 231; S. C. *nom.* *Sneed v. Green*, 8 Jur. N. S. 4.

⁸ For form of summons, see Vol. III.

⁹ Ord. XXXIII. 17, 18; *Marchioness of Londonderry v. Bramwell*, 3 K. & J. 162.

¹⁰ *Ibid.*

¹¹ *Ante*, p. 820.

¹² Ord. XXXVII. 17, 18. For form of summons, see Vol. III.

¹ *Stephens v. Heathcote*, 1 Dr. & S. 138; 6 Jur. N. S. 312; and see *Barrack v. McCulloch*, 3 K. & J. 110; *Rushout v. Turner*, 1 Dr. & S. 140, n.; *Wightman v. Wheelton*, 23 Beav. 397; 3 Jur. N. S. 124. For form of notice, see Vol. III.

him, without notice, the defendant may read the whole of his answer, without notice.²

The defendant having filed his affidavits, the plaintiff has seven days from the expiration of the fourteen days, or, if the time has been enlarged, from the expiration of such enlarged time,³ within which he may file affidavits in reply: which affidavits must be confined to matters strictly in reply. The plaintiff must deliver a list of these affidavits to the defendant or his solicitor;⁴ and except so far as such affidavits are in reply, they will not be regarded by the Court, unless, upon the hearing of the motion, the Court gives the defendant leave to answer them: in which case, unless the Court otherwise directs, the plaintiff is to pay the costs of such affidavits, and such further affidavits in answer.⁵ The time can, however, be enlarged by the Judge in Chambers, on a special application by summons.⁶

Where either the time for the defendant's filing his affidavits, or for the plaintiff's filing his affidavits in reply, is enlarged, notice thereof is to be given to the Clerk of Records and Writs by production of the order for such enlargement.⁷ Such notice is ordinarily given by producing to the Order of Course Clerk the order enlarging the time, and he will thereupon make a note of such enlargement, opposite the entry of the notice of motion in the cause list.

Where either the fourteen days for the defendant's filing his affidavits, or the seven days for the plaintiff's filing his affidavits in reply, expire in the Long Vacation, the time is extended to the fifth day of the ensuing Michaelmas Term, and will expire on that day, unless enlarged by order; and if the fourteen days are thus extended, the seven days commence to run from the expiration of such extended period.⁸

No further evidence, on either side, will be allowed to be used on the hearing of the motion without leave of the Court,⁹ except *the cross-examinations of such witnesses as have been cross- *823 examined.¹

All witnesses who have made affidavits, either on behalf of the plaintiff or the defendant, are liable to cross-examination;² and the party desiring to cross-examine any of them, may, at any time before the expiration of fourteen days next after the end of the time allowed for the

² *Stephens v. Heathcote, ubi sup.* [And see, in an administration suit, the effect of notice to read an answer, setting out accounts. *Wright v. Edwards*, 7 W. R. 193.]

³ Where the defendant is served out of the jurisdiction with the notice, the time to reply will be regulated by the service order; see *ante*, p. 810.

⁴ For form of list, see Vol. III.

⁵ Ord. XXXIII. 7.

⁶ See Ord. XXXVII. 17, 18. For form of summons, see Vol. III.

⁷ Ord. 22 Nov., 1866, r. 5.

⁸ Ord. XXXVII. 15. A doubt has arisen whether this rule applies to a case where the

fourteen days, or the seven days, are enlarged before the Long Vacation to a day occurring in the Vacation; see *Morgan*, 553, and *Clark v. Malpas*, there cited, and see *Braithwaite's Manual*, 167, n. (46).

⁹ Ord. XXXIII. 8. For cases in which special leave was given, see *Watson v. Cleaver*, 20 Beav. 137; 1 Jur. N. S. 270; and *Richards v. Curlew*, 18 Beav. 462, where it was held, that the application must not be *ex parte*.

¹ *Bedwell v. Prudence*, 1 Dr. & S. 221, 223.

² 15 & 16 Vic. c. 86, § 40; *Williams v. Williams*, 17 Beav. 156; 17 Jur. 434.

plaintiff to file affidavits in reply, or within such time as the Court or Judge in Chambers may specially appoint,⁸ give notice in writing⁴ to the party on whose behalf the affidavit is filed, or his solicitor, to produce the witness for cross-examination before the examiner; and unless the witness is produced accordingly, the affidavit cannot be used as evidence, without special leave of the Court.⁵ The plaintiff is entitled to cross-examine any defendant upon his answer;⁶ and where the plaintiff gives notice of his intention to use a defendant's answer against a co-defendant, the co-defendant may cross-examine upon the answer;⁷ and where a defendant gives notice to use his or a co-defendant's answer against the plaintiff, he, or the co-defendant, as the case may be, may be cross-examined by the plaintiff:⁸ the answer in such cases being treated as an affidavit. And even where the plaintiff had given notice to use the defendant's answers as affidavits, in support of his motion for a decree, he was allowed to cross-examine the defendants on the answers, without prejudice to the right of the other defendants to object to the cross-examination being used against them;⁹ but when no notice is given of the intention to read the answer of the defendant, and it is read as an admission, and not as an affidavit, he cannot be cross-examined upon it.¹⁰

According to the practice introduced by the Order of 5th February, 1861, it seems that all the evidence in chief on motions for decree must be taken by affidavit.¹¹ The Court has, however, power, it is presumed, in any case, upon special application, to order the evidence of any particular witness or witnesses to be taken *vis à voce*. Such an application could only be made on the part of the defendant, as the plaintiff *824 would, of course, ascertain, before * serving his notice of motion for a decree, whether it was necessary or desirable to examine any witness on his behalf orally, and if so, would bring the cause to a hearing in the ordinary way, instead of serving the notice. Before the Order of 5th February, 1861, it seems to have been thought, that the evidence in support of a motion for decree might be taken orally, by specifying the names of the witnesses to be examined, in the notice of motion, and summoning them before the examiner;¹ but, whether this

⁸ The application is usually made by summons; for a form, see Vol. III.

⁴ For a form, see Vol. III.

⁵ Ord. 5 Feb., 1861, r. 19. As to the course to be pursued by either party after such notice, see *post*, Chap. XXII. § 10, *Affidavits*, and Braithwaite's Manual, 178, n. (35). [And see as to the effect of delay in proceeding to cross-examine. *Bourdillon v. Baddeley*, 26 Beav. 255.]

⁶ *Wightman v. Wheelton*, 23 Beav. 397; 3 Jur. N. S. 124; *Rehden v. Wesley*, 26 Beav. 432; *Brumfit v. Hart*, 9 Jur. N. S. 12; 11 W. R. 53, V. C. S.

⁷ *Rehden v. Wesley*, and *Wightman v. Wheelton*, *ubi sup.*; *Dawkins v. Mortan*, 1 J. & H. 339.

⁸ See *Rehden v. Wesley* and *Wightman v. Wheelton*, *ubi sup.*

⁹ *Rehden v. Wesley*, *ubi sup.*

¹⁰ See *Dawkins v. Mortan*, 1 J. & H. 339, 341; *Cousins v. Vasey*, 9 Hare Ap. 61; *Stevens v. Heathcote*, 1 Dr. & S. 138; 6 Jur. N. S. 312.

¹¹ See Ord. 5 Feb., 1861, particularly r. 19, and see *Smith v. Baker*, 4 N. R. 321, V. C. W.; 2 H. & M. 498. [And any depositions taken in support of the motion will be irregular, and may be ordered to be taken off the file. *Coles v. Morris*, L. R. 2 Ch. Ap. 701.]

¹ *Pellatt v. Nicholls*, 24 Beav. 298; *Rehden v. Wesley*, 26 Beav. 432, and see 15 & 16 Vic. c. 86, § 40; and *Williams v. Williams*, 17 Beav. 156; 17 Jur. 434.

could then have been done or not, it is conceived that it cannot be done under the present practice.

The cross-examination of witnesses on their affidavits must, on motion for decree, be taken before the examiner; ² the Court has, however, power to order it to be taken *virâ voce* at the hearing. ³ No time has been limited for the cross-examination, but it must, it seems, take place within a reasonable time. ⁴

Where a suit is brought on by motion for decree, and replication has been filed in a cross-suit, and the plaintiff in the original suit has obtained an order for leave to use, in the cross-suit, the affidavits filed in the original suit, the plaintiff in the cross-suit may either treat the affidavits filed in the cross-suit as if they were filed in the original suit, and give notice to cross-examine the witnesses before an examiner, or he may treat them as evidence filed in the cross-suit, and give notice of cross-examination in open Court at the hearing. ⁵

A *subpœna duces tecum*, for the production of a will or other document at the hearing of a motion for a decree, may be issued, ⁶ and, it seems, as of course. ⁷

Motions for decree are set down with the Registrar in the cause-book, with the causes, and come on accordingly, unless the Court otherwise directs. ⁸ They must be set down within one week after the expiration of the time allowed to the plaintiff for filing his affidavits in reply, in case the defendant has filed any affidavit, or within one week after the expiration of the time allowed to the defendant to file his affidavits in answer, in case the defendant has not filed any affidavit; but in case the time allowed for either of the purposes aforesaid shall be enlarged, then within one week after the expiration of such enlarged time. ⁹ In order to set down * a motion for decree, the Record and Writ *825 Clerk's certificate that the cause is in a fit state to enable the plaintiff to move for a decree, indorsed by the plaintiff's solicitor with a memorandum of the date when the notice was served, and when it will expire, and, if there be any infant defendant, stating that a guardian *ad litem* has been appointed, or, if there be not, stating that there is not any infant defendant, must be produced at the order of course seat in the Registrar's office. ¹ The certificate is not to be given until after the expiration of the time allowed to the plaintiff to file his affida-

² Ord. 5 Feb., 1861, r. 19; *Bodger v. Bodger*, 11 W. R. 80, V. C. K. For mode of taking the cross-examination, see *post*, Chap. XXII. § 10, *Affidavits*.

³ See 15 & 16 Vic. c. 86, § 39.

⁴ *Bedwell v. Prudence*, 1 Dr. & S. 221; *Morey v. Vandenbergh*, 1 W. N. 197, V. C. S.

⁵ *Neve v. Pennell*, 1 H. & M. 252.

⁶ *Wigram v. Rowland*, 10 Hare Ap. 18; *Raworth v. Parker*, 2 K. & J. 163. For form of *subpœna*, see Vol. III.

⁷ *Wilhem v. Reynolds*, 8 W. R. 625, V. C. K.

⁸ Ord. XXXIII. 9.

⁹ Ord. 22 Nov., 1866, r. 2; see *Boyd v. Jaggard*, 17 Jur. 655; 10 Hare Ap. 54, L. C. & L. J.

¹ Reg. Regul. 15th Mar., 1860, r. 6; and see *Boyd v. Jaggard*, *ubi sup.* For forms of certificate and memorandum, see Reg. Regul. 15 Mar., 1860, r. 6, and Vol. III. The certificate of the Record and Writ Clerk will not be granted before the expiration of the time for answering, unless a written consent by the defendant's solicitor is left with him. For a form, see Vol. III.

vits in reply, in case the defendant shall have filed any affidavits, or until after the expiration of the time allowed to the defendant to file his affidavits in answer, in case the defendant has not filed any affidavit; but in case the time allowed for either of the purposes aforesaid shall be enlarged, then not until after the expiration of such enlarged time.² After the expiration of the week, the motion will not be set down without the consent in writing of the defendant's solicitor.³ If the plaintiff fails to set down the motion within the time above limited, the defendant may either move to dismiss the bill with costs, for want of prosecution, or set the motion down at his own request.⁴

In a proper case, a motion for decree may be marked,⁵ and heard as a short cause;⁶ and it will be so marked, on production of the certificate of the plaintiff's counsel that the motion is fit to be so heard, without the consent of the solicitors of any of the defendants; but notice of the cause having been so marked, must be given to the defendant;⁷ and the motion will not be heard before the day for which notice is given, except by consent of all parties.⁸

If a motion for injunction is, by consent, turned into a motion for decree, it should be set down "by order," that the month's delay may be saved.⁹

All affidavits and depositions to be used on the hearing of the motion must be printed, under the regulations hereafter explained.¹⁰

Two printed copies of the bill, and of each of the answers, must also be left with the Train-bearer of the Master of the Rolls, or *826 * of the Vice-Chancellor, as may be, for the use of the Court and the Registrar, before the motion comes on for hearing.¹

If the plaintiff fails to appear when the motion is called on, the defendant's counsel may apply to have the bill dismissed with costs, and need not, it seems, for this purpose produce an affidavit of the defendant's having been served with the notice of motion.² Where the defendant fails to appear, the plaintiff may move for the decree in his absence, subject to the production of an affidavit of service of the notice;³ but the Court has, in such case, allowed the decree to be reopened on motion.⁴ The affidavit, in either case, should be filed at the

² Ord. 22 Nov., 1866, r. 4.

³ For a form of consent, see Vol. III.

⁴ Ord. 22 Nov., 1866, r. 3.

⁵ *Ames v. Ames*, 10 Hare Ap. 54; 17 Jur. 664; *Drew v. Long*, 17 Jur. 173, V. C. K.; see *post*, Chap. XXV., *Hearing Causes*.

⁶ Reg. Regul. 15 Mar. 1860, r. 10. For form of certificate, see Vol. III.

⁷ *Molesworth v. Snead*, 11 W. R. 934, V. C. W.

⁸ *Ibid.*; *Loinsworth v. Rowley*, 10 Hare Ap. 55. For form of consent, see Vol. III.

⁹ *Green v. Low*, 22 Beav. 395. The Record and Writ Clerk's certificate will be required in such case.

¹⁰ Ord. 16 May, 1862; *post*, Ch. XXII. § 10, *Affidavits*.

¹ Reg. Regul. 15 March, 1860, r. 22; Reg.

Notice, 23 Nov., 1861; and see Ord. XXI. 12. The plaintiff's briefs consist of printed copies of the bill, and answers, affidavits in support, opposition, and reply, and of the depositions of the witnesses on their cross-examination, and of written copies of such exhibits or other documents as may be necessary. A defendant's briefs are the same, except that copies of only the answer, and of such answers of co-defendants as the plaintiff has notified his intention to read against him, or as he has signified his intention to read against the plaintiff or co-defendants, should be furnished. Each brief should be accompanied with observations.

² *Marter v. Marter*, 12 W. R. 34, M. R.

³ For form of affidavit, see Vol. III.

⁴ *Hughes v. Jones*, 26 Beav. 24.

Record and Writ Clerk's Office, and an office copy be produced to the Registrar, at the latest before the rising of the Court on the day on which the application is made.⁵ If neither party appears on the motion, it will be struck out of the paper.

Where the motion cannot conveniently proceed by reason of the solicitor for any party neglecting to attend personally, or by some proper person on his behalf, or omitting to deliver any paper necessary for the use of the Court, and which according to its practice ought to have been delivered, such solicitor is personally to pay to all or any of the parties such costs as the Court may award.⁶

Upon hearing a motion for a decree, it is discretionary with the Court to grant or refuse the motion, or to make an order giving such directions with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right.⁷ The decree or order is drawn up, passed, and entered in the manner hereafter explained, in treating of decrees made on the hearing of the cause.⁸ After an unsuccessful motion for a decree, the bill has been allowed to be amended.⁹

Upon an appeal from the whole decree, made on motion for decree, the plaintiff has the right to begin.¹⁰

* Where a decree, made on a motion for a decree, is appealed *827 from, a petition of appeal must be presented.¹

By bringing a cause to a hearing on a motion for a decree, considerable delay is saved; it is, therefore, the better course for a plaintiff to follow, where he expects to be able to prove his case by affidavit; but where he desires to examine witnesses in chief, orally, he should file replication.² It is also to be observed, that on motions for a decree, the plaintiff's evidence is known to the defendant before he prepares his proofs, the cross-examination of witnesses takes place before the examiner,³ and the plaintiff has an opportunity of adducing evidence in reply; but that in replication has been filed, both parties have to prepare their proofs before the evidence of the other side is known, the cross-examination of witnesses must take place before the Court itself,⁴ and there is no opportunity of adducing evidence in reply.

⁵ *Lord Milltown v. Stuart*, 5 Sim. 64; Seton, 29.

⁶ Ord. XXI. 12.

⁷ 15 & 16 Vic. c. 86, § 16; see *Thomas v. Bernard*, 5 Jur. N. S. 31; 7 W. R. 86, V. C. K.; *Wardle v. Dickson*, 5 Jur. N. S. 408; 7 W. R. 148, V. C. K.; *Raworth v. Parker*, 2 K. & J. 160; *Norton v. Spinksgill*, Kay, 46; 11. Ap. 10; *Robinson v. Lewwater*, 2 Eq. Rep. 1072, L. J.J.

⁸ See post, Chap. XXVI. § 3. *Drawing up Decrees*. For form of decree on motion, see Seton, 26.

⁹ *Thomas v. Bernard*, 5 Jur. N. S. 31; 7

W. R. 86, V. C. K.; [*Attorney-General v. Cambridge Corporation*], Gas Co., L. R. 6 Eq. 282, 488, 4 Ch. Ap. 71.]

¹⁰ *Burkhead v. Laidl*, 4 De G., M. & G. 702.

¹ Ord. XXXI. 8. For form of petition, see Vol. III.; 31 & 32 Vic. c. 11, § 2, overruling *Haxall v. McMurray*, L. R. 2 Ch. Ap. 790.]

² See ante, p. 825.

³ Ord. 2 Feb., 1861, r. 10.

⁴ Ord. 2 Feb., 1861, r. 7; with certain exceptions, for which see Ord. 2 Feb., 1861, rr. 10, 11, 16.

REPLICATION.

AFTER the defendant, if required to answer, has fully answered the bill, or, if not required to answer, the time allowed for putting in a voluntary answer has expired, the plaintiff, if he determines not to move for a decree, or his motion has been refused, must file a replication:¹ unless, where an answer has been filed, he decides to go to a hearing of the cause on bill and answer.

If, upon the answer alone, without further proof, there is sufficient ground for a final order or decree, the plaintiff must proceed to a hearing on bill and answer, without entering into evidence:² as where the plaintiff makes his title by a will or other conveyance in the defendant's

¹ Ord. XVII. 1; 15 & 16 Vic. c. 86, § 26; *Duffield v. Sturges*, 9 Hare Ap. 87; *Blake v. Cox*, 1 W. R. 124, V. C. W. If the plaintiff wishes to prove any fact on the hearing, not admitted by the answer, he must file a replication. *Mills v. Pitman*, 1 Paige, 490.

In Maine, "within thirty days after the answer is filed, unless exceptions are taken, or within fifteen days after it is perfected, the plaintiff's counsel shall file the general replication, and give notice thereof; or give notice of a hearing at the next term on bill and answer." Rule 9 of Chancery Practice; see Rule 17, N. Hamp. Chancery Practice, 38 N. H. 608; Rule 17, Mass. Chancery Practice; 66th Rule, United States Courts. A special replication cannot be filed without leave of Court. *Storms v. Storms*, 1 Edw. Ch. 358.

By 45th Equity Rule of the United States Courts, no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the Court, or a Judge thereof, may in his discretion direct.

[A general replication denies every allegation in the answer of the defendant not responsive to the bill, and he must prove matter pleaded in avoidance, or by way of estoppel. *Humes v. Scruggs*, 94 U. S. 22.

Under Equity Rule 66 of the United States Supreme Court, the complainant must reply to the answer of each defendant, when sufficient, without reference to the state of the

cause, or of the pleadings, in regard to any other defendant. *Coleman v. Martin*, 6 Blatchf. 290.]

In Massachusetts, "the form of the general replication shall be that the plaintiff joins issue on the answer. No special replication shall be filed, but by leave of the Court." Rule 16, of the Rules for Practice in Chancery. In New Hampshire, a replication shall be entitled as an answer, and shall be in substance, "The plaintiff says his bill is true, and the defendant's answer, as set forth, is not true, and this he is ready to prove." Rule 22 of Chancery Practice; see *Story Eq. Pl.* § 878; *Storms v. Storms*, 1 Edw. Ch. 358; *Dupote v. Massy*, Cox's Dig. 146; *Brown v. Ricketts*, 2 John. Ch. 425; *Lyon v. Tallmadge*, 1 John. Ch. 184; *Livingston v. Gibbons*, 4 John. Ch. 94; *Thorn v. Germand*, *ib.* 363; *Pratt v. Bacon*, 10 Pick. 123. [In Tennessee, no replication or other pleading after answer is allowed, but the cause is at issue upon the expiration of the time allowed to file exceptions to the answer. Code, §§ 4322, 4328, 4401.] Matters in avoidance of a plea, which have arisen since the suit began, are properly set up by a supplemental bill, not by a special replication. *Chouteau v. Rice*, 1 Min. 106. A special replication, denying part of the matter of the plea, and reasserting the substance of the bill, is inadmissible. *Newton v. Thayer*, 17 Pick. 129. [But may be treated as a general replication. *Allen v. Allen*, 3 Tenn. Ch. 145.]

² Ord. XIX. 1.

hands, and the defendant, by his answer, confesses it, or where a trust is confessed by the answer, and nothing further is required than to have the accounts taken.³

A cause is now, however, rarely heard on bill and answer.

* The only advantage in doing so, instead of hearing it on motion *829 for decree, is, that the month's notice is thereby saved; but, on the other hand, where a cause is heard upon bill and answer, the answer must be admitted to be true in all points, and no other evidence will be admitted;¹ unless it be matter of record to which the answer refers, and which is provable by the record itself,² or documents proved as exhibits at the hearing.³ It therefore behoves the plaintiff to look attentively into the answer; and if he finds that the effect of the defendant's admissions is avoided by any new matter there introduced, he should serve notice of motion for a decree,⁴ or reply to the answer, and proceed to establish his case by proofs.⁵ If the plaintiff decides upon having the cause heard upon bill and answer against one or all of the defendants, he must proceed in the manner hereafter pointed out.⁶

A replication must also be put in by the plaintiff where the defendant has pleaded to the bill, whether his plea be accompanied by an answer or not.⁷ It is, however, to be recollected, that, if the plaintiff replies to a plea before it has been argued, he admits the plea to be valid, if true;⁸ and that he cannot afterwards object to it, on the ground of its invalidity or irregularity.⁹

We have seen before, that a replication to a general disclaimer to the whole bill is improper: although, when a disclaimer to part of the bill is accompanied by a plea or answer to another part, there may be a replication to such plea or answer.¹⁰

A replication is the plaintiff's answer or reply to the defendant's plea or answer. By replying to the answer, the plaintiff does not preclude himself from reading any part of the answer he may consider essential to assist his case.

³ Wyatt's P. R. 374.

¹ *Contee v. Dawson*, 2 Bland, 264; *Childs v. Horr*, 1 Clarke (Iowa), 432; *Rogers v. Mitchell*, 41 N. H. 154; *Pierce v. West*, 1 Peters C. C. 351; *Pickett v. Chilton*, 5 Munf. 467; *Scott v. Clarkson*, 1 Bibb, 277. But where the cause is set down for hearing on bill, answer, and depositions, the replication is mere form, and the Court will suffer it to be filed *nunc pro tunc*. [*Rodney v. Hare*, Mos. 296; *Jones v. Brittan*, 1 Woods, 667;] *Scott v. Clarkson*, *ubi supra*; *Demaree v. Driskill*, 3 Blackf. 115; *Pierce v. West*, *ubi supra*; *Glenn v. Hebb*, 12 Gill & J. 271; *Armistead v. Bozman*, 1 Ired. Ch. 117; *Smith v. West*, 3 John. Ch. 363; see *Reading v. Ford*, 1 Bibb, 338.

² Ord. XIX. 2; *Legard v. Sheffield*, 2 Atk. 377; see, however, *Stanton v. Percival*, 3 W. R. 391; 24 L. J. Ch. 369. H. L.

³ *Post*, p. 874 *et seq.*; *Rowland v. Sturgis*,

2 Hare, 520; *Chalk v. Raine*, 7 Hare, 393; 13 Jur. 981; *Neville v. Fitzgerald*, 2 Dr. & War. 530; *contra*, *Jones v. Griffith*, 14 Sim. 262; 8 Jur. 733.

⁴ See *ante*, p. 819.

⁵ Wyatt's P. R. 375.

⁶ See *post*, Chap. XXV., *Hearing Causes*.

⁷ *Ante*, p. 664. A plea may be set down to obtain judgment of its sufficiency and formality, without a replication. *Moreton v. Harrison*, 1 Bland, 491.

⁸ *Hughes v. Blake*, 6 Wheat. 472; S. C. 1 Mason, 515; *Daniels v. Taggart*, 1 Gill & J. 312; *Brooks v. Mead*, Walk. Ch. 384; *Bellows v. Stone*, 8 N. H. 289; *Newton v. Thayer*, 17 Pick. 129; *Hurlburt v. Britain*, Walk. 454. Upon a replication to a plea, nothing is in issue except what is distinctly averred in the plea. *Fish v. Miller*, 5 Paige, 26.

⁹ *Ibid*.

¹⁰ *Ib.* p. 655.

Only one replication is to be filed in each cause, unless the Court otherwise directs.¹¹

The Court will not as of course, or except in cases of necessity, *830 * give the plaintiff leave to file more than one replication ;¹ but

where the replication only applied to some defendants, and as to the others the cause was not at issue, leave was given to file a second replication against such other defendants ;² and where, upon notice of motion to dismiss for want of prosecution, by one of two defendants, the plaintiff filed replication against such defendant alone, the other defendant not having appeared, the Court refused the motion, on the plaintiff undertaking to dismiss the bill against the defendant who had not appeared, but ordered the plaintiff to pay the costs of the motion.³

Upon filing the replication, the cause is deemed to be completely at issue ;⁴ and each defendant may, without any rule or order, proceed to verify his case by evidence ; and the plaintiff may, in like manner, proceed to verify his case by evidence ; so soon as notice of the replication being filed has been duly served on all the defendants who have filed an answer or plea, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the bill.⁵

The form of the replication in the General Orders assumes a case where the plaintiff desires to join issue as to one of the defendants ; to hear the cause on bill and answer as to another ; and to take the bill as confessed as against a third.⁶ Where, however, the plaintiff does not desire to join issue with any defendant, no replication can be filed.⁷ The full title of the cause, as it stands at the time the replication is filed, must be set forth in the heading of the replication, but only the names of such of the defendants as have appeared should be inserted or referred to in the body. If a defendant's name has been misspelt by the plaintiff, and such defendant has corrected the same by his answer, but the plaintiff has not afterwards amended his bill with respect to such name, the correction should be shown in the title of the replication ;⁸ in the body of the replication, however, the correct name only should be inserted. Where any defendant has died since the bill was filed, the words "since deceased" should follow his name in the title, but his name should be omitted in the body of the replication. If the plaintiff joins issue with all the defendants, their names need not be repeated in the body ; it is sufficient, in such case, to designate

¹¹ Ord. XVII. 2.

¹ *Stinton v. Taylor*, 4 Hare, 608, 610 ; 10 *ur.* 386.

² *Rogers v. Hooper*, 2 Drew. 97.

³ *Heanley v. Abraham*, 5 Hare, 214. As to when a second or further replication may be filed, without special leave, see *Braithwaite's Pr.* 73.

⁴ In America, generally, if not universally, the pleadings terminate with the replication, and no rejoinder is filed ; and the case is deemed at issue upon the filing of the replication. This is the general practice in the

Courts of the United States. *Story Eq. Pl.* § 879, note ; 66th Equity Rule of the United States Courts. [And in New Jersey. *McClane v. Shepherd*, 6 C. E. Green, 76.]

⁵ Ord. XVII. 2, where the form of replication is given, and which is to be adopted, as near as circumstances admit and require, *ibid.* ; and see form, Vol. III.

⁶ Ord. XVII. 2.

⁷ *Braithwaite's Pr.* 72.

⁸ Thus : "John Jones (in the bill called William Jones)."

* them as "all the defendants;" but if he does not join issue *831 with all, the names of the defendants must be set out in the body.

The names of those defendants who are stated in the bill to be out of the jurisdiction, and who have not appeared, must be inserted in the title, but not in the body; and the names of such formal defendants as have been served with a copy of the bill must be inserted in the title of the replication, but only such of them as have entered a common appearance should be named in the body.¹

The replication is prepared by the solicitor of the plaintiff: it must be written on paper of the same description and size as that on which bills are printed,² and be underwritten with the name and place of business of the plaintiff's solicitor, and of his agent, if any, or with the name and place of residence of the plaintiff where he acts in person, and, in either case, with the address for service, if any;³ and the replication must then be filed at the Record and Writ Clerks' Office.⁴ It does not require the signature of counsel.

Any error in the replication, except the omission of the names of any defendants, may be corrected by amendment; but an order to amend is necessary. The order may be obtained on special summons at Chambers, or, by consent, on petition of course at the Rolls.⁵ Against the defendants whose names have been omitted, another replication must be filed, or leave obtained to withdraw the existing replication and file another; and an order for leave so to do, in either case, must be obtained in like manner, or upon special motion with notice.⁶

The solicitor must give notice of the filing of the replication to the solicitor of the adverse party, or to the adverse party himself if he acts in person, on the same day on which it is filed.⁷ If he neglects to do so, the opposite party should move that the time for him to take the next step may be extended:⁸ not that the replication may be taken off the file.

The notice must be served before seven o'clock in the evening, except on Saturday, when it must be served before two o'clock in the afternoon. If served after these hours, the service will be considered to have been made on the following day, or Monday, as the case may be.⁹

* In proper cases, the notice will be allowed to be served out *832 of the jurisdiction;¹ and for this purpose, the time for service

¹ Braithwaite's Pr. 75.

² Ord. 6 March, 1860, r. 16; as to such paper, see Ord. IX. 3, *ante*, p. 396.

³ Ord. III. 2, 5, *ante*, pp. 453, 454. For a form, see Vol. III. Story Eq. Pl. § 878, note; Barton Suits in Equity, 144, 145; Chouteau v. Rice, 1 Min. 106.

⁴ Ord. I. 35. No fee is payable.

⁵ Braithwaite's Pr. 318. For forms of summons and petition, see Vol. III.

⁶ Stinton v. Taylor, 4 Hare, 608, 610; 10 Jur. 386; Braithwaite's Pr. 318. For forms of notice of motion, summons, and petition, see Vol. III.

⁷ Ord. III. 9. In practice, it is usual to serve the notice on all the defendants, or their solicitors, who have appeared. Braithwaite's Pr. 79.

⁸ Wright v. Angle, 6 Hare, 107; 11 Jur. 987; Lloyd v. Solicitors' Life Assurance Company, 3 W. R. 640, V. C. W.; *contra*, Johnson v. Tucker, 15 Sim. 599; 11 Jur. 466. For form of notice of motion, see Vol. III.

⁹ Ord. XXXVII. 2; *ante*, p. 456.

¹ Lanham v. Pirie, 2 Jur. N. S. 1201, V. C. S.; Heath v. Lewis, 2 W. R. 488, M. R.

will be extended;² service of the notice may also be substituted; and this has been done by allowing the notice to be advertised in the Gazette, and in two newspapers circulating in the county in which the defendant was last known to have resided.³ An order for leave to serve notice of the replication, in any of the modes above mentioned, may be obtained on *ex parte* motion, supported by an affidavit of the facts; and a copy of the order must be served with the notice.⁴

In giving notice of the filing of replication, the most convenient course is to serve a copy of the replication; but it is not essential to do so; and if not done, the notice must show the purport of the replication.⁵ The time for closing the evidence is computed from the day on which the replication is filed.

The plaintiff may file replication immediately after the answers have been put in, or a traversing note has been filed and served; or, where no answer is required, immediately after the time allowed for answering has expired;⁶ and when he desires to file replication, without waiting till all the answers required by him have been put in, or till the time has expired for defendants to answer voluntarily, he should amend the interrogatories,⁷ by striking out so much of the heading and foot-notes as requires an answer from the particular defendants who have not answered;⁸ and should obtain the consent of the solicitor of those defendants whose time to answer voluntarily has not elapsed, to such replication being filed, notwithstanding the time to file a voluntary answer has not expired.⁹

Where any formal defendants have been served with a copy of the bill, replication may be filed, notwithstanding a memorandum of such service may not have been entered: it being sufficient if such memorandum is entered before the certificate to set down the cause is granted.¹⁰

If the plaintiff proposes to take the bill *pro confesso* against any defendant, he cannot file replication until the order to take the bill *pro confesso* has been obtained; and such order must be produced to the officer when the replication is presented for filing: unless it *833 * has been previously left for entry, in the cause-book kept by the Clerks of Records and Writs.¹

Replication must be filed within the times following: within four weeks after the answer, or the last of the answers required to be put in by a defendant, is held or deemed to be sufficient;² or, where the plain-

² *Rooper v. Harrison*, 2 W. R. 510; 2 Eq. Rep. 1085, V. C. W.

³ *Barton v. Whitcomb*, 17 Jur. 81, L. C. & L. J.J.; 16 Beav. 206, n.; see also *Jenkin v. Vaughan*, 3 Drew. 20; *Lechmere v. Clamp*, 29 Beav. 259.

⁴ For forms of motion paper and affidavit, see Vol. III.

⁵ *Braithwaite's Pr.* 79. For form of notice, see Vol. III.

⁶ *Braithwaite's Pr.* 74, 76; and see Ord. XXXIII. 10, 12; *ante*, p. 828.

⁷ As to amending interrogatories, see *ante*, p. 486.

⁸ *Braithwaite's Pr.* 76.

⁹ *Ibid.* The consent should be indorsed on the proposed replication. For form of consent, see Vol. III.

¹⁰ *Braithwaite's Pr.* 74.

¹ *Ibid.*

² Ord. XXXIII. 10 (1); *ante*, p. 828, *note*.

tiff has undertaken to reply to a plea, within four weeks after the date of his undertaking; ³ or, where a traversing note has been filed, within four weeks after the filing of the traversing note; ⁴ or, where he has amended his bill without requiring an answer, within one week after the expiration of the time within which the defendant might have answered, but does not desire to answer, ⁵ or within fourteen days after the refusal of further time to put in his answer, ⁶ or within fourteen days after the filing of the answer: unless the plaintiff has, within such fourteen days, obtained a special order to except to such answer, or to reamend the bill. ⁷

The plaintiff may, however, in all these cases apply by motion, or by summons in Chambers, "pon notice to the defendants, for an order to enlarge the time for filing replication." ⁸

In computing the fourteen days, ⁹ within which the plaintiff must file replication, in cases where he has amended his bill, without requiring an answer to the amendments, and the defendant has answered the amendments, vacations are not reckoned; ¹⁰ but in computing the time in all other cases, they are reckoned. ¹¹

By not filing replication within the time allowed for so doing, the plaintiff subjects himself to an application for the dismissal of his bill for want of prosecution; ¹² but the replication will be received and filed at any time at the Record and Writ Clerks' Office, if it appears by the books of that office that the cause is in a state to admit of its being filed, even after notice of motion to dismiss has been served; and, indeed, to do so, and tender the costs of the motion, is generally the best way of meeting it. ¹³

* We have seen before, that after a replication has been filed. *834 a plaintiff, if he wishes to withdraw it and amend his bill further than by adding parties, must make a special application by summons for leave to do so: ¹ in which case, in addition to the affidavit ordinarily required upon an application to amend, a further affidavit is necessary, showing that the matter of the proposed amendment is material, and

³ Ord. XXXIII. 10 (2).

⁴ Ord. XXXIII. 10 (1).

⁵ Ord. XXXIII. 12 (1); XXXVII. 7.

⁶ Ord. XXXIII. 12 (2).

⁷ Ord. XXXIII. 12 (3). As to filing replication in anticipation of some of the answers, see Braithwaite's Pr. 74.

⁸ Ord. XXXIII. 10, 12; Ord. XXXVII. 17; see *Stinton v. Taylor*, 4 Hare, 608, 610; 10 Jur. 386; *Dalton v. Hayter*, 9 Jur. 1090, M. R. For form of summons, see Vol. III.

⁹ Under Ord. XXXIII. 12 (3).

¹⁰ Ord. XXXVII. 13 (4).

¹¹ *Stinton v. Taylor*, *ubi sup*.

¹² See 66th Equity Rule of the United States Courts; Rule 17, Mass. Chancery Rules.

In reference to extending the time to reply, in New York, see *The Sea Ins. Co. v. Day*, 9 Paige, 247; *Kane v. Van Vranken*, 5 Paige, 63.

If the plaintiff wishes to amend his bill, and a special application to the Court for leave to do so is necessary, he should not file a replication, but should obtain an order to extend the time for filing the replication, until after the decision of the Court upon the application to amend. *Vermilyea v. Odell*, 4 Paige, 122. If the plaintiff files a replication to the answer after he is apprised of the necessity of an amendment of his bill, he precludes himself from making such amendment. *Vermilyea v. Odell*, *ubi supra*; [*Chilford v. Coleman*, 13 Blatchf. 210.]

¹³ Braithwaite's Pr. 78; and see *ante*, p. 805.

¹ *Woods v. Woods*, 13 L. J. Ch. 98, V. C. E.; *Wilson v. Parker*, 9 Jur. 769, V. C. K. B.; Ord. XXXV. 61; *ante*, p. 417. For form of summons, see Vol. III.

could not, with reasonable diligence, have been sooner introduced into the bill.² After the evidence is closed, the application will be refused;³ but where, during the time for taking the evidence, the plaintiff discovered an important mistake of facts in the bill, the Court, thinking that the plaintiff had not shown such want of diligence as to preclude it from giving him leave to amend, gave liberty to withdraw replication and amend the bill, on the terms of the plaintiff paying the costs of the suit then incurred, including the costs of the application.⁴

A plaintiff has also been permitted, on motion, to withdraw his replication, and set his cause down for hearing upon bill and answer.⁵

Where replication is withdrawn, after evidence under it has been entered into, the order should provide that the withdrawal is to be without prejudice to such evidence.

It has sometimes happened that, even after witnesses have been examined, it has been discovered that, owing to a mistake, no replication has been filed: in such cases, the Court has permitted the replication to be filed *nunc pro tunc*.⁶ And it seems that the Court has permitted this to be done after the cause has come on for hearing, and the reading of the proofs has been commenced.⁷

After replication has been filed, exceptions cannot be taken to the answer for insufficiency.⁸

Replication may be filed to an answer put in to a supplemental statement.⁹

By the Bankruptcy Consolidation Act, it is enacted that, in all suits in Equity, other than a suit brought by the assignees for any debt or demand for which the bankrupt might have sustained a suit in Equity had he not been adjudged bankrupt, and whether at the suit of *835 or against the assignees of a bankrupt, no proof *shall be required, at the hearing, of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days after rejoinder, give notice in writing to the assignees of their intention to dispute some and which of such matters.¹ Rejoinder being abolished in Equity,² it seems that the notice must be given within ten days after the filing of replication.³

² Ord. IX. 15. For form of affidavit, see Vol. III.

³ *Gascoyne v. Chandler*, 3 Swanst. 418, 420, n.; *Bousfield v. Mould*, 1 De G. & S. 347; 11 Jur. 902; *Horton v. Brocklehurst* (No. 1), 29 Beav. 503.

⁴ *Champneys v. Buchan*, 3 Drew. 5.

⁵ *Rogers v. Gore*, 17 Ves. 130; *Brown v. Ricketts*, 2 John. Ch. 425. [So, for the purpose of questioning the sufficiency of a plea, *Green v. Harris*, 9 R. I. 401.]

⁶ *Wyatt's P. R.* 376; *Armistead v. Bozman*, 1 Ired. Eq. (N. C.) 117. [See *ante*, 829, n. 1.]

⁷ *Rodney v. Hare*, Mos. 296; see also *Healey v. Jagger*, 3 Sim. 494, 497. The like permission has also been given after the cause

has been set down for hearing on bill and answer, and a reference ordered. *Pierce v. West*, 1 Peters C. C. 351; *Smith v. West*, 3 John. Ch. 363; *Doody v. Pierce*, 9 Allen, 141, 143, 144. [And even where the case has been actually heard, the parties will be considered as having waived the formality of such an issue, and the answer will have no greater effect than if a replication had been filed. *Corbus v. Teed*, 69 Ill. 205.]

⁸ Ord. XVI. 7; *ante*, p. 695, note

⁹ *Braithwaite's Pr.* 74.

¹ 12 & 13 Vic. c. 106, § 235.

² Ord. XVII. 2; *ante*, pp. 829, 830, note.

³ *Pennell v. Home*, 3 Drew. 337; see, however, *Lee v. Donnistoun*, 29 Beav. 465.

EVIDENCE.

SECTION I. — *Admissions.*

THE cause being at issue, by the filing of the replication, the next step to be taken by the plaintiff is to prepare his proofs. The defendant also, if he has any case to establish in opposition to that made by the plaintiff, must, in like manner, prepare to substantiate it by evidence.¹ For this purpose, both parties must first consider: what is necessary to be proved; and then, the manner in which the proof is to be effected; and, in treating of these subjects, it will be convenient to consider, shortly, the general rules of evidence. With respect to the first point, it may be laid down as an indisputable proposition, that whatever is necessary to support the case of the plaintiff, so as to entitle him to a decree against the defendant, or of a defendant, to support his own case against that of the plaintiff, must be proved:² unless it is admitted by the other party.³

* Our object at present, therefore, must be to consider what *837 admissions by the parties will preclude the necessity of proofs; and it is to be observed that, if evidence is gone into to prove what is

¹ [Nothing is evidence in the Court of Chancery, says Mr. Gresley, that is not read or put in, that is to say, used by the parties at the hearing, and entered on the Master's books. Gresl. Eq. Ev. 212, see *infra*, 1003, n. 3; 1504, n. 10.] In New Hampshire the rules in Chancery provide for the trial of the cause on depositions, [and prescribe the time within which the evidence of each party must be taken]. Special orders may be made by the Court or by a Justice, upon petition and due notice, enlarging or reducing the time of taking testimony of either or both the parties. Rule 24, 38 N. H. 609, 610.

In Maine, "all testimony is to be taken in writing, by virtue of a commission issued on interrogatories filed with the clerk," &c. The formalities to be observed in taking, filing, abstracting, and producing the evidence are minutely pointed out in Rules 13, 14, 15, 16, 17, 18, Chancery Rules, Maine, 37 Me. 585, 586.

In Massachusetts, the evidence in proceedings in Equity is required to be taken in the same manner as in suits at Law, unless the Court for special reasons otherwise directs; but

this does not prevent the use of affidavits where they have heretofore been allowed. Genl. Sts. c. 131, § 60. The rules of the Court of Chancery in New Jersey provide for the filing of interrogatories to the plaintiff. Rule 77; Dick. Prec. 20; so in England such interrogatories for the examination of the plaintiff may be filed under 15 & 16 Vic. c. 86, § 19. See *ante*, p. 758, and *post*, p. 840.

[In Tennessee, the plaintiff may take testimony at any time after answer filed, and the defendant after filing a sufficient answer. Code, § 4457. Each party must take his proof in chief in four months, and rebutting proof within two months. Chancery Rules, rule 2 subs. 4; Code, § 4457, a. Failure to take proof within the time prescribed only deprives the party of evidence, but is no ground for dismissing the bill for want of prosecution. *Sargeant v. First Natl. Bank*, 7 Rep. 231, U. S. C. C. Pa.]

² For what is sufficient to throw upon the defendant the *onus* of denying the plaintiff's case, see *Bell v. Wilson*, 11 Jur. N. S. 437, V. C. K.

³ *Nelson v. Pinegar*, 30 Ill. 473.

admitted, or at an unnecessary or improper length, the costs of such evidence will be disallowed.¹

Admissions are either: I. Upon the Record; or, II. By Agreement between the Parties.²

I. Admissions on the Record may be: Constructive, namely, those which are the necessary consequence of the form of pleading adopted; or, Actual, namely, those which are positively contained in the pleading.

With respect to constructive admissions, the most ordinary instance of them is, where a plea has been put in by a defendant, either to the whole, or part of the bill: in that case, as we have seen,³ the bill, or that part of it which is pleaded to, so far as it is not controverted by the plea, is admitted to be true.⁴ A plaintiff, therefore, where he has replied to a plea, may rest satisfied with that admission, and need not go into evidence as to that part of his case which the plea is intended to cover;⁵ unless the plea is a negative plea: for in that case it will be necessary for him to prove the matter negatived, for the purpose of disproving the plea, in the same manner as he may enter into evidence, for the purpose of disproving matter which has been pleaded affirmatively.⁶

¹ Ord. XIX. 1; *Harvey v. Mount*, 8 Beav. 439, 453; 9 Jur. 741; *Smith v. Chambers*, 2 Phil. 221, 226; S. C. *nom.* *Chambers v. Smith*, 11 Jur. 359; *Mayor, &c. of Berwick v. Murray*, 7 De G., M. & G. 497, 514; 3 Jur. N. S. 1, 5; [*Attorney-General v. Corporation of Halifax*, 18 W. R. 37].

² As to admissions generally, see the following works on evidence: *Taylor*, § 653 *et seq.*; *Best*, §§ 543, 632; *Gresley*, Pt. I. Chaps. 1, 2; *Powell*, 151.

³ *Ante*, p. 614.

⁴ *Gresley Eq. Ev. (Am. ed.)* 9. Where the bill charges a fact to be within the knowledge of the defendant, or which may fairly be presumed to be so, if the answer is silent as to the fact, it will be taken as admitted. [*McAllister v. Clopton*, 51 Miss. 257; *Mead v. Day*, 54 Miss. 58.] It is otherwise, where the fact is not within the knowledge of the defendant, nor presumed to be so. *Moore v. Lockett*, 2 Bibb, 67, 69; *Mitchell v. Maupin*, 3 Monroe, 187; *Hardy v. Heard*, 15 Ark. 184; *Booth v. Booth*, 3 Litt. 57; *Moseley v. Gassett*, 1 J. J. Marsh. 212, 215; *McCampbell v. Gill*, 4 J. J. Marsh. 87, 90; *Kennedy v. Meredith*, 3 Bibb, 466; *Pierson v. Meaux*, 3 A. K. Marsh. 6; *Wilson v. Carver*, 4 Hayw. 92; *Neal v. Hagthorpe*, 3 Bland, 551; *Bank of Mobile v. Planters' and Merchants' Bank*, 8 Ala. 772; *Smilie v. Siler*, 35 Ala. 88. But see *Gamble v. Johnson*, 9 Missou. 605; *Nelson v. Pinegar*, 30 Ill. 473; *De Wolf v. Long*, 2 Gilman, 679. [Any material matter charged in the bill and neither admitted nor denied in the answer must be proved by the plaintiff. *Bagshaw v. Batson*, 1 Dick. 113; *Young v. Grundy*, 6 Cranch, 51; *Brown v. Pierce*, 7 Wall. 211; *Brockway v. Coff*, 3 Paige, 539; *Cropper v. Burton*, 5 Leigh, 425; *Lan v. Johnson*, 3 Fred. Eq. 70; *Hoyal v. Bryson*, 6 Heisk. 142; *Smith v. St. Louis*

Mut. Life Ins. Co., 2 Tenn. Ch. 602, where the point is discussed, and the authorities reviewed. See also *Cowen v. Alsop*, 51 Miss. 158, and *Hardwick v. Bassett*, 25 Mich. 149. In New Jersey, it has been recently held that a material fact averred in the bill, and not denied or alluded to in the answer, must be taken as admitted. *Sanborn v. Adair*, 2 Stew. Eq. 338; *Lee v. Stiger*, 3 Stew. Eq. 610.] By Rule 8, Chancery Practice in New Hampshire, "all facts well alleged in the bill, and not denied or explained in the answer, will be held to be admitted." Where a fact is admitted by the answer, the defendant cannot question or deny it by the proofs. *Lipencott v. Ridgway*, 3 Stockt. (N. J.) 526; *Weider v. Clark*, 27 Ill. 251. The answer of a defendant in Chancery, being a confession, is always evidence against him, when pertinent, whoever may have been the parties in the cause in which it was interposed. *Kiddie v. Debrutz*, 1 Hayw. 420; *Mims v. Mims*, 3 J. J. Marsh. 103, 109, 110; *Roberts v. Tennell*, 3 Monroe, 247, 249; *Hunter v. Jones*, 6 Rand. 541. An answer, admitting the correctness of a copy of a deed made by another person, and to which there was no subscribing witness, is evidence, both of the contents and of the execution of the deed, against the person making such admission. *Adams v. Shelby*, 10 Ala. 478; see *Clarke v. Spears*, 7 Blackf. 96. The answer, not under oath, may, in relation to its admissions, be used against the defendant as if it were under oath. *Smith v. Potter*, 3 Wis. 432. And the plaintiff may avail himself of such admissions without thereby making the denials evidence for the defendant. *Ibid.*

⁵ The plaintiff may, however, as we have seen, go into evidence as to his whole case; *ante*, p. 614.

⁶ *Ante*, p. 614.

* Actual admissions on the record are those which appear, *338 either in the bill, or in the answer.

The facts alleged in a bill, where they are alleged positively, are admissions in favor of the defendant, of the facts so alleged: and, therefore, need not be proved by other evidence; for, whether they are true or not, the plaintiff, by introducing them into his bill, and making them part of the record, precludes himself from afterwards disputing their truth.

The plaintiff, of course, cannot read any part of his own bill as evidence in support of his case, unless where it is corroborated by the answer; ¹ as, where the bill states a deed, or a will, and the defendant, in his answer, admits the deed or will to have been properly executed, and to be to the tenor and effect set forth in the bill: in such case, the plaintiff, having read the admission from the answer, may read his bill, to show the extent of the admission made by the defendant. In strictness, however, this can hardly be called reading the bill on the part of the plaintiff: since the reading is only allowed because the defendant, by admitting the statement to be true as set forth in the bill, has, to that extent, made that portion of the bill a part of his answer. ²

In general, where a defendant refers to a document for greater certainty, he has a right to insist upon the document itself being read; ³ but the plaintiff need not, on that ground, reply to the answer, but may set the cause down for hearing on bill and answer, and obtain an order to prove the document *vivâ voce* or by affidavit at the hearing: ⁴ provided it be such a document as by the rules of the Court hereafter to be noticed, can be proved in that manner. ⁵

With respect to the right of a defendant to make use of the plaintiff's bill as an admission of the facts therein stated, it is to be observed, that, at Common Law, the general rule is, that a bill in Chancery will not be evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer, or the depositions of witnesses: and that it cannot be admitted as evidence to prove any facts, either alleged or denied in the bill. ⁶ In Courts of Equity, however, * a different rule pre- *839

¹ The answer of a party in Chancery is proper evidence against him, and so much of the bill as is necessary to explain the answer. *McGowen v. Young*, 2 Stewart, 276.

² Where, however, an order has been obtained to take the bill *pro confesso*, the bill may be read in evidence, as an answer admitting the facts. 11 Geo. IV. & 1 Will. IV. c. 36, § 14; *ante*, p. 531. [So in Tennessee, except in the case of infant defendants, defendants of unsound mind, executors or administrators, defendants to divorce bills, non-residents of the State, and persons whose names and residences are unknown, made defendants without attachment of property. Code, § 4371.]

³ *Cox v. Allingham*, Jac. 337, 339; *Lett v. Morris*, 4 Sim. 307, 611; and *see ante*, p. 726. [But the admission by answer that a document was of the purport stated in the bill, and a

reference to it when produced and proved, will not entitle the plaintiff to read the statement of the contents from the bill: nor will a further admission that the document is in the defendant's possession entitle the plaintiff to call for its production at the hearing. *Hawling v. Legh*, 3 J. & Lat. 716. See also *Owen v. Jones*, 2 Anst. 505.]

⁴ *Field v. Cage*, cited *Wyatt's P. R.* 219; *ante*, p. 828.

⁵ *Post*, p. 908 *et seq.*

⁶ *Bellum v. Rostin*, 2 Exch. 665; 2 Phil. on Evid. 37, 38; *Taylor on Evid.* § 789; 1 Phil. Ev. (Cowan and Hill's ed.) 18, 31, 338, 359, note 640 to 2 *ibid.*; Cowan and Hill's notes, 921, 924; *Ravkin v. Maxson*, 2 Marsh. (Ken.) 488, 489; *Baldwin v. Davies*, 2 Hall (N. Y.), 444; *Owens v. Dawson*, 1 Watts, 149, 150; *Ross v. Lawless*, 4 Litt. 218; [*Cooley v. State*, 55 Ala. 162].

vails, and the bill may be read as evidence, for the defendant, of any of the matters therein positively averred.¹

But although a defendant has a right to read the plaintiff's bill as evidence against him, such right is confined to the bill as it stands on the record. If the bill has been amended, the amended bill is the only one upon the record, and the defendant has no right, in that case, to read the original bill in evidence.² It seems, however, that where the consequence of the amendment has been to alter the effect of the answer to the original bill, or to render it obscure, the defendant has a right to read the original bill, for the purpose of explaining the answer;³ and in a cause in the Court of Chancery in Ireland, Sir Anthony Hart L. C., in deciding upon the question of costs, read from the defendant's office copy certain charges in the original bill which had been expunged by amendment, for the purpose of ascertaining *quo animo* the bill had been filed.⁴

A bill may also be read in evidence against a plaintiff, although filed by him in another suit. In such case, however, it will be necessary to prove that it was exhibited by the direction, or with the privity, of the party plaintiff in it: "for any person may file a bill in another person's name."⁵

Although a plaintiff, by his replication, denies the truth of the whole of the defendant's answer, he does not thereby preclude himself from reading whatever portion of it he thinks will support his case: except the answer be that of an infant, which, as we have seen, can never be read to establish a fact which it is against the infant's interest to admit.⁶ The answer of the person under whom he derives title, may, however, be so read; and therefore it has been held, that if, in a suit to establish a will against the heir, the heir puts in his answer admitting the will, and dies before the hearing, the derivative heir, though an infant, will be bound by the admission, and the execution of the will need not, in such case, be proved.⁷ Of course, if an infant heir is bound by the admission of his ancestor, such an admission will be equally binding upon an adult.

Where a plaintiff proposes to read a passage from the defendant's answer as an admission, he must read all the circumstances stated in

¹ *Ives v. Medcalfe*, 1 Atk. 63, 65. [Neither the bill nor the answer is evidence in a technical sense on the hearing, nor is either allowed to be read *in extenso* under the English practice. The plaintiff only reads such parts of the answer as he relies on to support his case as admissions, and the defendant reads such part of the bill as he relies on as admissions. In America, the pleadings are usually read in lieu of the preliminary statement of counsel in England, *ad informandum conscientiam curiæ*. *Bartlett v. Gale*, 4 Paige, 507; *Beech v. Haynes*, 1 Tenn. Ch. 576; *Hart v. Ten Eyck*, 2 John. Ch. 91; *Lady Ormond v. Hutchinson*, 13 Ves. 50.]

² *Hales v. Pomfret*, Dan. 141.

³ *Ibid.*

⁴ *Fitzgerald v. O'Flaherty*, 1 Moll. 347.

⁵ *Wollet v. Roberts*, 1 Ch. Ca. 64.

⁶ *Ante*, p. 169. [Express admissions by answer stand as conclusive, and cannot be disputed, unless it is first shown that they were made by mistake. *Marsh v. Mitchell*, 11 C. E. Green, 497.]

⁷ *Robinson v. Cooper*, 4 Sim. 131; *Lock v. Foote*, *ib.* 132; *ante*, p. 172. [Lewis v. Outlaw, 1 Tenn. 140. And see as to the effect of admissions by testamentary trustees in estopping them from proving the contrary. *Coope v. Cresswell*, L. R. 2 Ch. Ap. 112, 121.]

the passage; and if the passage contains a reference to any other passage, that other passage must be read also.* But * where a plaintiff, in reading a passage from a defendant's answer, has been obliged to read an allegation which makes against his case, he will be permitted to read evidence to disprove such allegation.¹

There was formerly a distinction between bills for relief and bills for discovery, in the right of the plaintiff to read the answer of the defendant; but now, where a defendant in Equity files a cross-bill for discovery only against the plaintiff in Equity, or exhibits interrogatories for his examination, the answer to such cross-bill or interrogatories may be read and used by the party filing such cross-bill, or exhibiting such interrogatories, in the same manner, and under the same restrictions, as the answer to a bill praying relief may be read and used.²

Formerly, when the parties to a cause, could not be witnesses, questions as to reading the answer of the defendant frequently arose;³ but they are now of no practical importance: the answer being almost invariably made evidence in the cause.⁴

With respect to what will be considered as such an admission by an answer as will dispense with the necessity of other proof, it may be stated, that, besides those expressions which in words admit the fact alleged to be true, a statement by the defendant that "he believes," or that he has been "informed and believes," that such fact is true, will be sufficient: unless such statement is coupled by some clause to prevent its being considered as an admission.⁵ A mere statement, however, in an answer, that a defendant has been informed that a fact is as stated, without an answer as to his belief concerning it, will not be such an admission as can be read as evidence of the fact.⁶ Such an answer

⁸ Bartlett v. Gillard, 3 Russ. 149; see also Lady Ormond v. Hutchinson, 13 Ves. 47, 53; Rude v. Whitechurch, 3 Sim. 562; Nurse v. Bunn, 5 Sim. 225; Freeman v. Tatham, 5 Hare, 329, 335; 10 Jur. 685; [Beech v. Haynes, 2 Tenn. Ch. 571]. And see Taylor on Evid. § 660; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 359, 360, note 643 in 2 *id.* 926-928. If on exceptions being taken, a second answer is put in, the defendant may insist upon having that also read, to explain what he swore in his first answer. 1 Phil. Ev. 359, note 644, in 2 *id.* 928.

¹ Price v. Lytton, 3 Russ. 206. Where an answer admits a fact and insists on a distinct fact by way of discharge or avoidance, the latter, even if part of the same transaction, must be proved by evidence *ab initio*. Parkes v. Gorton, 3 R. I. 27; Walker v. Berry, 8 Rich. 33; Cummins v. Cummins, 15 Ill. 33; Stevens v. Post, 1 Beasley, 408, 410, 411; Hart v. Ten Eyck, 2 John. Ch. 62; Miller v. Wack, Saxt. 209; Beckwith v. Butler, 1 Wash. 224; Thompson v. Lamb, 7 Ves. 587; [Clements v. Moore, 6 Wall. 315; Napier v. Elam, 6 Yerg. 113; Beech v. Haynes, 1 Tenn. Ch. 569. But if the facts in discharge or avoidance are a direct and proper reply to an express charge, or interrogatory of the bill,

the answer is evidence of those facts. Hart v. Ten Eyck, 1 Cow. 744, note; Alexander v. Williams, 10 Yerg. 109; Goss v. Simpson, 4 Coldw. 288; Walter v. McNabb, 1 Heisk. 703. And *this*, whether the response be a direct denial or by a statement of acts in avoidance. Hopkins v. Spurlock, 2 Heisk. 152. *Infra*, 845, note.]

² Ord. XIX. 6.

³ Davis v. Spurling, 1 R. & M. 64, 68; Miller v. Gow, 1 Y. & C. C. C. 56, 59; Connop v. Hayward, *ib.* 33, 34; Allfrey v. Allfrey, 1 M. & G. 87, 93; 13 Jur. 269.

⁴ See *post*, p. 843, n. 3.

⁵ See Potter v. Potter, 1 Ves. S. 274; Hill v. Bimney, 6 Ves. 738; and see Woodhatch v. Freedland, 11 W. R. 398, V. C. K.; see also Bird v. Lake, 1 H. & M. 111. [See, where the answer admitted the execution of "some such" bonds and mortgages as were set out in the bill. Willis v. McKimney, 3 Stew. Eq. 465.] An answer admitting a verbal agreement alleged in the bill, but insisting on the Statute of Frauds, cannot be read as an admission of the agreement. Jackson v. Oglander, 2 H. & M. 465.

⁶ 1 Phil. Ev. (Cowen & Hill's ed. 1839) 360, note.

is, in effect, insufficient; and if the plaintiff, upon reading the pleadings, finds such a statement as to a fact with respect to which it is important to have the defendant's belief, he should except to the answer for insufficiency.

*841 * It has been before stated, that the answer of an infant, being in fact the answer of his guardian, cannot be read against him.¹ The answer, however, may, it seems, be read against the guardian; and in *Beasley v. Magrath*,² the answer of an infant, by his mother and guardian in another cause, was read against the mother in her own capacity. And it seems, that where a defendant, being an infant, answers by guardian, and, at full age, neither amends nor makes a new answer, as he may do, but prays a hearing of the cause *de novo*, his answer is evidence against him.³

The answer of an idiot or lunatic, put in by his committee, may be read against him; and it has been held that the answer of a person of weak intellect, put in by his guardian, could also be read against him;⁴ but it is doubtful if this decision would now be followed.⁵

For the rules of practice with regard to reading the answer of married persons, the reader is referred to a former portion of this Treatise.⁶

The plaintiff cannot, of course, read the answer of one defendant against a co-defendant as an admission:⁷ and, as a general rule, it cannot be read as evidence, except on motion for a decree, where

¹ *Ante*, p. 169; *Gresley Eq. Ev.* (Am. ed.) 323.

² 2 Sch. & Lef. 34.

³ *Hinde*, 422.

⁴ *Loving v. Caverley*, Prec. in Ch. 229.

⁵ *Ante*, pp. 177, 178; *Micklethwaite v. Atkinson*, 1 Coll. 173; *Percival v. Caney*, 4 De G. & S. 610; 14 Jur. 1056, 1062; S. C. *nom.* *Stanton v. Percival*, 3 W. R. 391; 24 L. J. Ch. 369, H. L.

⁶ *Ante*, pp. 184, 185.

⁷ *Jones v. Turberville*, 2 Sumner's Ves. Jr. 11, note (b); 4 Bro. C. C. 115, S. C.; [*Atwood v. Small*, 6 Cl. & F. 282, 295;] 1 Greenl. Ev. § 178; 1 Phil. Ev. (Cowen & Hill's ed. 1839), 362, note 650, in 2 *id.* 931; *Porter v. Bank of Rutland*, 19 Vt. 410; *Blodget v. Hobart*, 18 Vt. 414. It seems to be a well established general principle, that the answer of one defendant cannot be read in evidence against a co-defendant, if there is no joint interest, privity, fraud, collusion, or combination between them. *Jones v. Jones*, 13 Iowa, 276; *Rust v. Mansfield*, 25 Ill. 336; *Williamson v. Haycock*, 11 Iowa, 40; *Mobley v. Dubuque, &c., Co.*, 11 Iowa, 71; *Judd v. Seaver*, 8 Paige, 548; *Hayward v. Carroll*, 4 Harr. & J. 518; *Singleton v. Gayle*, 8 Porter, 271; *Conner v. Chase*, 15 Vt. 764; *Thomasson v. Tucker*, 2 Blackf. 172; *Moseley v. Armstrong*, 3 Monroe, 389; *Robinson v. Sampson*, 23 Maine, 388; *Webb v. Pell*, 3 Paige, 368; *Collier v. Chapman*, 2 Stew. 163; *Chambliss v. Smith*, 30 Ala. 366; *Graham v. Sublett*, 6 J. J. Marsh. 145; *M'Kim v. Thompson*, 1 Bland, 160; *Calwell v. Boyer*, 8 Gill & J. 136; *Dexter v. Arnold*,

3 Sumner, 152; *Felch v. Hooper*, 20 Maine, 159; *Clarke v. Van Reimsdyk*, 9 Cranch, 152, 156; *Leeds v. Mar. Ins. Co. of Alex.*, 2 Wheat. 380, 383; *Dade v. Madison*, 5 Leigh, 401; *Daniel v. Boullard*, 2 Dana, 296; *Field v. Holland*, 6 Cranch, 8; *Fanning v. Pritchett*, 6 Monroe, 79, 80; *Roundlett v. Jordan*, 3 Greenl. 47; *Mills v. Gore*, 20 Pick. 34; [*Wells v. Stratton*, 1 Tenn. Ch. 328]. The answer of one defendant is not evidence against the other defendant, though prior to the filing of the answer the former may have transferred to the latter all his interest in the subject-matter of the controversy. *Jones v. Hardesty*, 10 Gill & J. 404; see also *Haworth v. Bostock*, 4 Y. & C. 1; *Lewis v. Owen*, 1 Ired. Eq. 290; *Hoare v. Johnstone*, 2 Keen, 553; [*Dickinson v. Railroad Co.*, 7 W. Va. 390]. But the answer of a defendant, which is responsive to the bill, is admissible as evidence *in favor* of a co-defendant (*Davis v. Clayton*, 5 Hum. 446); more especially where such co-defendant, being the depositary of a chattel claimed by the plaintiff, defends himself under the title of the other defendant. *Mills v. Gore*, 20 Pick. 28; but see *Morris v. Nixon*, 1 How. U. S. 118; *Cannon v. Norton*, 14 Vt. 178. The deposition of a party in Chancery, read without objection, is evidence for his co-defendant. *Fletcher v. Wier*, 7 Dana, 354; see *Wolley v. Brownhill*, 13 Price, 500; S. C. 1 M'Lel. 317. If a defendant in his argument relies on the answer of his co-defendant, he thereby makes it evidence against himself. *Chase v. Manhardt*, 1 Bland, 336.

* notice of the intention to read it has been given.¹ Thus, in **842 Morse v. Royal*,² the answer of an executor was offered as evidence against the residuary legatee, who had been made a party to the suit; but Lord Erskine refused to receive it for any other purpose than that of showing what funds came to the hands of the executors, what debts there were, and the value of the estate. In cases, however, where the right of the plaintiff, as against one defendant, is only prevented from being complete by some question between the plaintiff and a second defendant, the plaintiff is permitted to read the answer of such second defendant, for the purpose of completing his claim against the first;³ and where several persons are mutually interested as partners, or jointly liable as the co-obligors of a bond, the declarations or answers of one may be admissible against the others.⁴

Cases, moreover, have occurred in which a defendant has, by the form of his answer, made the answer of a co-defendant evidence against himself; as, where a defendant stated in his answer that he was much in years, and could not remember the matter charged in the bill, but that J. S. was his attorney and transacted the matter, whereupon J. S. was made a defendant, the answer * was allowed to be read *843 against the original defendant: Lord Cowper being of opinion,

¹ 15 & 16 Vic. c. 86, § 15; *Cousins v. Vasey*, 9 Hare Ap. 61; *Dawkins v. Mortan*, 1 J. & H. 339; *Stephens v. Heathcote*, 1 Dr. & S. 138; 6 Jur. N. S. 312; *ante*, p. 821; see *Fielden v. Slater*, L. R. 7 Eq. 523.

² 12 Ves. 355, 361; see also *M'Intosh v. Great Western Railway Company*, 4 De G. & S. 544; *Wych v. Meal*, 3 P. Wms. 310; and *Gibbons v. Waterloo Bridge Company*, 1 C. P. Coop. t. Cott. 385, where the answer of the officer of a corporation was not allowed to be read against the corporation. *Taylor on Evid.* § 684.

³ *Green v. Pledger*, 3 Hare, 165, 170; 8 Jur. 801; and generally concerning the circumstances in which the Court will try and decide a case between co-defendants, see *Cottingham v. Lord Shrewsbury*, 3 Hare, 627, 638; *Lord Chamley v. Lord Dunsany*, 2 Sch. & Lef. 690, 706, 709, H. L.; *Farquharson v. Seton*, 5 Russ. 45, 62; *Smith v. Baker*, 1 Y. & C. C. C. 223, 228; *Fletcher v. Green* (No. 2), 33 Beav. 513; [*Sandford v. Morrice*, 11 Cl. & F. 667, 681; *Mount v. Potts*, 8 C. E. Green, 188; *Ingram v. Smith*, 1 Head, 412, 427; *Symmes v. Strong*, 1 Stew. Eq. 131].

⁴ *Crosse v. Beddingfield*, 12 Sim. 35, 39; 5 Jur. 836; but the answer of a defendant who has become bankrupt, and ceased to be a partner, cannot; *Parker v. Morrell*, 2 Phil. 453, 463; 12 Jur. 253; see 1 Greenl. Ev. § 178; *Clarke v. Van Reimsdyk*, 9 Cranch, 153, 156; *Williams v. Hodgson*, 2 Harr. & J. 474, 477; *Van Reimsdyk v. Kane*, 1 Gall. 630; *Hutchins v. Childless*, 4 Stew. & P. 34; *Gilmore v. Patterson*, 36 Maine, 544; *Clayton v. Thompson*, 13 Geo. 291. Upon a bill in Equity by one partner against his copartners

for an account, the answer of one of the defendants will not be evidence to charge another. *Chapin v. Colman*, 11 Pick. 331. But if it appears that the defendants, as constituting a partnership among themselves, of the one part, were in partnership with the plaintiff of the other part, the answer of one of the defendants would be evidence to charge the others. *Ibid.*; see also *Judd v. Seaver*, 8 Paige, 548; *Van Reimsdyk v. Kane*, 1 Gall. 630; *Winchester v. Jackson*, 3 Hayw. 310; *Rector v. Rector*, 3 Gilman, 105. The answer of a wife is not evidence against her husband. *The City Bank v. Bangs*, 3 Paige, 36. Nor is the answer of an obligee, evidence against his previous assignee, a party in the same suit. *Fanning v. Pritchett*, 6 Monroe, 79; *Turner v. Holman*, 5 Monroe, 411. Nor is the answer of a principal debtor, admitting his insolvency, evidence against his surety, a co-defendant, at the suit of a co-surety for contribution. *Daniel v. Bullard*, 2 Dana, 296. *A fortiori*, it follows that the mere silence of one defendant is no evidence against his co-defendant. *Timberlake v. Cobbs*, 2 J. J. Marsh. 136; *Blight v. Banks*, 6 Monroe, 192; *Harrison v. Johnson*, 3 Litt. 285.

The rule that the answer of one defendant cannot be read in evidence against his co-defendant, does not apply where the latter claims through him whose answer is offered in evidence. 1 Greenl. Ev. § 178. Nor where one defendant in his answer refers to the answer of his co-defendant. *Anon.*, 1 P. Wms. 301; *Dunham v. Gates*, 3 Barb. Ch. 196; *Blakeney v. Ferguson*, 14 Ark. 641.

that the words in the first answer amounted to a reference to a co-defendant's answer.¹

Interpleader suits form an exception to this rule; and the answer of one defendant may be read against a co-defendant, to show that adverse claims are made.²

It is to be observed, that where an answer has been replied to generally, it cannot (except by consent) be read as evidence on the part of the defendant himself.³ In disposing of the question of costs, however, the Court will permit the defendant's answer to be read in his own behalf;⁴ and it has been held, that a peer's answer upon protestation of honor may also be read on the question of costs, on behalf of the defendant who has put it in. Moreover, the Court itself will look at the answer: not as evidence, but as what may regulate its discretion with respect to the further investigation of particular facts.⁵

Although a defendant cannot read his own answer as evidence for himself, as to any other point than that of costs, he is entitled to have the benefit of his answer, so far as it amounts to a denial of the plaintiff's case, unless the denial by the answer is contradicted by the evidence of more than one witness: the rule of Courts of Equity being, that where the defendant, in express terms, negatives the allegations in the bill, and the evidence is that of only one person affirming what has been so negatived, the Court will not make a decree.⁷ The de-

*844 nial, however, by the answer, *must in such cases be positive;

¹ Anon., 1 P. Wms. 301.

² *Masterman v. Price*, 1 C. P. Coop. t. Cott. 383; *Chevet v. Jones*, *ibid.*; 6 Mad. 267; and see *post*, Chap. XXXIV. § 3, *Bills of Interpleader*.

³ Where a defendant has filed an answer, and it has been replied to, it is now a common practice to file a short affidavit by him, verifying the statements of his answer, in order to make it evidence on his own behalf. *Barrack v. McCulloch*, 3 K. & J. 110; 3 Jur. N. S. 180; and see *Williams v. Williams*, 10 Jur. N. S. 608; 12 W. R. 663, V. C. K. For forms of affidavit, see Vol. III.

⁴ *Vancouver v. Bliss*, 11 Ves. 458; *Howell v. George*, 1 Mad. 1, 13; and see *Morgan & Davey*, 85; and *post*, Chap. XXXI. § 1, *Costs*.

⁵ *Dawson v. Ellis*, 1 J. & W. 524, 526.

⁶ *Miller v. Gow*, 1 Y. & C. C. C. 56, 59; [*Beech v. Haynes*, 1 Tenn. Ch. 569, 576. *Ante*, 839, n. 1].

⁷ *Pember v. Mathers*, 1 Bro. C. C. 52; see also *Kingdome v. Boakes*, *Prec.* in Ch. 19; *Wakelin v. Walthall*, 2 Ch. Ca. 8; *Alam v. Jourdan*, 1 Vern. 161; *Christ's Coll. Cam. v. Widdington*, 2 Vern. 283; *Hine v. Dodd*, 2 Atk. 276; *Glynn v. Bank of England*, 2 Ves. S. 38; *Mortimer v. Orchard*, 2 Ves. J. 243; *Lord Cranstown v. Johnston*, 3 Ves. 170; *Cooth v. Jackson*, 6 Ves. 40; *Evans v. Bicknell*, *ib.* 174, 183; *Cooke v. Clayworth*, 18 Ves. 12; *Holder-nesse v. Rankin*, 2 De G., F. & J. 258, 272; 6 Jur. N. S. 903; and see *Williams v. Williams*, 10 Jur. N. S. 608; 12 W. R. 663, V. C. K.; [*Stearns v. Stearns*, 8 C. E. Green, 167].

Where a replication is put in, and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill, shall be taken as true, unless they are disproved by evidence of greater weight than the testimony of a single witness. This may result from the testimony of two witnesses, or of one with corroborating circumstances; or from corroborating circumstances alone; or from documentary evidence alone. *Pierson v. Cutler*, 5 Vt. 272; *Dunham v. Gates*, 1 Hoff. Ch. 188; *Hart v. Ten Eyck*, 2 John. Ch. 92; *Watkins v. Stockett*, 6 Harr. & J. 435; *Hughes v. Blake*, 6 Wheat. 468; *Pierson v. Claves*, 15 Vt. 93; *Gould v. Williamson*, 21 Maine, 273; *Johnson v. Richardson*, 38 N. H. 353; *Moors v. Moors*, 17 N. H. 483; *Robinson v. Stewart*, 10 N. Y. 189; *Miles v. Miles*, 32 N. H. 147; *Camp v. Simon*, 34 Ala. 126; *Davis v. Stevens*, 3 Clarke, 158; *Panton v. Tefit*, 22 Ill. 366; *Pusey v. Wright*, 31 Penn. (State) 387; *Spence v. Dodd*, 19 Ark. 166; *Hill v. Bush*, 19 Ark. 522; 1 Greenl. Ev. § 260; *Gresley Eq. Ev.* 4; *Clarke v. Van Reimsdyk*, 9 Cranch, 160; *Hollister v. Barkley*, 11 N. H. 501; *Landon v. Goddard*, 2 Story, 267; *Roberts v. Salisbury*, 3 Gill & J. 425; *Purcell v. Purcell*, 4 Hen. & M. 607; *M'Cowen v. Young*, 2 Stew. & P. 161; *Alexander v. Wallace*, 10 Yerger, 115; *Daniel v. Mitchell*, 1 Story, 172; *Neville v. Demeritt*, 1 Green Ch. 322; *Betty v. Taylor*, 5 Dana, 598; *Gray v. Faris*, 7 Yerger, 155; *Johnson v. Slawson*, 1 Bailey Eq. 463; *Mason v. Peck*, 7 J. J. Marsh. 301; *Stafford v. Bryan*, 1

otherwise, the rule will not apply; * as where a defendant, by * 845

Paige, 239; Clark v. Oakley, 4 Ark. 236; Towne v. Smith, 1 Wood. & M. 115; Green v. Tanner, 8 Met. 422; Cushing v. Smith, 3 Story, 556; Hough v. Richardson, 3 Story, 659, 692; Gould v. Gould, 3 Story, 516, 540; Jones v. Belt, 2 Gill, 106; Menifee v. Menifee, 3 English, 9; Morgan v. Tiflon, 3 McLean, 339; Appleton v. Horton, 25 Maine, 23; Eastman v. McAlpice, 1 Kelly, 157; Tobey v. Leonard, 2 Wall. 423; O'Bannon v. Myer, 36 Ala. 551; Benson v. Woolverton, 2 McCarter, 158; Bird v. Styles, 3 C. E. Green, 297; Hynson v. Voshell, 26 Md. 83, 94; De Hart v. Baird, 4 C. E. Green, 423; Hughes v. Blackwell, 6 Jones Eq. 73; Hill v. Williams, 6 Jones Eq. 242; Stephens v. Orman, 10 Florida, 9; Barton v. Moss, 32 Ill. 50; Dunlap v. Wilson, 32 Ill. 517; Myers v. Kinzie, 26 Ill. 36; White v. Hampton, 10 Iowa, 238; Gillett v. Robbins, 12 Wis. 319; [Bent v. Smith, 7 C. E. Green, 560; Bowerley v. Walden, 20 Gratt. 147; Powell v. Manson, 22 Gratt. 189; Falk v. Turner, 101 Mass. 495; Zane v. Cawley, 21 N. J. Eq. 130; Fulton v. Woodman, 54 Miss. 158]. The right of a defendant in a bill in Chancery to have his answer thereto taken in evidence, is co-extensive with his obligation to answer. Blaisdell v. Bowers, 40 Vt. 126. The statute of Vermont, providing that parties shall not testify in their own behalf, in certain cases, does not apply to an answer to a bill in Chancery, but the answer, when responsive, is evidence, and is not affected by that statute. Blaisdell v. Bowers, *ubi supra*. The plaintiff is not allowed to impeach the character of the defendant, for truth and veracity, but must overcome his answer by stronger evidence. Vandegrift v. Herbert, 3 C. E. Green, 469; Brown v. Bulkley, 1 McCarter, 294; Chambers v. Warren, 13 Ill. 321; Butler v. Catling, 1 Root, 310; Salmon v. Claggett, 3 Bland, 165; but see Miller v. Tolleson, 1 Harp. Ch. 145. The operation of the defendant's answer is the same, although the equity of the plaintiff's bill is grounded on the allegation of fraud. Dilly v. Barnard, 8 Gill & J. 171; M'Donald v. McCleod, 1 Ired. Eq. 226; Lewis v. Owen, 1 Ired. Eq. 290; Murray v. Blatchford, 1 Wend. 583; Cunningham v. Freeborn, 3 Paige, 557; Graham v. Berryman, 4 C. E. Green, 29; Blanton v. Brackett, 5 Coll. 232; Green v. Vaughan, 2 Blackf. 324; Hart v. Ten Eyck, 2 John. Ch. 92; Wight v. Prescott, 2 Barb. Ch. 196. The defendant is as much bound, to answer the charging part as the stating part of the bill; and his answer to the charging part, if responsive thereto, is evidence in his own favor, if an answer on oath has not been waived by the plaintiff. Smith v. Clark, 4 Paige, 368; Rich v. Austin, 40 Vt. 416; Adams v. Adams, 22 Vt. 68. Where, however, the answer of the defendant is not responsive to the bill; or sets up affirmative allegations of new matter not stated or inquired of in the bill, in opposition to, or in avoidance of, the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations; and the defendant is as much bound to establish the allegations

so made, by independent testimony, as the plaintiff is to sustain his bill. [Clements v. Moore, 6 Wall. 315; Seltz v. M. Russell, 94 U. S. 589; Roberts v. Stedman, 78 Ill. 129; Gordon v. Bell, 50 Ala. 213; Roberts v. Birge, 5 C. E. Green, 139; O'Brien v. Fry, 82 Ill. 274; Hart v. Carpenter, 36 Mich. 402; Bellows v. Stone, 18 N. H. 465; Wakeman v. Grover, 4 Paige, 23; New England Bank v. Lewis, 8 Pick. 113; Hart v. Ten Eyck, 2 John. Ch. 89; Dickey v. Allen, 1 Green Ch. 406; Bradley v. Webb, 53 Maine, 462; O'Brien v. Elliot, 15 Maine, 125; Lucas v. Bank of Darien, 2 Stewart, 280; Winans v. Winans, 4 C. E. Green, 220; Pierson v. Claves, 15 Vt. 93; Wells v. Houston, 37 Vt. 245; M'Daniel v. Barnam, 5 Vt. 279; Tobin v. Walkinshaw, 1 McAll. C. C. 26; Pusey v. Wright, 31 Penn. St. 387; Garlick v. McArthur, 6 Wis. 450; Ives v. Hazard, 4 R. I. 14; Dease v. Moody, 31 Miss. 617; Fidler v. Porch, 2 Stockt. 243; Voorhees v. Voorhees, 3 C. E. Green, 223; Miles v. Miles, 32 N. H. 147; Busby v. Littlefield, 33 N. H. 76; Rogers v. Mitchell, 41 N. H. 157; Leach v. Fobes, 11 Gray, 509; M'Donald v. M'Donald, 16 Vt. 630; Randall v. Phillips, 3 Mason, 378; Gordon v. Sims, 2 M'Cord Ch. 156; Clarke v. White, 12 Peters, 178; Lampton v. Lampton, 6 Monroe, 620; Purcell v. Purcell, 4 Hen. & M. 511; Hagthorp v. Hook, 1 Gill & J. 272; Alexander v. Wallace, 10 Yerger, 105; Carter v. Sleeper, 5 Dana, 263; Flagg v. Mann, 2 Sumner, 487; Cocke v. Trotter, 10 Yerger, 213; Gould v. Williamson, 21 Maine, 273; Jones v. Jones, 1 Ired. Eq. 332; Johnson v. Pierson, Dev. Eq. 364; Miller v. Wack, 1 Saxton, 204; Pierce v. Gates, 7 Blackf. 162; Dunn v. Dunn, 8 Ala. 784; Sanborn v. Kittridge, 20 Vt. 632; Fitzhugh v. M'Pherson, 3 Gill, 408; Patton v. Ashley, 3 English, 290; Brooks v. Gillis, 12 Sm. & M. 538. [An answer to statements of the bill not necessary to the complainant's case are not evidence for the defendant. Brown v. Kahnweiler, 1 Stew. Eq. 311, citing Wanmaker v. Van Buskirk, Saxt. 685; Farnum v. Burnett, 6 C. E. Green, 87; Day v. Perkins, 2 Sandf. Ch. 359, 365.] The bill set out an agreement, and called upon the defendant to admit or deny it, but not to state what it was, and the defendant in his answer set forth another agreement; such statement of the latter agreement is not responsive to the bill, and is not evidence for the defendant. Jones v. Beet, 2 Gill, 106. An answer, in stating the particulars of a transaction charged and inquired into by the bill, is responsive. Merritt v. Brown, 4 C. E. Green, 286, 289; Youle v. Richards, Saxton, 539; [Moody v. Metcalf, 51 Ga. 128. To a bill for an account between partners alleging that each partner had an equal interest, the answer was held responsive which denied the allegation, and averred that the shares were unequal, specifying them. Eaton's Appeal, 66 Pa. St. 483]. If the bill requires the defendant to state an account between the parties, the account so stated is responsive to the bill. Bellows v. Stone, 18 N. H. 465. If the defendant might have fully answered the

*846 his answer, denies a fact as to his belief * only;¹ or where it is a mere constructive denial, by the filing of a traversing note.²

plaintiff's bill, and left out any particular allegations of new matter in his answer, then those allegations are not responsive, but all allegations are responsive, the absence of which in the answer would furnish just ground for exception. *Bellows v. Stone*, 18 N. H. 465. But when the case is heard upon the bill and answer alone, the answer must be taken as true, whether responsive to the bill or not, because the defendant is precluded from proving it. *Lowry v. Armstrong*, 2 Stew. & P. 297; *Cheney v. Belcher*, 5 Stew. & P. 134; *M'Gowen v. Young*, 3 Stew. & P. 161; *Paulling v. Sturgis*, 3 Stew. & P. 95; *Stone v. Moore*, 26 Ill. 165; *Doolittle v. Gooking*, 10 Vt. 275; *Slason v. Wright*, 14 Vt. 208; *Wright v. Bates*, 13 Vt. 341; *Dale v. M'Evers*, 2 Cowen, 118; *Reed v. Reed*, 1 C. E. Green, 248; *Jones v. Mason*, 5 Rand. 577; *Kennedy v. Baylor*, 1 Wash. 162; *Copeland v. Crane*, 9 Pick. 73; *Tainter v. Clark*, 5 Allen, 66; *Perkins v. Nichols*, 11 Allen, 542; *Russell v. Moffit*, 6 Howard (Miss.), 303; *Trout v. Emmons*, 29 Ill. 433; *Buntain v. Wood*, 29 Ill. 504; *Gaskill v. Sine*, 2 Beasley, 130; *Mason v. McGore*, 28 Ill. 322; *DeWolf v. Long*, 2 Gilman, 679; *Rogers v. Mitchell*, 41 N. H. 154. Still, general allegations in an answer, containing matters of belief and conclusions from facts not particularly stated, are said by *Wilde J.* in *Copeland v. Crane*, 9 Pick. 73, 78, to be entitled to little or no weight in a hearing on the bill and answer. See *BeFord v. Crane*, 1 C. E. Green, 265. Such an answer, however, is sufficient to put the plaintiff to the proof of his case; the Court in such a case, will believe what the defendant believes, nothing being found to the contrary. *Buttrick v. Holden*, 13 Met. 355, 377. And so far as his answer is a mere denial of the plaintiff's case, of course it prevails. It is for the plaintiff to prove the allegations in the bill which are denied by the answer. But when the answer admits the plaintiff's case, and seeks to avoid it, by general allegations of the character above alluded to by Mr. Justice Wilde, then the question of its effect, as an answer, properly arises, and undoubtedly, in such a case, it would be entitled to but little weight. See *Givens v. Tidmore*, 8 Ala. 745. An answer, which alleges as facts what the defendant could not personally know, though responsive to the bill, merely puts the plaintiff upon the proof of his own allegations. *Dugan v. Gittings*, 3 Gill, 138; see *Drury v. Conner*, 6 Harr. & J. 288, 291; [Lawrence v. Lawrence, 6 C. E. Green, 317]. So of a denial by the defendant upon information and belief, not founded on the personal knowledge of the defendant. *Coleman v. Ross*, 46 Penn. St. 180; *Newman v. James*, 12 Ala. 29; *Townsend v. McIntosh*, 14 Ind. 57; *Hartwell v. Whitman*, 36 Ala. 712; see *Bellows v. Stone*, 18 N. H. 465, 479. [So, an answer on information simply makes an issue. *Wilkins v. May*, 3 Head, 173.] As to the effect of the answer of a corporation being put in, not under oath, but under the common seal of the corporation, see *Haight*

v. Proprietors of Morris Aqueduct, 4 Wash. C. C. 601; *Lovett v. Steam Saw Mill Ass.*, 6 Paige, 54; *State Bank v. Edwards*, 20 Ala. 512; *Union Bank v. Geary*, 5 Peters, 99. Such answer has no other force and effect than that of an individual not under oath. *Maryland and New York Coal and Iron Co. v. Wingert*, 8 Gill, 170. [So of an answer sworn to in another State before an officer not authorized to take an oath to an answer. *Freytag v. Hoeland*, 8 C. E. Green, 36.] As to the effect of an answer, made by one incompetent to give testimony in any case, and incapable of making oath, see *Salmon v. Claggett*, 3 Bland, 125. The oaths of two plaintiffs in the same cause, made, by the statute of New Jersey, competent witnesses for themselves, will not be considered as destroying the effect of the responsive denial of the answer, unless they seem to the Court to be entitled to the weight of the oaths of two credible witnesses; and, in considering their weight, the fact of the interest of these witnesses as parties to the suit, must be taken into consideration. *Vandegrift v. Herbert*, 3 C. E. Green, 466. It has been stated above, in this note, that the plaintiff will not be allowed to discredit the answer by impeaching the character of the defendant for truth and veracity. This subject was very fully examined by Chancellor Green, in *Brown v. Bulkley*, 1 McCarter, 294, and he entirely sustains this position.

Under the Practice Act in California, a sworn answer is no evidence for the defendant. *Goodwin v. Hammond*, 13 Cal. 168; *Bostic v. Love*, 16 Cal. 69. And in Missouri the old rule with respect to the weight of an answer in Chancery has been done away with by the new code. *Walton v. Walton*, 17 Mo. 376. So in Iowa, the rule requiring two witnesses, or one and strong corroborating circumstances, to overcome the answer, does not exist; though such answer throws upon the plaintiff the onus of sustaining his material charges by competent proof. *Graves v. Alden*, 13 Iowa, 573; *Jones v. Jones*, 13 Iowa, 276; *Chevette v. Mason*, 4 Green, 231; *Culbertson v. Luckey*, 13 Iowa, 12; *White v. Hampton*, 10 Iowa, 238; *Gilbert v. Mosier*, 11 Iowa, 498. A sworn answer in Chancery, if not demanded, only puts in issue the allegations of the bill. *Wilson v. Holcomb*, 13 Iowa, 110; *Connelly v. Carlin*, *ib.* 383. An answer in Chancery without an oath is a mere pleading, and of no effect as evidence. *Morris v. Hoyt*, 11 Mich. 9.

¹ *Arnot v. Bischoe*, 1 Ves. S. 95, 97; *Hughes v. Garner*, 2 Y. & C. Ex. 328, 335. [The true rule, in such case, is that the answer is to be regarded as the deposition of one witness, and the plaintiffs must produce evidence sufficient to overcome it, and there is no unvarying rule on the subject. *Veile v. Blodgett*, 49 Vt. 270.] Where the answer does not state facts positively, or as within the defendant's own knowledge, or does state

² See *ante*, p. 514.

The reason for the adoption of this rule, by the Courts, was: because, there being a single deposition only, against the oath of the defendant in his answer, the denial of facts by the answer was equally strong with the affirmation of them by the deposition.³ Where, therefore, there were any corroborative circumstances in favor of the plaintiff's case, which gave a preponderance in his favor, the Court departed from the rule, and either made a decree, or directed an issue.⁴ Thus, where a bill was filed for the specific * performance of an agree- *847

them inferentially merely, or only according to the defendant's best knowledge and belief, the rule requiring two witnesses, or one witness with corroborating circumstances, to counteract its effect, does not apply. [Cunningham v. Ferry, 74 Ill. 426.] The only effect of the answer in such case is, to put the plaintiff to the necessity of proving the facts alleged in his bill. Waters v. Creagh, 4 Stew. & P. 410; Hughes v. Garner, 2 Y. & C. 127; Knickerbacker v. Harris, 1 Paige, 209; Stevens v. Post, 1 Beasley (N. J.), 408; Pearce v. Nix, 34 Ala. 183; Watson v. Palmer, 5 Ark. 501, 505, 506; Drury v. Conner, 6 Har. & J. 288; Phillips v. Richardson, 4 J. J. Marsh. 213; Copeland v. Crane, 9 Pick. 73, 78; Parkman v. Welch, 19 Pick. 231; Norwood v. Norwood, 2 Harr. & J. 328; Pennington v. Gittings, 2 Gill & J. 208; Bellows v. Stone, 18 N. H. 465; Hunt v. Rousmanier, 3 Mason, 294; Brown v. Brown, 10 Yerger, 84; Combs v. Buswell, 2 Dana, 474; Young v. Hopkins, 6 Monroe, 22; Martin v. Greene, 10 Missou. 652. The same is true where the answer is evasive, or so expressed as not to amount to a positive denial. Wilkins v. Woodfin, 5 Munf. 183; McCampbell v. Gill, 4 Monroe, 90; Sallee v. Duncan, 7 Monroe, 383; Hutchinson v. Sinclair, 7 Monroe, 293; Neal v. Ogden, 5 Monroe, 362; Lyon v. Hunt, 11 Ala. 295; Hartwell v. Whitman, 36 Ala. 712; Martin v. Greene, 10 Missou. 652. [And if the facts are stated in the bill to be in the defendant's personal knowledge, and the defendant merely disclaim personal knowledge and demand strict proof, this will not amount to a denial of the facts and put the complainant on proof of them. McAllister v. Clopton, 51 Miss. 257.] So where the answer is merely formal to put in issue the allegations of the bill. Reynolds v. Pharr, 9 Ala. 560. [Or neither admits nor denies a fact charged by the bill. Ante, 837, n. 4.] The answer of a corporation, being put in under its common seal only, cannot be used as evidence, but puts in issue the allegations to which it responds, and imposes on the plaintiff the burden of proving such allegations. Baltimore & Ohio R. R. v. Wheeling, 13 Grattan (Va.), 40. Where an answer on oath is waived, the answer is not evidence in favor of the defendant for any purpose. Patterson v. Gaines, 6 How. U. S. 550; Larsh v. Brown, 3 Ind. 234; Moore v. McClintock, 6 Ind. 200; Doon v. Bayer, 16 Md. 144; although in fact put in under oath; Gerrish v. Towne, 3 Gray, 82; Armstrong v. Scott, 3 Iowa, 433; Wilson v. Holcomb, 13 Iowa, 110; Connelly v. Carlin, *ib.* 383; but as a

pleading, the plaintiff may avail himself of the admissions and allegations contained therein, which establish the case made by the bill. Bartlett v. Gale, 4 Paige, 503; Miller v. Avery, 2 Barb. Ch. 582; Wilson v. Towle, 36 N. H. 129; Durfee v. McClung, 6 Mich. 223; Smith v. Potter, 3 Wis. 432; see also Union Bank of Georgetown v. Geary, 5 Peters, 99, 110-112; Story Eq. Pl. § 875 a, and note; [White v. Hampton, 10 Iowa, 238.]

³ Walton v. Hobbs, 2 Atk. 19.

⁴ Pember v. Mathers, Walton v. Hobbs, Hine v. Dodd, *ubi supra*; and Janson v. Rany, 2 Atk. 140; see also *Re Barr's Trust*, 4 K. & J. 219; Dunn v. Graham, 17 Ark. 60; 1 Greenl. Ev. § 260; 1 Phil. Ev. (Cowan & Hill's ed.) 154, 155, and notes referred to; Sturtevant v. Waterbury, 1 Edw. Ch. 442; Columbia Bank v. Black, 2 M'Cord Ch. 344, 350; Smith v. Shane, 1 M'Lean, 27; Clark v. Van Reimsdyk, 9 Cranch, 160; Neilson v. Dickinson, 1 Desaus. 163; Union Bank of Georgetown v. Geary, 5 Peters, 99; Clark v. Hunt, 3 J. J. Marsh. 560; Young v. Hopkins, 6 Monroe, 22; Watson v. Stockett, 6 Harr. & J. 435; Roberts v. Salisbury, 3 Gill & J. 425; McNeil v. Magee, 5 Mason, 244; Pierson v. Catlin, 3 Vt. 272; Dunham v. Jackson, 6 Wend. 72; Turner v. Holman, 5 Monroe, 410; Hutchinson v. Sinclair, 7 Monroe, 294; Drury v. Connor, 6 Harr. & J. 288; Wilkins v. Woodfin, 5 Munf. 183; Love v. Braxton, 5 Call, 527; Vance v. Vance, 5 Monroe, 523; Cunningham v. Freeborn, 3 Paige, 557; Estep v. Watkins, 1 Bland, 488. The answer that denies, may contain the circumstances to corroborate the plaintiff's proof, so as to overcome itself, when taken in connection with that proof. Pierson v. Catlin, 3 Vt. 272; Maury v. Lewis, 10 Yerger, 115; Sayre v. Fredericks, 1 C. E. Green (N. J.), 205. Circumstances alone, in the absence of a positive witness, may be sufficient to overcome the denial of the answer, even of a person who answers on his own knowledge. Long v. White, 5 J. J. Marsh. 238; Robinson v. Stewart, 10 N. Y. 184; Robinson v. Hardin, 26 Geo. 344; Roberts v. Kelly, 2 P. & H. 390; see also Sturtevant v. Waterbury, 1 Edw. 442; Brown v. Brown, 10 Yerger, 84; Dunham v. Gates, 1 Hoff. Ch. 188; Cunningham v. Freeborn, 3 Paige, 554; S. C. on appeal, 11 Wend. 251; Gould v. Williamson, 21 Maine, 276; Preschbaker v. Freeman, 32 Ill. 475.

[The credit due to an answer in Chancery is no greater than that which is due to the deposition of a witness, and, therefore, if that which is in favor of respondent be unreasonable in itself, or be disproved by other wit-

ment, which the defendant denied by his answer, but the agreement was proved by one witness, and there was also evidence to prove the defendant's confession of it, besides other corroborative circumstances, a decree was made.¹ So, where a defendant had denied notice of a previous mortgage, which, however, was proved by a single witness, and it was also proved, by other evidence, that upon an application being made to the defendant on behalf of the previous mortgagee for an account, he observed: "You have no right, for your mortgage is not registered," Lord Redesdale held, that the testimony of the witness, who proved the notice directly, was confirmed by that observation, which showed that the defendant had investigated the subject, and relied on the neglect to register the mortgage.²

Upon the same principle, where a parol agreement, with part-performance, is insisted upon in a bill, and the agreement is denied by the answer, yet, if it is proved by one witness, and supported by circumstances of part-performance, such as delivery of possession, the specific performance of the agreement has been decreed.³ In such cases, however, if the defendant, by his answer, denies the agreement set up by the bill, and his denial is confirmed by circumstances, the Court will not decree a specific performance, although the case made by the bill is corroborated by one witness.⁴ And where a particular agreement by parol, namely, an agreement to grant a lease for three lives, was stated in the bill, and proved by one witness, and confirmed by acts of part-performance, but the answer admitted an agreement for one life only, and was supported by the testimony of one witness, the Court refused to decree for the plaintiff: the evidence of part-performance being equally applicable to either agreement.⁵

Sometimes, the Court gave the defendant an opportunity of trying the case at Law, when the plaintiff's case was supported by
 *848 * the evidence of only one witness and corroborating circumstances;¹ and sometimes the Court directed the answer of the defendant to be read as evidence.² As the practice of directing an

nesses, or be inconsistent with other facts in the cause, it may be rejected, although there may not be two witnesses contradicting the respondent. *Brown v. Brown*, 10 Yerg. 84.]

¹ Only *v. Walker*, 3 Atk. 407, 408.

² *Biddulph v. St. John*, 2 Sch. & Lef. 532.

³ *Morphett v. Jones*, 1 Swanst. 172, 182.

⁴ *Pilling v. Armitage*, 12 Ves. 78, 79; *Money v. Jordan*, 2 De G., M. & G. 318; *S. C. nom. Jordan v. Money*, 5 H. L. Ca. 185; [*Glass v. Hulbert*, 102 Mass. 28.]

⁵ *Lindsay v. Lynch*, 2 Sch. & Lef. 1, 7.

¹ *East India Company v. Donald*, 9 Ves. 275, 283, 284; *Ibbottson v. Rhodes*, 1 Eq. Ca. Ab. 229, pl. 13; 2 Vern. 554; *Pember v. Mathers*, 1 Bro. C. C. 52; *Savage v. Brocksopp*, 18 Ves. 335-337; *post*, "*Trial of Questions of Fact*;" *Lancaster v. Ward*, *Overton*, 430; *Smith v. Betty*, 11 Gratt. (Va.) 752.

² *Ibbottson v. Rhodes*, *ubi sup.* The answer cannot be read unless an order is made to that effect. *Black v. Lamb*, 1 Beasley (N. J.), 108; *Gresley Eq. Ev.* 227; see Rule 33 of the Rules of Practice in Chancery in Massachusetts; *Gamble v. Johnson*, 9 Missou. 605; *Kinsey v. Grimes*, 7 Blackf. 290. [See, as to the effect of the answer, *Richmond v. Richmond*, 10 Yerg. 343.] In *Marston v. Brackett*, 9 N. H. 350, the Court remarked that "the manner of proceeding to the trial of issues from Chancery is under the control of the Court. Orders may be made respecting the admission of testimony, and an order may be made for the examination of one or both of the parties; but this may be refused. If the party, after the evidence has been taken for the hearing, moves for a trial by the jury, we are of opinion the case should be tried there upon the same evidence upon which it would have been tried had it taken

issue, in a case of this description, was intended solely for the satisfaction of the defendant, it was by no means compulsory upon the defendant to take one; and if the defendant declined an issue, the Court itself was bound to give judgment upon the question whether the circumstances outweighed the effect of the rule, so as to authorize a decree against the denial in the answer.

It must be remembered, that the parties to a cause can now be witnesses on their own behalf;³ so that such questions as we have just been considering, are of very rare occurrence, in modern practice.

II. Admissions by agreement between the parties are those which, for the sake of saving expense or preventing delay, the parties, or their solicitors, agree upon between themselves.⁴

With respect to admissions of this description, as they must depend entirely upon the circumstances of each case, little can now be said respecting them beyond drawing to the practitioner's notice the necessity there exists that they should be clear and distinct. In general, they ought to be in writing and signed either by the parties or their solicitors; and the signature of the solicitor employed by the party is considered sufficient to bind his principal; the Court inferring that he had authority for that purpose.⁵ It does not, however, appear to be necessary that an agreement to admit a particular fact should be in writing; and where, at Law, the plaintiff's attorney swore that he had proposed that the defendant should acknowledge a warrant of attorney, so as to enable the deponent, if it should become necessary, to enter up judgment thereon, and that the defendant had accepted his offer, it was considered well proved that the defendant had agreed to acknowledge *the instrument for all purposes, and that the *849 plaintiff was at liberty to act upon the instrument without the necessity of producing the subscribing witness.¹

It is to be remarked, that although the Courts are disposed to give every encouragement to the practice of parties or their solicitors agreeing upon admissions among themselves, they will not sanction an agreement for an admission by which any of the known principles of Law are evaded; and, therefore, where a husband was willing that his wife should be examined as a witness, in an action against him for a malicious prosecution, Lord Hardwicke refused to allow her examination: because it was against the policy of the law to allow a woman to be a witness, either for or against her husband.² Upon the same principle, where the law requires an instrument to be stamped, the

the usual course of cases in Chancery, and been examined by the Court; unless the Court, upon cause shown, make an order permitting further evidence to be introduced. Any other course would lead to great abuse," &c.

³ See 14 & 15 Vic. c. 99, § 2

⁴ *Gresley Eq. Ev.* (Am. ed.) 38 *et seq.*

⁵ *Young v. Wright*, 1 Camp. N. P. 139; *Gainsford v. Gammer*, 2 *id.* 9; *Laing v.*

Kaine, 2 Bos. & P. 85. For form of admission, see Vol. III.

¹ *Marshall v. Cliff*, 4 Camp. N. P. 133; but it may be doubted whether it is not necessary, in Chancery, that all admissions should be in writing, see Ord. III. 11.

² *Barker v. Dixie*, Rep. t. Hardwicke, 264. As to the present law, with regard to husband and wife giving evidence for or against each other, see 16 & 17 Vic. c. 83.

Court will not give effect to an agreement between the solicitors to waive the objection arising from its not being stamped.³

To save expense, it has been recently enacted, that where all the parties to a suit are competent to make admissions, any party may call on any other, by notice, to admit any document, saving all just exceptions.⁴

All written admissions of evidence, whereon any order is founded, must be indorsed by the Registrar,⁵ and be then filed at the Report Office,⁶ and a note thereof made on the order, by the Clerk of Reports.⁷

SECTION II.—*The Onus Probandi.*

Having ascertained what matters are to be considered as admitted between the parties, either by the pleadings or by agreement, the next step is to consider what proofs are to be adduced in support of those points which are not so admitted.⁸

In considering the question of: what matters are to be proved in a cause, the first point to be ascertained is, upon whom the burden of the proof lies? And here it may be laid down, as a general *850 *proposition, that the point in issue is to be proved by the party who asserts the affirmative, according to the maxim of the Civil Law: “*Ei incumbit probatio qui dicit, non qui negat.*”¹ This rule is com-

³ Owen v. Thomas, 3 M. & K. 353, 357; [Nixon v. Albion Mar. Ins. Co., L. R. 2 Ex. 438;] see, however, Orange v. Pickford, and Thompson v. Webster, cited Seton, 16; see also *post*, p. 880, and Chap. XXV., *Hearing Causes*.

⁴ 21 & 22 Vic. c. 27, § 7; see *post*, p. 879.

⁵ Reg. Regul. 15 March, 1860, r. 23. For form of entering admissions, see Seton, 24.

⁶ Ord. I. 44.

⁷ Ord. XXIII. 23.

⁸ The rules of evidence are the same in Courts of Equity as in Courts of Law, Morrison v. Hart, 2 Bibb, 5; Lemaster v. Burkhart, 2 Bibb, 23; Dwight v. Pomeroy, 17 Mass. 303; Reed v. Clark, 4 Monroe, 20; Stevens v. Cooper, 1 John. Ch. 425; Baugh v. Ramsey, 4 Monroe, 137; Eveleth v. Wilson, 15 Mass. 109.

¹ On this subject, see the following works on evidence: 1 Phillips, 552; Taylor, § 337 *et seq.*; Best, § 271; Gresley, 388; Starkie, 586; Powell, 180. This is a rule of convenience, adopted, not because it is impossible to prove a negative, but because a negative does not admit of the direct and simple proof of which the affirmative is capable. 1 Greenl. Ev. § 74; Dranquet v. Prudhomme, 3 La. 83, 86; 1 Phil. Ev. 194-200; 2 Phil. Ev. (Cowen & Hill's notes, ed. 1839) 475 *et seq.*; Phelps v. Hartwell, 1 Mass. 71; Blaney v. Sargeant, 1 Mass. 335; Loring v. Steinman, 1 Met. 204, 211; Phillips v. Ford, 9 Pick. 39. Regard is to be had in this matter to the substance of

the issue rather than to the form of it; for in many cases the party, by making a slight change in his pleading, may give the issue a negative or affirmative form, at his pleasure. 1 Greenl. Ev. § 74. To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions. 1 Greenl. Ev. § 78. One class of these exceptions will be found to include those cases in which the party grounds his right of action upon a negative allegation, and where of course the establishment of this negative is an essential element of his case. 1 Greenl. Ev. § 78; Lane v. Crombie, 12 Pick. 177; Kerr v. Freeman, 33 Miss. 292. So where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it. 1 Greenl. Ev. § 80. There is no difference in respect to the burden of proof, between proceedings at Law and in Equity; in both the party maintaining the affirmative of the issue has it cast upon him. Pusey v. Wright, 31 Penn. St. 387. [Upon the party alleging an alteration in a deed rests the burden of proving the alteration. Putnam v. Clark, 29 N. J. Eq. 412. And upon him who claims under an agreement in writing rests the burden of proving its execution and contents, although lost. Swaine v. Maryott, 28 N. J. Eq. 589. So, upon him, who has signed a joint and several note, rests the burden of proving that he signed

mon as well to Courts of Equity as to Courts of Law : and accordingly, when a defendant insists upon a purchase for a valuable consideration, without notice, the fact of the defendant, or those under whom he claims, having had notice of the plaintiff's title, must be proved by the plaintiff.² So where a *feme covert*, having a separate property, had joined with her husband in a security for money which it was the object of the bill to recover from her (her husband being dead), and the defendant, by her answer, admitted that she had signed the security, but alleged that she had done so, not of her own free-will, but under the influence of her husband, Sir John Leach M. R. held, that it lay upon the wife to repel the effect of her signature, by evidence of undue influence, and not upon the plaintiff to prove a negative.³

In general, it may be taken for granted, that wherever a *primâ facie* right is proved, or admitted by the pleadings, the *onus probandi* is always upon the person calling such right in question.⁴ And here it may be observed, that a Court will always treat a deed or instrument as being the thing which it purports to be, unless the contrary is shown ; and, therefore, it is incumbent upon the party impeaching it, to show that the deed or instrument in question is not what it purports to be ;⁵ thus, where a bond, which was upon the face of it a simple money bond, was impeached as being intended merely as an indemnity bond, it was held, that the burden of proving it to be an indemnity bond, lay on the party * impeaching it.¹ So, if a party claims *851 two legacies under two different instruments, the burden of showing that he is only entitled to one, will lie upon the person attempting to make out that proposition : for the Court will assume that the testator having given the two legacies by different documents, meant to do so, till the contrary is established.²

Indeed, in all cases where the presumption of Law is in favor of a party, it will be incumbent on the other party to disprove it : though in so doing he may have to prove a negative,³ therefore, where the ques-

only as surety. *Coleman v. Norman*, 10 Heisk. 590.] A party in Equity, pleading matter in avoidance, takes upon himself the burden of proof of the matter so pleaded. *Peck v. Hunter*, 7 Ind. 295.

[The party setting up that the consideration of a mortgage arose out of an illegal contract has the burden of proof upon him. *Feldman v. Gamble*, 11 C. E. Green, 494. After fraud is proved, the burden is on the other party, who relies on laches, to show when a knowledge of the truth was acquired. *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221. Those who found a right upon a person having survived a particular period, as the date of the death of a testator, must establish that fact affirmatively by evidence, and this although he may have been heard from only shortly before that period. *In re Phere's Trusts*, L. R. 5 Ch. Ap. 139; *In re Lewes's Trusts*, L. R. 11 Eq. 236. See *Robinson v. Gallier*, 2 Woods, 178, and the very able argument of Mr. Spofford in that

case. See also *Wing v. Augrave*, 8 H. L. Cas. 182; *Newell v. Nichols*, 19 N. Y. Sup. Crt. 604.]

² *Eyre v. Dolphin*, 2 Ball & B. 303; *Saunders v. Leslie*, *ib.* 515; *ante*, p. 698.

³ *Field v. Sowle*, 4 Russ. 112.

⁴ *Banbury Peerage*, 1 S. & S. 153, 155.

⁵ [*Vreeland v. Bramhall*, 1 Stew. Eq. 85.]

¹ *Nicol v. Vaughan*, 6 Bligh, N. R. 104; 1 Cl. & F. 49.

² *Lee v. Pain*, 4 Hare, 216; *Hooley v. Hatton*, 2 Dick. 461. Where two legacies are given to the same legatee, by the same instrument, the presumption is the other way. *ib.* 462.

³ Whenever there is a presumption that a fact exists, he who makes an allegation to the contrary must prove it. *Higdon v. Higdon*, 6 J. J. Marsh. 51. Deeds are presumed to be delivered on the day of their date. An allegation of another day must be proved. *Ibid.*

tion turns on the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party asserting the illegitimacy ought to prove it,⁴ for the presumption of Law is, that a child born of a married woman whose husband is within the four seas, is legitimate, unless there is irresistible evidence against the possibility of sexual intercourse having taken place.⁵

It is important, in this place, to notice, that in cases where it is sought to impeach a will, or other instrument, on the ground of insanity, the rule as to the *onus probandi* is: that "where a party has ever been subject to a commission, or to any restraint permitted by Law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the proof, showing sanity, is thrown upon him."⁶ On the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side:⁷ which is not to be made out by rambling through the whole life of the party, but must be applied to the particular date of the transaction.¹

It has also been held, that where general lunacy has been established, and a party insists upon an act done during a lucid interval, the proof is thrown upon the party alleging the lucid interval; and that, in order to establish such an interval, he must prove not merely a cessation of

⁴ 1 Phil. on Evid. 197; 1 Greenl. Ev. § 81. So where infancy is alleged. *Ibid.* So in case a party once proved to be living is alleged to be dead, the presumption of life not yet being worn out by lapse of time; the burden of proof is on the party making the allegation, notwithstanding its negative character. *Ibid.*

⁵ *Head v. Head*, 1 S. & S. 150; T. & R. 138; see also *Bury v. Phillpot*, 2 M. & K. 349, 352; *Hargrave v. Hargrave*, 9 Beav. 552; 10 Jur. 957; *Plowes v. Bossey*, 2 Dr. & S. 145; 8 Jur. N. S. 352, V. C. K.; *Atchley v. Sprigg*, 10 Jur. N. S. 144, V. C. K. As to other instances of presumptions of law, see the following works on evidence: 1 Phillips, 467 *et seq.*; Taylor, § 61 *et seq.*; Best, § 305 *et seq.*; Gresley, 473; Powell, 47.

⁶ Where one is under guardianship as *non compos*, the presumption is that he is incapable of making a will. *Breed v. Pratt*, 18 Pick. 115. Yet this does not prevent his making a will if his mind is actually sound. *Ibid.*; *Stone v. Damon*, 12 Mass. 488; 2 Greenl. Ev. § 690; *Crowningshield v. Crowningshield*, 2 Gray, 531; see *Stewart v. Lisenard*, 26 Wend. 255. The commission of suicide by the testator is not conclusive evidence of insanity. *Brooks v. Barrett*, 7 Pick. 94; *Duffield v. Robeson*, 2 Harring. 583; see 2 Greenl. Ev. §§ 689, 690.

⁷ See 2 Greenl. Ev. §§ 689, 690; *Phelps v. Hartwell*, 1 Mass. 71; *Hubbard v. Hubbard*, 6 Mass. 397; *Breed v. Pratt*, 18 Pick. 115;

Rogers v. Thomas, 1 B. Monroe, 394; *Morse v. Slason*, 13 Vt. 296; *Jackson v. King*, 4 Cowen, 207; *Stevens v. Van Cleve*, 4 Wash. C. C. 262; *Burton v. Scott*, 3 Rand. 399; *Jackson v. Van Dusen*, 5 John. 144; *Hoge v. Fisher*, 1 Peters C. C. 163; *Pettes v. Bingham*, 10 N. H. 514; *Gerrish v. Mason*, 22 Maine, 438; *Brooks v. Barrett*, 7 Pick. 94, 99; *Commonwealth v. Eddy*, 7 Gray, 583; *Baxter v. Abbott*, 7 Gray, 71. Under the statutes of Massachusetts, it has been held that the burden of proving the sanity of the testator is upon him who offers the will for probate. *Crowningshield v. Crowningshield*, 2 Gray, 524; see *Comstock v. Hadlyme*, 8 Conn. 261. But in the absence of evidence to the contrary, the legal presumption is in favor of the sanity of the testator. *Baxter v. Abbott*, 7 Gray, 71. [The presumption is always in favor of sanity, and insanity cannot be presumed from the mere fact of suicide. *Weed v. Mutual Benefit Life Ins. Co.*, 70 N. Y. 561. See *Anderson v. Cramer*, 11 W. Va. 562; *Mayo v. Jones*, 78 N. C. 402.] If it is alleged that the testator had no knowledge of the contents of the will he has executed, or that he was induced to execute it by misrepresentation, the burden of proof is on those who object to the will. *Pettes v. Bingham*, 10 N. H. 514.

¹ *White v. Wilson*, 13 Ves. 87, 88; and see the *Attorney-General v. Parthorpe*, 3 Bro. C. C. 441, 443; *Jacobs v. Richards*, 18 Beav. 300; 18 Jur. 527.

violent symptoms, but a restoration of mind to the party, sufficient to enable him to judge soundly of the act.²

It may also be stated, generally, that whenever a person obtains by voluntary donation a benefit from another, the *onus probandi* is upon the former, if the transaction be questioned, to prove that the transaction was righteous,³ and that the donor voluntarily and deliberately did the act, knowing its nature and effect. Moreover, where the relation of the parties is such that undue influence might have been used, the *onus probandi*, to show that such influence was not exerted, is upon the person receiving the benefit.⁴

SECTION III. — *Confined to Matters in Issue.*

It is a fundamental maxim, both in this Court and in Courts of Law, that no proof can be admitted of any matter which is not noticed in the pleadings.⁵ This maxim has been adopted, in *order to *853 obviate the great inconvenience to which parties would be exposed, if they were liable to be affected by evidence at the hearing, of the intention to produce which they had received no notice. In a former part of this Treatise, the operation of this rule, in requiring the introduction into a bill of every fact which the plaintiff intends to prove, has been pointed out.¹ It has also been shown, that the same rule applies to answers, and that a defendant who has put in an answer, cannot in strictness avail himself of any matter in his defence which is not

² Hall v. Warren, 9 Ves. 605, 611; Clark v. Fisher, 1 Paige, 171; Halley v. Webster, 21 Maine, 461; Boyd v. Eby, 8 Watts, 66; Jackson v. Van Dusen, 5 John. 144, 159; Goble v. Grant, 2 Green Ch. 629; Whitenach v. Stryker, 1 Green Ch. 8; Duffield v. Roberson, 2 Harring. 375; Harden v. Hays, 9 Barr. 151; Jencks v. Probate Court, 2 R. I. 255. The rule does not apply to a case of insanity caused by violent disease. Hix v. Whittemore, 4 Met. 545; Townshend v. Townshend, 7 Gill, 10.

³ Cooke v. Lamotte, 15 Beav. 234.

⁴ Hoghton v. Hoghton, *ib.* 278; Nottidge v. Prince, 2 Giff. 246; 6 Jur. N. S. 1066; Walker v. Smith, 29 Beav. 394. [See Lyon v. Home, L. R. 6 Eq. 655, where the relation was that of spiritual medium and follower. See, also, where one of the parties labors under some inequality of condition: Kempson v. Ashbee, L. R. 10 Ch. App. 19; Baker v. Bradley, 7 De G. M. & G. 621; Connelly v. Fisher, 3 Tenn. Ch. 382; or there is a fiduciary relation between the parties: Malone v. Kelley, 54 Ala. 532; Leighton v. Orr, 44 Iowa, 679.]

⁵ Whaley v. Norton, 1 Vern. 484; Gordon v. Gordon, 3 Swanst. 472; Clarke v. Turton, 11 Ves. 240; Williams v. Llewellyn, 2 Y. & J. 68; Hall v. Maltby, 6 Pri. 240, 259; Powys v. Mansfield, 6 Sim. 565; Langdon v. God-

dard, 2 Story, 267; James v. McKeinon, 6 John. 543; Lyon v. Tallmadge, 14 John. 501; Barque Chusan, 2 Story, 456; Barrett v. Sergeant, 18 Vt. 365; Pinson v. Williams, 23 Miss. 64; Kidd v. Manley, 28 Miss. 156; Surget v. Byers, 1 Hemp. 745; Craige v. Craige, 6 Fried. Eq. 191; Moores v. Moores, 1 C. E. Green, 275; Chandler v. Herrick, 3 Stockt. 497; Burnham v. Dalling, 3 C. E. Green, 134. Proofs taken in a cause must be pertinent to the issue in that cause, *scilicet* *allegata*. Underhill v. Van Cortlandt, 2 John. Ch. 339; Parsons v. Heston, 3 Stockt. 155. Evidence relative to matters not stated in the pleadings, nor fairly within their general allegations, is impertinent, and cannot be made the foundation of a decree. Vansciver v. Bryan, 2 Bensley, 434; and see the following works on evidence: Taylor, § 239 *et seq.*; Best, § 253 *et seq.*; Gresley, 249; Powell, 220.

[A decree entirely outside of the issue raised in the record is *contra bona fides*, and will be so adjudged, even when assailed in a collateral proceeding. Monday v. Vail, 5 Vroom, 418; Windsor v. McVeigh, 93 U. S. 283; Dillard v. Harris, 2 Tenn. Ch. 196; Mayo v. Harding, 3 Tenn. Ch. 247; Farley v. Tarkington, 5 Bant. 592. See also Marsh v. Mitchell, 11 C. E. Green, 499.]

¹ *Ante*, p. 326.

stated in his answer, although it appears in his evidence.² In certain cases, however, evidence of particular facts may be given under general allegations, and, in such cases, therefore, it is not necessary that the particular facts intended to be proved should be stated in the pleadings.³ The cases in which this exception to the general rule is principally applicable, are those where the character of an individual, or his general behavior, or quality of mind comes in question: as where, for example, it is alleged that a man is *non compos*, particular acts of madness may be given in evidence, and not general evidence only that he is insane.⁴ So, also, where it is alleged that a man is addicted to drinking, and liable to be imposed upon, the evidence should be confined to his being a drunkard, but particular instances may be given.⁵ In like manner, where the charge in a bill was, that the defendant was a lewd woman, evidence of particular acts of incontinence was allowed to be read.⁶ In cases of this nature, however, it is necessary, in order to entitle the party to read evidence of particular facts, that they should point directly to the charge: and therefore, it has been held, that an allegation in a bill, that a wife had misbehaved herself, did not imply that she was an adulteress, and that a deposition to prove her one ought not to be read.⁷ And so, the mere saying that a wife did not behave herself as a virtuous woman, will not entitle her husband to prove that she has committed adultery, unless there is an express charge of the kind:⁸ for the virtue of a woman does not consist merely in her chastity.⁹

The question, how far particular acts of misconduct can be *854 given in evidence under a general charge of misbehavior, appears to have been much discussed before Lord Talbot, in *Wheeler v. Trotter*:¹ which was the case of a bill filed for the specific performance of an agreement to grant a deputation of the office of Registrar of the Consistory Court; and, amongst other defences set up by the defendant's answer, it was alleged that the plaintiff was not entitled to the assistance of the Court because he had not accounted for divers fees which he had received under a deputation authorizing him to execute the office, and had taken several fees which were not due, and concealed several instruments and writings belonging to the office. Upon the defendant's attempting to read proofs as to the misbehavior alleged in such general terms by his answer, it was objected, on the

² *Ante*, p. 711; *Smith v. Clarke*, 12 Ves. 477, 480. From the case of the London and Birmingham Railway Company v. Winter, C. & P. 57, 62, it seems, that a fact brought to the attention of the Court by the evidence, but not stated upon the answer, will, under some circumstances, afford a ground for inquiry, before a final decree.

³ *Moore v. Moore*, 1 C. E. Green (N. J.), 275; *Hewett v. Adams*, 50 Maine, 271, 276; *Gresley Eq. Ev.* 161 *et seq.*; *Story Eq. Pl.* §§ 28, 252. [See where the party has had no opportunity of answering as to the particular

fact. *Weston v. Empire Assurance Co.*, L. R. 6 Eq. 23.]

⁴ *Clarke v. Periam*, 2 Atk. 333, 340.

⁵ *Ibid.*

⁶ *Clarke v. Periam*, *ubi sup.*; and the cases there cited.

⁷ *Ibid.*; *Sidney v. Sidney*, 3 P. Wms. 269, 276; 1 C. P. Coop. t. Cott. 514, n.

⁸ *Lord Donerail v. Lady Donerail*, cited 2 Atk. 338.

⁹ *Per Lord Hardwicke*, in 2 Atk. 339.

¹ 3 Swanst. 174, n.

part of the plaintiff, that the charges were too general, as the plaintiff could not tell what proof to make against them, unless he examined every particular fee he had received, and also every instrument that had come to his hands; and that the defendant should have pointed out the particular facts in his answer, so that the plaintiff might be enabled to know how to clear himself by his proof; and the case was assimilated to that of an action at Common Law for a breach of covenant to repair, where, if the defendant pleads that he left the premises in repair, the plaintiff must, in his replication, show particularly what part is out of repair; and to an indictment for barratry, which may be general, yet the prosecutor is always obliged to give the defendant a list, upon oath, of the particular matters that are intended to be proved: but the Lord Chancellor held, that although the matters intended to be proved might have been more precisely put in issue, by enumerating the particular facts, yet, as they were not intended to charge the plaintiff with any particular sums received more than were accounted for, but to show a general misbehavior of the plaintiff in his office, so that a Court of Equity should not help him, he thought that, for this purpose, they were sufficiently put in issue.

The cases in which evidence of particular facts may be given under a general allegation or charge, are not confined to cases in which the character, or quality of mind, or general behavior of a party comes in issue. The same thing may be done, where the question of notice is raised in the pleadings by a general allegation or charge. Thus, where the defence was a purchase for a valuable consideration, without notice of a particular deed, but, in order to meet that case by anticipation, the bill had suggested that the defendant pretended that she was a purchaser for a valuable consideration, without notice, and simply charged the contrary: * the deposition of a witness, who proved *855 a conversation to have taken place between himself and a third person, who was the solicitor of the defendant, and the consequent production of the deed, was allowed to be read as evidence of notice.¹ In such a case, the question whether the party has notice or not, is a fact, which should be put in issue, but the mode in which it is to be proved need not be put upon the record: for the rule that no evidence will be admitted, in support of any facts but those which are mentioned in the pleadings, requires that the facts only intended to be proved should be put in issue, and not the materials of which the proof of those facts is to consist.² Thus, in a case of pedigree, if Robert Stiles is alleged to be the son of John Stiles, that fact may be proved in any mode which the rules of evidence will allow, and it is not necessary to state that mode upon the record.

It is upon this principle that documentary evidence, or letters them-

¹ Hughes v. Garner, 2 Y. & C. Ex. 328, 335.

² Blacker v. Phepar, 1 Moll. 354; see Story Eq. Pl. §§ 23, 252, 263, 265, &c.

selves, are not specifically put in issue.³ Indeed, a party may prove his case by written or parol evidence, indifferently, and is under no more restrictions in one case than in another. It is not necessary to put every written document in issue;⁴ thus, where a bill charges an agreement for the purpose of establishing a lien, the general rule has been laid down that whatever would be evidence of the agreement at Law is evidence in Equity; subject to this: that if one party should keep back evidence which the other might explain, and thereby take him by surprise, the Court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it.⁵

Although letters and writings in the hands of a party may be proved and used as evidence of facts, yet, if they are intended to be used as admissions or confessions of facts by the opposite party, they ought to be mentioned in the pleadings,⁶ in order that the party against whom they are intended to be read, may have an opportunity to meet them by evidence or explanation.⁷ In *M'Mahon v. Burchell*,⁸ however, Lord Cottenham allowed certain letters to be used as evidence of admissions, though not mentioned in the pleadings: observing, that "he could not go the length of saying that evidence of an admission was not admissible, merely because it was not put in issue."

This principle is not confined to writings, but applies to every *856 * case where the admission or confession of a party is to be made use of against him; thus, it has been held, that evidence of a confession by a party that he was guilty of a fraud, could not be read: because it was not distinctly put in issue.¹ So, also, evidence of alleged conversations between a witness and a party to the suit, in which such party admitted that he had defrauded the other, was rejected: because such alleged conversations had not been noticed in the pleadings.² "No man," observes Sir Anthony Hart, "would be safe, if he could be affected by such evidence. Lord Talbot said, long ago, that if you are to oust a defendant for fraud alleged against him, and the fraud is proved by the acknowledgment of the defendant that he had no right to the matter in litigation, the plaintiff must charge that, on the record, to give him the opportunity to deny or explain and avoid it."³

³ *Ibid.*

⁴ Per Sir Anthony Hart, in *Fitzgerald v. O'Flaherty*, 1 Moll. 350; see also *Lord Cranshaw v. Johnston*, 3 Ves. 170, 176; *Dey v. Dunham*, 2 John. Ch. 188; *Pardee v. De Cola*, 7 Paige, 132; *Kellogg v. Wood*, 6 Paige, 578.

⁵ *Malcolm v. Scott*, 3 Hare, 63; *S. C. nom Scott v. Malcolm*, 8 Jur. 1059.

⁶ *Houlditch v. Marquis of Donegal*, 1 Moll. 364; *Whitley v. Martin*, 3 Beav. 226.

⁷ *Blacker v. Phepoe*, *ubi sup.*

⁸ 2 Phil. 127, 133; 1 C. P. Coop. t. Cott. 475.

¹ *Hall v. Maltby*, 6 Pri. 240; *Mulholland v. Hendrick*, 1 Moll. 359.

² *Farrell v. —*, 1 Moll. 363; *M'Mahon v. Burchell*, 2 Phil. 127; 1 C. P. Coop. t.

Cott. 475; *Langley v. Fisher*, 9 Beav. 90, 101; *Graham v. Oliver*, 3 Beav. 124, 129. But it has been held in the United States by Mr. Justice Story, upon full consideration, that the confessions, conversations, and admissions of the defendant need not be expressly charged in a bill in Equity, in order to enable the plaintiff to use them in proof of facts charged, and in issue therein. *Smith v. Burnham*, 2 Sumner, 612; *Jenkins v. Eldredge*, 3 Story, 183, 283, 284; see *Story Eq. Pl.* § 265, *α*, and note; *Brown v. Chambers*, *Hayes Exch.* 597; *Malcolm v. Scott*, 3 Hare, 39, 63; *Brandon v. Cabiness*, 10 Ala. 155; *Bishop v. Bishop*, 13 Ala. 475; *Camden & Amboy R. R. Co. v. Stewart*, 4 C. E. Green (N. J.), 343, 346, 347.

³ *Farrell v. —*, *ubi sup.*

It is only when conversations are to be used as admissions, that the rule which requires them to be stated on the record applies. Where the conversation is in itself the evidence of the fact, it need not be specially alluded to: as in the case of *Hughes v. Garner*,³ where the notice was communicated to the defendant by a conversation, which was made use of to prove the fact of the conversation having taken place, and not as an admission by the party that he had received notice.

Another rule of evidence, which may be noticed in this place, is, that the substance of the case made by the pleadings must be proved; that is, all the facts alleged upon the pleadings which are necessary to the case of the party alleging them, and which are not the subject of admissions, either in the pleadings or by agreement, must be established by evidence.⁵ In the case of a plaintiff, however, it is sufficient to prove so much only of the allegations in the bill as are necessary to entitle him to a decree.⁶ Thus, * where the suit is for an ac- *857 count, all the evidence necessary to be read at the hearing is that which proves the defendant to be an accounting party, and then the decree to account follows of course; and any evidence as to the particular items of an account, however useful they may be in a subsequent stage of the cause, would be irrelevant at the original hearing.¹ For this reason, where the suit is against an administrator, or an executor, all that it is necessary to prove, on the part of the plaintiff, is, that the defendant fills and has acted in that character. This point was much discussed before Lord Gifford M. R. in *Law v. Hunter*.² There

⁴ 2 Y. & C. Ex. 328, 335; *Graham v. Oliver ubi sup.*

⁵ See the following works on evidence: Taylor, § 173 *et seq.*; Best, § 280 *et seq.*; Powell, 185 *et seq.*; 1 Phil. Ev. (Cowan & Hill's ed. 1839) 200 *et seq.* and notes; 1 Greenl. Ev. § 56 *et seq.*; *Gresley Eq. Ev.* (Am. ed.) 167 *et seq.* The rule at Law, that the evidence must substantially support the plaintiff's declaration, is applicable to bills in Chancery. *Moffet v. Claberts*, 1 Scam. 384; *Mansy v. Mason*, 8 Porter, 111; *Shelby v. Shelby*, 1 B. Mon. 278; *Thompson v. Thompson*, 2 B. Mon. 174; *Beers v. Botstord*, 13 Conn. 146; *Simplot v. Simplot*, 14 Iowa (6 With.), 449; *Chaffin v. Kimball*, 23 Ill. 36.

⁶ See, however, *Edney v. Jewell*, 6 Mad. 165, where an unnecessary statement was required to be proved. *Gresley Eq. Ev.* (Am. ed.) 167-169, 172.

¹ *Gresley Eq. Ev.* 168; *Dubourg De St. Colombe v. United States*, 7 Peters, 625, 626; *Hudson v. Trenton, &c. Manuf. Co.*, 1 C. E. Green (N. J.), 475; *Lockett v. Lockett*, L. R. 4 Ch. Ap. 336. The Court should be satisfied that the plaintiff is entitled to have an account taken. If the Court is satisfied upon that point the practice is to refer the case to a Master to state the details of the account, and ascertain the balance. But the Chancellor may, if he sees fit, take the account himself. He not only may, however, but ought to refuse an account, if he is satisfied upon

the evidence that nothing is due the plaintiff, or that for any cause an account ought not to be decreed. *Campbell v. Campbell*, 4 Halst. Ch. (N. J.) 743; see *Wright v. McKean*, 2 Beasley (N. J.), 259. Where the evidence has been taken on both sides before the hearing, without objection, it may be used by the Court, so far as may be necessary, in giving directions to the Master, as to the manner of taking the account, and the principles by which he should be governed in taking it. The decree must direct to what matters the account shall extend, and in decreeing a general account, special directions will be considered proper and necessary by the particular circumstances of the case. *Hudson v. Trenton, &c. Manuf. Co.*, 1 C. E. Green (N. J.), 475, 477, 478; *Izard v. Bodine*, 1 Stockt. (N. J.), 311; *Sharp v. Morrow*, 6 Monroe, 300; *Rensen v. Rensen*, 2 John. Ch. 501.

[An account should not be ordered until there has been a decree adjudicating the rights of the parties. *Carey v. Williams*, 1 Lea, 51; S. C. 2 Tenn. Leg. Rep. 192; *Patton v. Cone*, 1 Lea, 14; S. C. 2 Tenn. Leg. Rep. 171. And the Court has no authority, without such decree, except by consent of parties, to order an account. *Smith v. Earl of Pomfret*, 2 Dick. 437; *McLean v. McNamara*, 1 D. & B. Eq. 499; *Tumble v. Dodd*, 2 Tenn. 500; *Wessells v. Wessells*, 1 Tenn. Ch. 58.]

² 1 Russ. 100, 102.

the defendant, who had principally acted as executor of the testator, admitted that he had received personal estate of the testator to the amount of from 35,000*l.* to 45,000*l.*: and the plaintiff, having gone into very voluminous evidence to show how much of the personal estate of the testator had come into the defendant's hands, in order to prove that he had received assets to a much larger amount than that admitted by the answer, proposed to enter such evidence as read; but the Master of the Rolls would not permit it to be done, as the only tendency of such evidence was to show the state of the account, which the Court itself could not inquire into, but must refer to the Master, as the proper person for taking the account.³ The same principle was afterwards acted upon, by the same learned Judge, in *Walker v. Woodward*,⁴ where, upon a bill for an account, the liability to account having been admitted by the defendant, he had entered into evidence to prove items of his discharge, but was not suffered to read them at the hearing.

Where, however, through inadvertence or negligence, the plaintiff has omitted to prove some particular fact which is necessary to support his case, the Court sometimes will permit him to supply the defect, by giving him leave to prove the fact omitted.¹ This is frequently done in the case of wills disposing of real estate,² where either the plaintiff has relied upon an admission of the will by answer, which the Court thinks not sufficiently full,³ or where the absence or death of one of the witnesses to the will,⁴ or the testator's sanity,⁵ has not been proved.⁶ The practice of the Court, in this respect, is not confined to cases of wills: a cause has been ordered to stand over, for the purpose of allowing proof of the due execution of a deed, or the death of a party,⁷ or the fact of trading;⁸ and we have before seen,⁹ that where the plaintiff has omitted to give due proof at the hearing of the fact of the defendant being out of the jurisdiction, he has been allowed to prove it. So, where the plaintiff had relied upon the admission of facts by the answers, and it was held that, some of the defendants being married women, the admissions in their answers would not bind them, the Court of Exchequer allowed the cause to stand over, with liberty to the plaintiff to supply the requisite proof.¹⁰ And where

³ *Hudson v. Trenton, &c. Manuf. Co.*, 1 C. E. Green (N. J.), 475, 477.

⁴ 1 Russ. 107, 110; *Smith v. Chambers*, 2 Phil. 221, 226; S. C. *nom.* *Chambers v. Smith*, 11 Jur. 359; see, however, the observations of Sir J. Wigram V. C. in *Tomlin v. Tomlin*, 1 Hare, 241, 245; and see *ib.* 241, n.: see also *Forsyth v. Ellice*, 2 M'N. & G. 209, 214; [*Waters v. Earl of Shaftesbury*, 14 W. R. 259. And in administration suits, *Foster v. Foster*, L. R. 3 Ch. Ap. 330. And production of probate will sustain allegation of proof of will. *Dyson v. Morris*, 1 Hare, 413.]

¹ See Seton, 1118.

² *Lechmere v. Braiser*, 2 J. & W. 288; *Chichester v. Chichester*, 24 Beav. 239.

³ *Potter v. Potter*, 1 Ves. S. 274; *Belt's*

Sup. 147; and see *Hood v. Pimm*, 4 Sim. 101, 110.

⁴ *Wood v. Stane*, 8 Fri. 613.

⁵ *Abrams v. Winshup*, 1 Russ. 526; *Wallis v. Hodgson*, 6. 527, n.; 2 Atk. 56.

⁶ See *Gresley Eq. Ev.* (Am. ed.) 132-138, where many instances are given of relief in cases of defects or omissions, whether they are brought to light and become material in consequence of something which arises unexpectedly in the course of the proceedings, or were caused by accident or inadvertence.

⁷ *Moons v. De Bernales*, 1 Russ. 301.

⁸ *Lechmere v. Brasier*, *ubi sup.*

⁹ *Ante*, p. 152; *Hughes v. Eades*, 1 Hare, 486, 488; 6 Jur. 455.

¹⁰ *Hodgson v. Merest*, 9 Pri. 563.

the evidence read at the hearing, to prove the loss of a deed, was held not sufficiently strong to entitle the party to read secondary evidence of its contents, Sir Thomas Plumer M. R. gave the plaintiff leave to prove the loss of the deed more strictly.¹¹

In general, orders of this nature are made upon a simple application by counsel at the hearing of the cause; the application may, however, be made before the hearing:¹² in which case it was formerly made on motion;¹³ or by petition;¹⁴ and, it is presumed, may now be made, either by motion,¹² or by summons in Chambers.¹⁵ Formerly, when the evidence in causes was taken on interrogatories, the plaintiff was permitted to exhibit an interrogatory to prove the fact desired; now, he is permitted to prove it, either *viva voce*, or by affidavit.¹⁶

In *Edney v. Jewell*,¹⁷ the Court, instead of directing an interrogatory to be exhibited to prove the fact omitted, directed an inquiry into the fact: and it seems that, in some cases, the deficiency of proof against infants may be supplied in the same manner.¹ It is not, however, the practice to direct inquiries as to any facts which are the foundation of the relief; such as the execution of a will, or the fact of trading.² The course, in such case, is to order the cause to stand over, and direct the proofs to be supplied: in which case, the cause must be again set down.³ In *Miller v. Priddon*,⁴ however, where the plaintiffs claimed to be the children of a certain marriage, but did not prove that they were so, an inquiry was directed.

In some cases, the Court, instead of ordering the cause to stand over for the purpose of supplying the deficient evidence, will make a decree as to all that part of the case which is in a situation to be decided upon, and give liberty to prove the rest. This has been frequently done in the case of a will, where, although it was not sufficiently proved to affect the real estate, the Court has decreed an account of the personal estate, with liberty to supply the deficiency of proof.⁵ In *Martin v. Whichelo*,⁶ Lord Cottenham, in reference to the cases on this subject, said: "It is impossible to reconcile the cases, or to extract any principle upon which any fixed rule can be founded. The Court has exercised a wide discretion in giving or refusing leave to supply the defect

¹¹ *Cox v. Allingham*, Jac. 337, 341, 345.

¹² *Douglas v. Archbutt*, 23 Beav. 293.

¹³ *Attorney-General v. Thurnall*, 2 Cox, 2.

¹⁴ *Cox v. Allingham*, *ubi sup.*

¹⁵ See 15 & 16 Vic. c. 80, § 26; 15 & 16 Vic. c. 86, § 38. For forms of notice of motion and summons, see Vol. III.

¹⁶ See 13 & 14 Vic. c. 35, § 28; 15 & 16 Vic. c. 86, §§ 38-41; Ord. XIX.; Ord. 5 Feb., 1861. In *Smith v. Blackman*, cited Seton, 1117, the Court would not allow the testator's will to be proved at the hearing by affidavit; but gave leave to exhibit an interrogatory for that purpose.

¹⁷ 6 Mad. 165.

¹ See *Quantock v. Bullen*, 5 Mad. 81, 82;

Gascoyne v. Lamb, 11 Jur. 902, V. C. K. B.

² *Lechmere v. Brasier*, 2 J. & W. 289; *Holden v. Hearn*, 1 Beav. 445, 456; *Chapman v. Chapman*, 13 Beav. 308. [See *Weston v. Empire Assurance Co.*, L. R. 6 Eq. 23, where an inquiry, whether the defendant had or had not notice of a charge, was directed.]

³ *Lechmere v. Brasier*, *ubi sup.*

⁴ 1 M. & G. 687; and see observations of Lord Truro in *Fowler v. Reynald*, 3 M. & G. 500, 511; 15 Jur. 1019, 1021.

⁵ *Lechmere v. Brasier*, 2 J. & W. 289; *Rositer v. Pitt*, 2 Mad. 165.

⁶ C. & P. 257, 261; see also *Simmons v. Simmons*, 6 Hare, 360; 12 Jur. 8, 11; *Williams v. Knipe*, 5 Beav. 273, 276.

of evidence : in doing which, the merits of the case, upon the plaintiff's own showing, ought to have a leading influence." The last-mentioned case was a creditor's suit, where the plaintiff had taken the bill *pro confesso* against one of the defendants, who was the executor, but had adduced no evidence of his debt as against the other defendants, who were the devisees of the testator's real estate, and who did not sufficiently admit the debt; and his Lordship refused to allow the plaintiff an opportunity of going into new evidence against the devisees, and dismissed the bill with costs against them: as the plaintiff, on her own statement, appeared to be a simple contract creditor, suing the devisees of the real estate more than six years after the debt accrued: although the personal representative had received ample assets, and a judgment *de bonis testatoris, et, si non de bonis propriis*, had been obtained against him. In *Davies v. Davies*,⁷ Sir J. L. Knight Bruce

V. C. allowed evidence of the due execution of a will to be supplied; but thought that the defendants were entitled to have * the evidence supplied in whatever manner they might elect; and, in accordance with their desire, directed the plaintiffs to bring an action of ejectment.¹

SECTION IV. — *Of the Effect of a Variance.*

It is not only necessary that the substance of the case made by each party should be proved, but it must be substantially the same case as that which he has stated upon the record:² for the Court will not allow a party to be taken by surprise, by the other side proving a case different from that set up in the pleadings.³ Thus, the specific performance of an agreement, to grant a lease for three lives, cannot be decreed upon what amounts to evidence of an agreement to grant only for one life.⁴ The principles which guide the Court, in matters of this descrip-

⁷ 3 De G. & S. 698.

¹ See Seton, 1117, where the cases on the subject of supplying defective evidence are collected.

² *Gresley Eq. Ev.* 170-173; 1 *Greenl. Ev.* § 63 *et seq.*; *Hobart v. Andrews*, 21 Pick. 526, 534; *Bellows v. Stone*, 14 N. H. 175; *Crothers v. Lee*, 29 Ala. 337; *Bowman v. O'Reilly*, 31 Miss. 261; *Reynolds v. Morris*, 7 Ohio (N. S.), 310; *Williams v. Starr*, 5 Wis. 534; *Gurney v. Ford*, 2 Allen, 576; *Andrews v. Farnham*, 2 Stockt. 91; *McWhorter v. McMahan*, 10 Paige, 386; *Sears v. Barnum*, 1 Clark, 139; *Simplot v. Simplot*, 14 Iowa, 449; *Feckham v. Buffum*, 11 Mich. 529; *Holman v. Vallejo*, 19 Cal. 493; *Singleton v. Scott*, 11 Iowa, 589; *Ohling v. Luitjens*, 32 Ill. 23.

[The rule applies as well to the defendant as the plaintiff. *Mead v. Coombs*, 11 C. E. Green, 173. Although a rigid and technical construction of bills and proceedings in Equity is exploded in favor of substance, yet a party will not be allowed to recover upon a

case proved, essentially different from that alleged in the bill. *Baughner v. Eichelberger*, 11 W. Va. 217; *Pasman v. Montague*, 3 Stew. Eq. 385.]

³ As to variance generally, see the following works on evidence: 1 Phillips, 569 *et seq.*; Taylor, § 172 *et seq.*; Best, § 287; *Gresley*, 242; *Powell*, 193.

[Where the bill sought to establish a trust by virtue of an express agreement, and the evidence was of a purely resulting trust in an entirely different person, and at a different time, the variance was held fatal, and the Court refused, under the circumstances, to allow an amendment. *Midmer v. Midmer*, 11 C. E. Green, 299, affirmed 12 C. E. Green, 548.]

⁴ *Lindsay v. Lynch*, 2 Sch. & Lef. 1; see also *Mortimer v. Orchard*, 2 Ves. J. 243; *Legh v. Haverfield*, 5 Ves. 453, 457; *Wooliam v. Hearn*, 7 Ves. 211; *Deniston v. Little*, 2 Sch. & Lef. 11, n.; *Savage v. Carroll*, 2 Ball & B. 451; *Daniels v. Davison*, 16 Ves. 249, 256; *Story Eq. Pl.* § 394, n.; *Harris v. Knickerbocker*, 5 Wend. 638.

tion, are clearly stated by Lord Redesdale, in his judgment in *Denison v. Little*,⁵ where his Lordship observes, that the general practice of the Court is to compel parties, who come for the execution of agreements, to state them as they ought to be stated, and not to set up titles which, when the cause comes to a hearing, they cannot support.

We have seen, in a former part of this Treatise, that, in bills where the rights asserted are founded on prescription, a considerable degree of certainty is required in setting out the plaintiff's case; to which may be added, that, in general, the proof must correspond in certainty with the case so set out.⁷ Thus, the Court of Exchequer, in deciding upon title questions, was in the habit of requiring that the proof of a *modus* should correspond with the *modus* as laid in the bill.⁸ And so in other cases, where particular customs are prescribed for, the evidence is, *in general, required to be in conformity with the *861 statement in the pleadings. In *The Dean and Chapter of Ely v. Warren*,¹ however, Lord Hardwicke said, that the Court of Chancery would not put persons to set forth a custom with so much exactness as is requisite at Law, or with so much nicety as the Court of Exchequer expects.

We have seen before that, in some cases, where a plaintiff has alleged a different agreement, in his bill, from that which has been admitted by the answer, the Court has permitted the plaintiff to amend his bill, by abandoning the first agreement and insisting upon that stated upon the answer;² and when the defendant sets up a parol variation from the written contract, it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to specific performance, or whether the Court will perform the contract: taking care that the subject-matter of this parol agreement or understanding is carried into effect, so that all parties may have the benefit of what they contracted for.³ When, however, there is a material variance in a written agreement, it is the ordinary practice to dismiss the bill with costs, without prejudice to the plaintiff's bringing a new bill.⁴ In *Mortimer v. Orchard*,⁵ however, where the plaintiff had prayed the specific performance of an agreement stated in the bill, but proved a parol agreement

⁵ 2 Sch. & Lef. 11, n.

⁶ *Ante*, p. 369.

⁷ 1 Greenl. Ev. §§ 71, 72. [*Ante*, 361, n. 1.]

⁸ *Scott v. Fenwick*, 3 Eagle & Y. 1318; *Uthoff v. Lord Huntingfield*, 2 *ib.* 649; cited 1 Pri. 237; *Prevost v. Benett*, 3 Eagle & Y. 705; 1 Pri. 236; *Blake v. Veysie*, 3 Dow. 189; 2 Eagle & Y. 699; *Miller v. Jackson*, 1 Y. & J. 65.

¹ 2 Atk. 190.

² *Ante*, p. 408; *Bellows v. Stone*, 14 N. H. 175; such amendment may be allowed even after a hearing upon bill, answer, and evidence. *Ibid.*

³ *London and Birmingham Railway Company v. Winter*, C. & P. 62; and see *Benson*

v. Glastonbury Canal Company, 1 C. P. Coop. t. Cott. 350; C. P. Coop. 42.

⁴ *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Woolam v. Hearne*, 7 Ves. 211, 222; *Denison v. Little*, 2 Sch. & Lef. 11, n.

⁵ 2 Ves. J. 243; see *Story Eq. Pl.* § 464 and note. [Relief may be granted upon the statements made by the answer, although the case made by the bill is different and not sustained by the proof. *Rose v. Mynatt*, 7 Yerg. 30; *Bailey v. Bailey*, 8 Humph. 230. But the whole answer must be taken together, the matter of discharge as well as the matter of charge. *Neal v. Robinson*, 8 Humph. 435; *Mulloy v. Young*, 10 Humph. 298. *Ante*, 361, n. 1.]

which was quite different, Lord Rosslyn, although he thought the bill ought to be dismissed, yet, as there had been a partial execution of some agreement between the parties, by the building of a house, directed a reference to the Master, to settle a lease pursuant to the agreement confessed in the answer.

The rules which have just been discussed, relate to the general aim or tendency of the proof to be adduced. There are other rules relating to the medium of proof, independently of its tendency, which might properly be introduced in this place, such as the General Rules: that the best evidence which the nature of the case admits, ought to be produced, and that hearsay of a fact is not admissible; but a discussion of these rules would extend this Treatise beyond all reasonable limits. The reader is, therefore, referred to the Treatises on the Law of Evidence;⁶ and it is to be observed, that what he will find to be *862 laid down in any of those *Treatises to the rule of evidence in Courts of Law, will generally be applicable to cases in Courts of Equity.¹

SECTION V. — *Documentary Evidence which proves itself.*

Having endeavored to direct the practitioner's attention to the matters which it will be necessary for him to prove in the cause, the next thing to be considered is the evidence by which such matters are to be substantiated. This evidence may be either: I. Documentary; or, II. The testimony of witnesses.

Documentary evidence consists of all those matters which are submitted to the Court in the shape of written documents. It is not, of course, intended to include in this definition the depositions of witnesses examined in the cause: for although, by the practice of Courts of Equity, the evidence to be derived from the parol examination of witnesses is set down in writing, and brought before the Court in that form, yet this does not vary the nature of the evidence itself: which, being spoken by the witness *vivâ voce* to the person by whom he was examined, does not, from the circumstance of its being committed to writing, for more convenient use before the Judge, lose its parol character. Neither is it intended to include evidence by affidavit: which

⁶ As to BEST EVIDENCE: see 1 Phillips, Chap. IX.: Taylor, §§ 363-397; Best, §§ 87-107; Gresley, 247. As to HEARSAY: see 1 Phillips, Chap. VIII.; Taylor, §§ 507-542; Best, § 497; Hubback, 648-711; Gresley, 304-325; Powell, 84-93. [Parol evidence is admissible to establish the terms of a sale, although a memorandum of sale has been given. *Perrine v. Cooley*, 39 N. J. L. 449. So, although a deed may have been delivered and accepted. *Trayer v. Ruder*, 45 Iowa, 272. And see, as to proof of a lost judgment-roll, *Mandeville v. Reynolds*, 68 N. Y. 528; *Beveridge v. Chetlain*, 1 Ill. App. 231. Parol

testimony which tends to confirm a written contract is not objectionable: *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 255; or to ascertain the person intended to be benefited by a written guaranty: *Hodges v. Bowen*, 83 Ill. 161; or trust: *Railroad Co. v. Durant*, 95 U. S. 576.]

¹ *Manning v. Lechmere*, 1 Atk. 453; *Glynn v. Bank of England*, 2 Ves. S. 41; *Morrison v. Hart*, 2 Bibb, 5; *Lemaster v. Burckhart*, 2 Bibb, 28; *Dwight v. Pomeroy*, 17 Mass. 303; 1 Greenl. Ev. § 98 *et seq.*; *Gresley Eq. Ev.* (Am. ed.) 218 *et seq.*

is now the most usual form in which the evidence of the witnesses is adduced. Such evidence is, in fact, a simple and easier mode by which the parol evidence of witnesses is communicated to the Court.

Some descriptions of documentary evidence are admitted by the Court, without the necessity of any proof being gone into to establish their validity; whilst others require the support of parol testimony, before they can be received. It is proposed, in this section, to consider documentary evidence of the first description; and, in the next section, to treat of documents which require parol proof.

All copies of public or private Acts of Parliament, purporting to be printed by the Queen's printer, and all copies of the journals of Parliament, and of Royal proclamations, purporting to be printed by the Queen's printer, or by the printers of either House of Parliament, are admitted as evidence thereof.² And it is to be observed, *that *863 copies of the statutes of Great Britain and of Ireland respectively, before the Union, are received as conclusive evidence of the several statutes, in the Courts of either kingdom.¹

Exemplified copies of records in other Courts of Justice under the Great Seal of Great Britain, or under the Seals of the Courts themselves,² and the seal of the Queen, and of the superior Courts of Justice, and of the Courts established here by Act of Parliament, are admitted in evidence, without extrinsic proof of their genuineness.³

In like manner, all proclamations, treaties, and other acts of State,

² 8 & 9 Vic. c. 113, § 3; 13 & 14 Vic. c. 21, § 7; Taylor on Evid. §§ 1368, 1371, 1372; 2 Phil. on Evid. 135, 194. Private Acts of Parliament, not printed by the Queen's printer, are proved by an examined copy, compared with the original in the Parliament Office at Westminster. Taylor, § 1368; Hubback, 613; see 1 Greenl. Ev. §§ 479, 482.

¹ 41 Geo. III. c. 90, § 9; 1 Greenl. Ev. § 480; Young v. Bank of Alexandria, 4 Cranch, 388; Biddis v. James, 6 Binney, 321, 326; Gresley Eq. Ev. (Am. ed.) 302-305; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 317 *et seq.* It is not the duty of Courts to take judicial notice of the execution of a public statute. Canal Company v. Railroad Company, 4 Gill & J. 7; see 1 Greenl. Ev. § 481. In Massachusetts, the printed copies of all statutes, acts, and resolves of the Commonwealth, whether of a public or a private nature, which shall be published under the authority of the government, shall be admitted as sufficient evidence thereof, in all Courts of Law, and on all occasions whatever. Genl. Sts. c. 131, § 62.

As to the proof of foreign laws, of the laws of sister States, of the laws of Congress in the State Courts, and of the laws of the States in the Courts of the United States, see 1 Greenl. Ev. §§ 486, 487, 488, 489, 490. [The Act of Congress prescribing the mode in which public acts, records, &c., shall be authenticated as evidence, does not relate to

the admissibility of such acts, records, &c., of a State in its own Courts, or in the Courts of the United States sitting in that State. Town of South Ottawa v. Perkins, 94 U. S. 260.] In Massachusetts, printed copies of the Statute Laws of any other State, and of the United States, or of the territories thereof, if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their Courts, shall be admitted in all Courts of Law, and on all other occasions, in that State, as *prima facie* evidence of such laws. Genl. Sts. c. 131, § 63. For the mode of authenticating the records and judicial proceedings of one State to be used in the Courts of other States, see 1 Greenl. Ev. §§ 504-506.

² See 1 Greenl. Ev. § 501. [Levisay v. Delp, 1 Tenn. Leg. Rep. 275.]

³ 2 Phil. on Evid. 197; Taylor, §§ 409, 1378, 1 Greenl. Ev. § 503. As to the proof, of British treaties, charters, letters-patent, grants from the Crown, pardons, and commissions, see Taylor, § 1374; of the general records of the realm, in the custody of the Master of the Rolls, see 1 & 2 Vic. c. 94, §§ 12, 13; Taylor, § 1377; and of documents belonging to the Common Law side of the Court of Chancery, see 12 & 13 Vic. c. 109, §§ 11, 13; Taylor, § 1385. [See Documentary Evidence Act of 1868, 31 & 32 Vic. c. 37.]

of any Foreign State, or of any British colony: and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any Foreign State, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited, in any such Court: may be proved by examined or authenticated copies: that is to say, in the case of a proclamation, treaty, or other act of State, the authenticated copy must purport to be sealed with the seal of the Foreign State or British colony to which the original document belongs; but if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any Foreign or Colonial Court, or an affidavit, pleading, or other leading document, filed or deposited in any such Court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the Foreign or Colonial Court, to which the original document belongs, or, in the event of such Court having no seal, to be signed by the Judge, or if there be more than one

Judge, by any one of the Judges; and the Judge must attach to *864 his signature a statement in writing on the said *copy, "that the Court whereof he is a Judge, has no seal." And where the authenticated copies purport to be sealed or signed as above mentioned, the same are to be admitted as evidence, in every case in which the original document could have been received in evidence, without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.¹

It may be observed here, that questions of Foreign Law are questions of fact, which must be determined, in each case, on the evidence adduced in it: and for this purpose, a decision on a former case, or the evidence then made use of, is not available.²

¹ 14 & 15 Vic. c. 99, § 7; Taylor, §§ 1372, 1398; see 1 Greenl. Ev. § 514. If the foreign document sought to be proved by a copy does not fall within the language of section 7, evidence must be given that it is a public writing, deposited in some registry or place, whence, by the law, or the established usage of the country, it cannot be removed; and the copy must then be shown to have been duly examined. Taylor, § 1398.

² *Earl Nelson v. Lord Bridport*, 8 Beav. 527, 554; *M'Cormick v. Garnett*, 5 De G., M. & G. 278; and see *Sussex Peerage Case*, 11 Cl. & F. 85; *Di Sora v. Phillips*, 10 H. L. Ca. 624; Taylor, §§ 1280, 1281, 1370; *United States of America v. M'Rae*, L. R. 3 Ch. Ap. 85, 86. English Courts may now ascertain what the foreign law is, by sending cases for the opinion of foreign Courts; but, unless they are in countries under the government of the Queen, a convention must first be entered into with the foreign government. 22 & 23 Vic. c. 63; 24 & 25 Vic. c. 11; and see *post*, Chap. XXVII., *Trials of Questions of Fact*. In Massachusetts, the unwritten or common law of any other of the United States, or of

the territories thereof, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their Courts may also be admitted as evidence of such law. Genl. Sts. c. 131, § 64. The existence, tenor, or effect, of all foreign laws, may be proved as facts, by parol evidence; but if it appears that the law in question is contained in a written statute or code, the Court may in its discretion reject any evidence of such law that is not accompanied by a copy thereof. *Ib.* § 65.

[In Tennessee, the laws of other States may be proved by copies of the statutes purporting to be published by authority of the particular State. Code, § 3800. And, under the Code, § 3801, the Supreme Court takes judicial notice of the laws and statutes of sister States. *Hobbs v. Memphis*, &c. R. Co., 9 Heisk. 873; *Anderson v. May*, 10 Heisk. 84, 88.]

Where the plaintiff relies upon a contract made in another State, and the defendant claims that it is void by the laws of that State, he must show its invalidity as well by his pleadings as by his proof. It is not suffi-

Documents which are admissible without formal proof in England, are also admissible in Ireland, and *vice versa*; ³ and such documents are in like manner admissible in Colonial Courts.⁴

Registers of British vessels, and certificates of register, purporting to be duly signed, are received in evidence as *prima facie* proof of all the matters contained or recited in such register, and of all the matters contained or recited in or indorsed in such certificate of registry, without proof of the signature.⁵

Whenever any book or other document is of such a public nature as to be admissible in evidence, on its mere production from the proper custody, any copy thereof or extract therefrom is *admissible in evidence, if it be proved to be an examined copy or extract, or if it purport to be signed, and certified as a true copy or extract, by the officer to whose custody the original is intrusted.¹ Thus extracts from parish registers, certified by the rector, vicar, or curate to be true extracts, are evidence of the baptism, marriage, or burial referred to; and it is not necessary to prove that the rector, vicar, or curate is the person entitled to have the custody of the register.²

Certified copies of entries, purporting to be sealed or stamped with the seal of the General Register Office, are evidence of the birth, death,

cient for the defendant to allege in his answer that the contract is void by the laws of the land; because that only draws the attention of the Court to the laws of the State in which the proceedings are pending. Courts will not *ex officio* take notice of foreign laws. *Campion v. Kille*, 1 *McCart* (N. J.), 229; [*Dainese v. Hale*, 91 U. S. 13; *Kline v. Baker*, 99 Mass. 253. It is otherwise, where the judgment of a Court of a sister State is impeached. *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *State of Ohio v. Hinchin*, 27 Penn. St. 479. Foreign laws and foreign adjudications, to be the basis of decision in Alabama, must be proved by being given in evidence in the Court below. *Varner v. Young*, 56 Ala. 265.]

The presumption is that the law of another State is the same as that of the State in which the cause is heard. *Paine v. Noelke*, 43 N. Y. Sup. Crt. 176; *McLear v. Hunsicker*, 29 La. Ann. 539.]

For form of case, see Vol. III.

³ 14 & 15 Vic. c. 99, §§ 9, 10; *Re Mahon*, 9 Hare, 459. As to Scotch Bankruptcy proceedings, see 19 & 20 Vic. c. 79, §§ 47, 73, 140, 147, 174; *Taylor*, 10 B. 1400 A.

⁴ 14 & 15 Vic. c. 99, § 11.

⁵ 14 & 15 Vic. c. 99, § 12; 17 & 18 Vic. c. 104, § 107; *Taylor*, § 1451.

¹ 14 & 15 Vic. c. 99, § 14; *Dorrett v. Meux*, 15 C. B. 142; *Scott v. Walker*, 2 E. & B. 555. Section 14 also provides, that the officers shall furnish certified copies or extracts, on payment of not more than 4*d.* per folio of ninety words; see, for cases under this section, *Reg. v. Mainwaring*, 1 Dears. & B. 132; 2 Jur. N. S. 1236; *Reeve v. Hodson*, 10 Hare Ap. 19. For a list of public books and documents, the contents of which are

now provable, either by examined or by certified copies, under 14 & 15 Vic. c. 99, § 14, see *Taylor*, § 1438. For a list of the principal public registers and documents, certified copies of which are receivable in evidence by virtue of some enactment having special reference to them, see *ib.* §§ 1439-1440. As to the statutable methods of proof of records or other proceedings of particular tribunals, or of public records and documents, see *ib.* § 1391 *et seq.*; and as to the proof of certificates, under statutes having special reference to them, see *ib.* 1441 *et seq.*; see *Genl. Sts. Mass.* c. 21, § 6; *St. Mass.* 1867, c. 213. [Proof of a record is irrelevant without proof of some regulation making a record obligatory, or giving it some effect. *Golden Fleece Gold, &c. Co. v. Cable, &c. Co.*, 12 Nev. 312. And see *Butler v. St. Louis Life Ins. Co.*, 45 Iowa, 93; *Fraser v. Charleston*, 8 S. C. 318.]

² *Re Neddy Hall's Estate*, 17 Jur. 29, L. J.J.; 1 *Greenl. Ev.* §§ 483-485, 493, 498, 507, 508. The case appears to be incorrectly reported in 2 De G., M. & G. 748; see *Re Porter's Trusts*, 2 Jur. N. S. 349, V. C. W.; *Seton*, 16. The certificate should express that the person signing it is the rector, &c., of the parish or place; see *Re Neddy Hall's Estate*, 2 De G., M. & G. 749; *Sugd. V. & P.* 420, n. As to burials in cemeteries, see 10 & 11 Vic. c. 65, §§ 32, 33; 27 & 28 Vic. c. 97. A stamp duty of one penny is imposed, by 23 & 24 Vic. c. 15, §§ 1, 2, and *Sched.*, on every certificate of birth, baptism, marriage, death, or burial; it is payable by the party requiring the certificate, and is to be denoted by an impressed or adhesive stamp, to be cancelled by the person who grants the certificate. For form of certificate, see Vol. III.

or marriage to which the same relate, without any further proof of such entry; but no certified copy, purporting to be given in the office, is of any force or effect, unless it is so sealed or stamped.³

Copies or extracts, certified and sealed with the seal of the Commissioners, of letters-patent, specifications, disclaimers, and memoranda of alterations, and all other documents recorded and filed in the Commissioners' Office, or in the Office of the Court of Chancery appointed for the filing of specifications, are to be received in evidence, in all proceedings relating to letters-patent for inventions, without further proof or production of the originals.⁴

Whenever, by any Act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of
*866 any corporation or joint-stock or other company, or any *certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, is or shall be receivable in evidence of any particular in any Court of Justice, or in any judicial proceeding, the same are respectively to be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required or impressed with a stamp and signed, as directed by the respective Acts, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character, of the person appearing to have signed the same.¹

All Courts, Judges, and other judicial officers, are bound to take judicial notice of the signature of any of the Equity or Common Law Judges of the Superior Courts at Westminster, where such signature is attached, or appended to any decree, order, certificate, or other judicial or official document.²

Amongst the records of other Courts of Justice, copies of which the Court of Chancery is in the habit of receiving as evidence, may be ranked the depositions of witnesses, and proceedings taken in causes in other Courts of Equity of concurrent jurisdiction. The rules by which the Court is governed, in receiving evidence of this description are the same as those adopted by it in cases where depositions taken in the Court of Chancery in one cause are offered to be read in another;³ but no depositions taken in any other Court are to be read, unless by order.⁴

¹ 6 & 7 Will. IV. c. 86, § 38. The identity of the person named in the certificate must, of course, be proved. *Parkinson v. Francis*, 15 Sim. 160; *Seton*, 15. Extracts from the district registries were not formerly received as evidence by the Court, but they are now generally admitted: *ibid.*; *Reg. v. Mainwaring*, 1 Dears. & B. 132; 2 Jur. N. S. 1136; and see 6 & 7 Will. IV. c. 86, § 36; not, however, it seems, at the Rolls. As to the stamp duty on the certificate, see *supra*. As to extracts from non-parochial registers, deposited with the Registrar-General, under the 3 & 4 Vic. c. 92, see §§ 9-15; 2 Phil. on Evid. 145; *Taylor*, § 1440.

⁴ 16 & 17 Vic. c. 115, § 4.

¹ 8 & 9 Vic. c. 113, § 1.

² 8 & 9 Vic. c. 113, § 2.

³ See *post*, p. 867.

⁴ Ord. XIX. 4; see, however, *Goodenough v. Alway*, 2 S. & S. 481; *Williams v. Broadhead*, 1 Sim. 151; *Manby v. Bewicke*, 3 Jur. N. S. 685, V. C. W.; in *Lake v. Peisley*, L. R. 1 Eq. 173; 11 Jur. N. S. 1012, M. R., an order to read depositions taken in bankruptcy was made on an *ex parte* motion; and in *Stephens v. Biney*, L. R. 2 Eq. 303; 12 Jur. N. S. 428, V. C. W., an order of course to read depositions taken in the Palatine Court of Lancaster, was discharged as irregular. [See *Allen v. Bennett*, L. R. 6 Eq. 522.]

The method of proving depositions taken in one Court of Equity, upon the hearing of a cause in another, is, by producing a certified copy of the bill and answer, if one has been put in: unless the depositions are so ancient that no bill and answer can be forthcoming, or unless the defendant has been in contempt, or has had an opportunity of cross-examining, which he chose to forego: in which case the depositions may be read after proving the bill only.⁵ Where the depositions have been taken on interrogatories, under a commission issuing out of another Court, they are not admissible without the production of the commission, under the authority of which they were taken: unless the depositions are of long standing, so that the commission may be presumed to have been lost.⁶ It is to be noticed, however, that depositions may be used as evidence against a party to the suit, or for the purpose of contradicting *the witness, without proof of the bill *867 and answer, although some proof of the identity of the person will be required.¹

It has been before stated, that the Court of Chancery pays attention to its own proceedings, although they are not actually recorded:² in illustration of which it may be stated, that all the proceedings of the Court, in the cause, which are required as evidence, may be used as such, without further testimony to establish them than the production of the proceeding itself, or of an office copy of it, signed by the officer in whose custody such proceeding properly is, according to the practice of the Court.

According to the former practice of the Court, it was necessary, when any proceedings in one cause were to be given in evidence in another, that the foundation for the production of them should be laid, by proving the bill and answer in the cause in which they were taken. Gradually, however, this rule has been relaxed; and the Court will now dispense with the strict proof of the bill and answer,³ and make an order, that the party shall be at liberty, at the hearing, to read the proceedings in the former cause. Such an order is not, however, necessary to entitle a party to read a decree or order.⁴

A decree or order of the Court of Chancery, determining a matter of right, is good evidence as to that right, not only against the party against whom the decree was made, but against all those claiming under

⁵ 2 Phil. on Evid. 210, 211; Taylor, § 1413; Goodenough v. Alway, *ubi sup.*

⁶ 2 Phil. on Evid. 210, 211; Taylor, § 1415; 1 Greenl. Ev. § 517.

¹ 2 Phil. on Evid. 210, 211; Taylor, § 1413; see Davison v. Robinson, 3 Jur. N. S. 791, V. C. W.; 6 W. R. 673, L. C.; 1 Greenl. Ev. § 156; [Bell v. Johnson, 1 J. & H. 682.]

² *Ante*, p. 688. The final decree of a Court of Equity may be given in evidence in another suit, although such decree has not been formally enrolled. Bates v. Delavan, 1

Paige, 269. [A Court will take judicial notice of its own records, and the back of records of its judgments proves itself when offered in evidence in that Court. Reliance v. Brown, 82 Ill. 279. So, of the entire record of a cause. Nichol v. Ridley, 5 Yerg. 64. And see Natl. Bank v. Bryant, 13 Bush, 419.]

³ Ord. XIX. 4; Seton, 980 *et seq.*; Taylor, § 1413.

⁴ Ord. XIX. 4; Brooks v. Taylor, Mos. 188; see Green v. Green, 5 Ham. 278.

him.⁵ But although a decree between other parties cannot be read as evidence, yet it may be read as a precedent.⁶ And it is not in any case necessary, in order that it should be admissible as evidence, that the parties to it should have filled the relative situations of plaintiff and defendant: if the present plaintiff and the defendant were co-defendants in the former cause, the decree in that cause may be read, though not as conclusive evidence.⁷ "It frequently happens," observes Lord Hardwicke, "that there are several defendants, all claiming against the plaintiff, and having also different rights and claims among one another:

the Court then makes a decree, settling the rights of all the parties; * but a declaration for that purpose could not be made, if this objection (*viz.*, to receiving the decree as evidence, because made between co-defendants) holds: which would be very fatal, as it would occasion the splitting one cause into several."¹

The depositions of witnesses, which have been taken in another cause, may, as well as other proceedings, be read at the hearing, under an order to be obtained for that purpose,² if the two suits are between the same parties or their privies, and the issue is the same;³ and such depositions are admissible in evidence in the former cause.⁴ Thus, evidence which has been taken in a cross-cause may, by order, be read at the hearing of the original cause,⁵ and *vice versa*, provided the point in issue is the same in each case. Where the matter in issue is not the same, the depositions taken in one cause cannot be read in the other;⁶

⁵ *Borough v. Whichcote*, 3 Bro. P. C. ed. Toml. 595; *Maule v. Bruce*, 2 C. P. Coop. t. Cott. 215; see 1 Greenl. Ev. §§ 522, 523, 536; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 358, note, 639 in 2 *ib.* 915 *et seq.* For the mode of proving decrees and answers in Chancery, see 1 Greenl. Ev. §§ 511, 512. A decree in Chancery, being the act of a Court of a sister State, must be authenticated according to the statute of the United States, 1790, May 26, 1 U. S. Stat. at Large, 122 (1 Greenl. Ev. § 504), to be admissible in evidence. *Barbour v. Watts*, 2 A. K. Marsh. 290. [The printed report of a decision of the Supreme Court, though issued by authority of law, is secondary evidence, and inadmissible as evidence of the judgment, unless the original record be lost or destroyed. *Donellan v. Hardy*, 57 Ind. 393; *Taylor v. Commonwealth*, 29 Gratt. 780. And see *Mason v. Pelletier*, 77 N. C. 52.]

⁶ *Austen v. Nicholas*, 7 Bro. P. C. 9.

⁷ *Askew v. Poulterers' Company*, 2 Ves. S. 89; *Belt's Sup.* 299.

¹ *Ibid.*; see also, *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 710, H. L.; *Farquharson v. Seton*, 5 Russ. 45, 63.

² See *post*, p. 871; *Leviston v. French*, 45 N. H. 21.

³ *Mackworth v. Penrose*, 1 Dick. 50; *Lade v. Lingood*, 1 Atk. 203; *Humphreys v. Pensam*, 1 M. & C. 580, 586; *Hope v. Liddell* (No. 2), 21 Beav. 180; *Williams v. Williams* 10 Jur. N. S. 608; 12 W. R. 663, V. C. K.;

Maule v. Bruce, 2 C. P. Coop. t. Cott. 215; *Brooks v. Cannon*, 2 A. K. Marsh. 525; *Leviston v. French*, 45 N. H. 21; *Gresley Eq. Ev. (Am. ed.)* 185, 186; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 364, and notes in 2 *ib.* 934, 935; *Harrington v. Harrington*, 2 Howard, 701; *Payne v. Coles*, 1 Munf. 373; *Dale v. Roosevelt*, 1 Paige, 36; *Roberts v. Anderson*, 3 John. Ch. 376; see *Lake v. Peisley*, L. R. 1 Eq. 173; 11 Jur. N. S. 1012, M. R.; *Stephenson v. Biney*, L. R. 2 Eq. 303; 12 Jur. N. S., V. C. W. [And where the chief matter of controversy in two suits was the same, the Court, on motion, ordered that the testimony taken in either suit should be read in the other, and that the hearing on both should come on together. *Evans v. Evans*, 8 C. E. Green, 180. In a suit in Chancery to quiet title, and restrain an action of ejectment, the deposition of a witness who has since died, taken in that action, is competent evidence. *Wanner v. Sisson*, 2 Stew. Eq. 141.]

⁴ *Williams v. Williams*, 10 Jur. N. S. 608; 12 W. R. 663, V. C. K.

⁵ *Lubiere v. Genou*, 2 Ves. S. 579, in which case the cross-bill had been dismissed. *Holcombe v. Holcombe*, 2 Stockt. (N. J.) 284; see *post*, Chap. XXXIV. § 1, *Cross Bills*. For form of order, see *Seton*, 1275, No. 2. The order does not extend to an answer not put in evidence. *Moore v. Harper*, 1 W. N. 56; 14 W. R. 306, V. C. W.

⁶ *Christian v. Wrenn*, Bunb. 321.

and even where two suits related substantially to the same matters, one suit being instituted by the first tenant for life in remainder, and the other by the first tenant in tail in remainder, Sir J. L. Knight Bruce V. C. refused to allow the evidence taken in one suit to be used in the other.⁷ Where the person against whom the evidence is offered, was neither a party to such other cause, nor privy to a person who was a party, the depositions taken in that cause cannot be read; thus, where a father is tenant for life only, depositions taken in a cause to which he was a party, cannot be read against his son who claims as tenant in tail.⁸ The rule with regard to reading depositions in another suit, appears to be the same as that with respect to reading verdicts at Common Law, namely: "that nobody can take a benefit by it, who had not been prejudiced by it had it gone contrary."⁹ Thus, it has been held, that if A. prefers his bill against B., and B. exhibits his bill against A. and C., in relation to the same matter, and a trial at Law is directed, C. cannot give in *evidence the depositions in the cause between A. and B., but the trial must be entirely as of a new cause.¹

This rule appears to be somewhat at variance with what is stated in *Coke v. Fountain*,² to be a common one, namely, that where one legatee has brought his bill against an executor, and proved assets, and afterwards another legatee brings his bill, that the last-named legatee should have the benefit of the depositions in the former suit, though he was not a party to it; but it is to be observed, that the case of the legatee is different from the case of a plaintiff in ordinary circumstances: for although the legatee was not actually a party to the original suit, yet he was so virtually: his interest in the first suit having been represented by the executor. In fact, in the case of the legatee, the suit is *in pari materia*; and, with respect to the subject in dispute, the plaintiff in the second suit stands in the same situation, with regard to the defendant, as the plaintiff in the first.

The same principle appears to have been acted upon in other cases, besides those of legatees. Thus in *Terwit v. Gresham*,³ depositions taken in an old cause, where the same matters were under examination and in issue, were permitted to be read, although the plaintiff and those under whom he claimed were not parties to the former cause: inasmuch as the *terre tenants* of the same lands were then parties; and so even at Law, in the case of tithes, an answer to a bill filed in the Court of Exchequer, in a suit instituted by a vicar against the rector and others, owners of the lands, was evidence in an action for tithes, by a succeeding rector.

⁷ *Blagrove v. Blagrove*, 1 De G. & S. 252, 259; 11 Jur. 744; and see *Hope v. Liddell*, 21 Beav. 180.

⁸ *Peterborough v. Norfolk*, Prec. in Ch. 212; *Coke v. Fountain*, 1 Vern. 413; and see *Rhodes v. Rhodes*, 14 W. R. 515, V. C. W.

⁹ *Gilb. on Evid.* 28; *Buller*, N. P. 229; 2 *Phil. on Evid.* 8.

¹ *Rushworth v. Countess of Pembroke*, Hardres, 472. For the reason, why a verdict is not evidence for or against a person who was not a party to it, see 2 *Phil. on Evid.* 8.

² *Ubi sup.*

³ 1 *Cha. Ca.* 73.

against the owners or occupiers of the same lands.⁴ In like manner, in a case before Sir Anthony Hart, in Ireland,⁵ depositions which had been taken in a suit by one tenant in common against another were admitted in evidence, in a suit by another tenant in common, against the same defendant. In such cases, however, it must be proved that the depositions are touching the same land or tithes.⁶

It seems not to be important what character the individual, against whom the depositions in the former suit are offered, filled in that suit, whether that of plaintiff or defendant, provided he had, in such character, an opportunity of cross-examining the witness. If he was a

party to the first suit as a co-defendant, and becomes a plain-
*870 tiff in the second suit, making his co-defendant in * the first suit

a defendant, he may, if such co-defendant sets up the same defence that he did in the original suit, read the evidence taken in that suit against such co-defendant. Thus, where the creditors of a testator filed their bill against the residuary legatees, and also against a purchaser from the testator, praying to have their debts paid, and the conveyances, alleged to have been executed by the testator to the purchaser, set aside for fraud, and obtained a decree accordingly, and afterwards the residuary legatees filed another bill against the purchaser, praying for an account of the residue, and to set aside the conveyances: upon the question arising, whether the depositions taken in the former cause, as to the fraud in obtaining the conveyances, could be read in the second cause, for the legatees against the purchasers, who were co-defendants in the former cause, it was held, that as there was the same question and the same defence in both the causes, the depositions ought to be read.¹

Where a cause had been set down for hearing on motion for a decree, the Court allowed the plaintiff to use the examination of the defendant, taken in another cause; but gave leave to the defendant to file affidavits in explanation, subject to the right of cross-examination.²

It may be stated here, that where the depositions of witnesses in another suit are offered to be read at the hearing, against persons who were parties to such other suit, or those claiming under them, it does not appear to be necessary that the witnesses, whose depositions were offered to be read, should be proved to be dead. This appears to have been the effect of the determination of the House of Lords in the *City of London v. Perkins*,³ and of Sir John Leach V. C. in *Williams v. Broadhead*.⁴ In the subsequent case of *Carrington v. Cornock*,⁵ however, Sir

⁴ *Lady Dartmouth v. Roberts*, 16 East, 334; see also *Travis v. Challenor*, 3 Gwill. 1237; *Ashby v. Power*, *ib.* 1239; *Benson v. Olive*, 2 Gwill. 701; *Earl of Sussex v. Temple*, 1 Lord Raym. 310.

⁵ *Byrne v. Frere*, 2 Moll. 157; and see *Bishop of Lincoln v. Ellis*, Bunb. 110.

⁶ *Benson v. Olive*, Bunb. 284.

¹ *Nevil v. Johnson*, 2 Vern. 447; and see

Askew v. Poulterers' Company, 2 Ves. S. 89, 90.

² *Watson v. Cleaver*, 20 Beav. 137.

³ 3 Bro. P. C. ed. Toml. 602.

⁴ 1 Sim. 151.

⁵ 2 Sim. 567; and see *Blagrave v. Blagrave*, 1 De G. & S. 252; 11 Jur. 744; *Lawrence v. Maule*, 4 Drew. 472. 480.

Lancelot Shadwell V. C. seems to have entertained a different opinion from that expressed by Sir John Leach, in *Williams v. Broadhead*; and it is to be remarked, that at Law, the depositions of a witness, taken in a suit in Chancery, cannot, without a special order, be read, if the witness is alive, even though he is unable to attend by reason of sickness.²

Some doubt seems to have been, at one time, entertained whether the depositions of witnesses, taken in a cause where the bill had been subsequently dismissed, could be read at the hearing of another cause; and the rule appears to have been laid down, that if the *dis- *871 missal was upon merits, evidence of the facts which have been proved in the cause may be used as evidence of the same facts, in another cause between the same parties:¹ but where a cause has been dismissed, not upon merits, but upon the ground of irregularity (as, for instance, because it comes on by revivor, where it ought to have come on by original bill), so that regularly there was no cause in Court, and consequently no proofs properly taken, such proofs cannot be used.² If, however, upon a bill to perpetuate testimony, the cause should be set down for hearing, and the bill dismissed because it ought not to have been set down, the plaintiff may, notwithstanding the dismissal, have the benefit of the depositions.³

An order for leave to read, at the hearing, the depositions or proceedings in another cause, is granted upon motion of course, or on petition of course at the Rolls;⁴ and must be served upon the adverse party: who may, if there is any irregularity in it, or in the mode in which it has been obtained, apply by motion to discharge it. As, however, it is possible that the irregularity of such an order may not appear till it is acted upon at the hearing, when it would be too late to discharge it, the order is always made "saving all just exceptions:"⁵ the effect of which is, to leave it open to the party, against whom the evidence is offered, to make any objection to the reading of evidence under it which the nature of the case will admit, in the same manner that he might have done had no such order been made.

Where either party, plaintiff or defendant, obtains an order to use the depositions of witnesses taken in another cause, the opposite party may likewise use the same without motion: unless, upon special reason shown to the Court by the party obtaining such order, the opposite party be prohibited by the same order from so doing.⁶

When proceedings or depositions in another cause, in the Court of Chancery, are ordered to be read as evidence at the hearing, it will be

² 2 Phil. on Evid. 124; Taylor, § 445; *Gresley Eq. Ev.* (Am. ed.) 186, 187.

¹ *Lubiere v. Genou*, 2 Ves. S. 579; *M'Intosh v. Great Western Railway Company*, 7 De G., M. & G. 737.

² *Backhouse v. Middleton*, 1 Cha. Ca. 173-175; 3 Cha. Rep. 22; *Gresley Eq. Ev.* (Am. ed.) 187; *Hopkins v. Strump*, 2 Harr. & J. 301.

³ *Hall v. Hoddlesdon*, 2 P. Wms. 162; see also *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316.

⁴ For forms of order on motion, see *Seton*, 1275, Nos. 1, 2; and for forms of motion paper and petition, see Vol. III.

⁵ *Hand*, 114, 115; see term of order, *Seton*, 1275, Nos. 1, 2.

⁶ Ord. XIX. 5.

sufficient to produce the office copies of them. Such office copies, however, must be signed by the proper officer: otherwise, they cannot
 *872 be read;⁷ and if at the hearing of a cause, it is found * that the office copy of a proceeding, which one party relied upon as evidence, has not been properly signed, the Court will allow the cause to stand over for the purpose of procuring the proper signature.¹

No person may take out of the office of the Clerks of Records and Writs any record or document filed there, except by direction of the Court.² Where any record or other document, filed or deposited in that office, is required to be produced in the Court of Chancery, or in any of its offices, a memorandum bespeaking an attendance therewith should be left with the Record and Writ Clerk, and the proper fee be paid, or arranged to be paid; an attendance in Court with records, however, is made only at the request of the Judge.³

Where a record or other document, in the custody of the Record and Writ Clerks, is required to be produced out of the Court of Chancery or its offices, an order authorizing such production must be obtained, on motion of course, or on petition of course at the Rolls, supported by an affidavit to the effect that such production is necessary as evidence;⁴ but, as a rule, no such order will be made for production of original documents, if certified or examined copies will answer the purpose.⁵ No *subpoena* need be issued; but the officer will attend, on the order, and a memorandum bespeaking his attendance, being left with him, and on the office fees, and his reasonable expenses (if any) being paid.⁶

With respect to the production of proceedings in Chancery, upon trials in Common Law Courts, it may here be observed, that there is a difference between criminal and civil cases: in the former, it is necessary that the original record should be procured; in the latter, a copy signed and certified by the officer to whose custody the original is intrusted,⁷ or proved by the person putting it in to have been ex-

¹ Attorney-General v. Milward, 1 Cox, 437. Since 18 & 19 Vic. c. 134, § 6, office copies of decrees and orders from the Registrars' books, are to be certified by the Clerks of Records and Writs, Seton, 16. The office copy of an order, or of a report confirmed by fiat, signed by the Registrar in Lunacy, and sealed or stamped with the seal of his office, is admissible as evidence of such order or report, without further proof. 16 & 17 Vic. c. 70, § 100; and see *ib.* § 101; and 25 & 26 Vic. c. 86, § 29.

² Attorney-General v. Milward, *ubi sup.*

³ Ord. I. 42.

⁴ Braithwaite's Pr. 512. A fee of 10s., in fee fund stamps, is payable upon every application for the officer's attendance in a Court of Equity, and for his attendance, *per diem*. Regul. to Ord. Sched. 4. For form of memorandum bespeaking the attendance, see Vol. III.

⁵ Braithwaite's Pr. 514; Gresley, 192. For forms of motion paper, petition, and affidavit, see Vol. III.

⁶ Braithwaite's Pr. 514; Attorney-General

v. Ray, 6 Beav. 335; Anon., 13 Beav. 420; Biddulph v. Lord Camoys, 19 Beav. 467.

⁷ Braithwaite's Pr. 513, 514. A fee of 1l. is payable on every application for the officer's attendance in Courts of Law, *per diem*, and for his attendance, besides his reasonable expenses. Reg. to Ord. Sched. 4. These expenses are: one guinea per day, and travelling expenses (first class), if the attendance is in the country; and half a guinea per day, without travelling expenses, if the attendance is in a Court of Law in London or Middlesex. Braithwaite's Pr. 513, 514. The office fees are paid in stamps; the officer's fees are paid to him in money: *ibid.*; and he may require the solicitor or party desiring his attendance to deposit with him a sufficient sum to cover his just fees, charges, and expenses, and undertake to pay any further fees, &c., not fully answered thereby. Ord. I. 43. For form of memorandum bespeaking attendance, see Vol. III.

⁸ 14 & 15 Vic. c. 99, § 14; Reeve v. Hodson, 10 Hare Ap. 19; *ante*, p. 865.

amined with the original record, is *sufficient;¹ and for this *873 reason, an application for production of the original depositions, at the trial of a civil action, was refused.²

The documents which have been before enumerated as requiring no evidence to prove them, are all, either in a greater or less degree, public documents. Private documents which are thirty years old from the time of their date, also prove themselves.³ This rule applies, generally, to deeds concerning lands, and to bonds, receipts, letters, and all other writings: the execution of which need not be proved, provided they have been so acted upon, or brought from such a place, as to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty.⁴ Lord Chief Baron Gilbert, however, upon this point, says, that "if possession hath not gone along with a deed, some account ought to be given of the deed; because the presumption fails where there is no possession;"⁵ and he adds a caution, that "if there is any blemish in an ancient deed, it ought to be regularly proved; or where it imports a fraud: as, where a man conveys a reversion to one, and afterwards conveys it to another."⁶

The rule of computing the thirty years from the date of a deed, is equally applicable to a will.⁷ Some doubt appears formerly to have been entertained on this point, on the ground that deeds take effect from their execution, but wills from the death of the testator.⁸ In *Rancliff v. Parkins*,⁹ Lord Eldon observes, that, in a Court of Law, "a will thirty years old, if the possession has gone under it, and sometimes without the possession, but always with possession, if the signing is sufficiently recorded, proves itself. But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity; and then, possession under the will, and claiming and dealing with the *property as if it had passed under the will, *874 would be cogent evidence to prove the due signing of the will, though it should not be recorded."¹

¹ 2 Phil. on Evid. 208, 209; Taylor, §§ 1379, 1382-1384.

² Attorney-General v. Ray, 6 Beav. 335; see 3 Hare, 335.

³ 2 Phil. on Evid. 245; Taylor, §§ 74, 75.

⁴ 2 Phil. on Evid. 246; Taylor, § 75; see also, as to letters, Fenwick v. Reed, 6 Mad. 7, 8; Attorney-General v. Stephens, 6 De G., M. & G. 111; 2 Jur. N. S. 51.

⁵ Gilb. on Evid. 89; and see Taylor, §§ 74, 539, 600; Gresley Eq. Ev. (Am. ed.) 124, 125; 1 Phil. Ev. (Cowan & Hill's ed. 1839) 477, note 903, in 2 *ib.* 1310 *et seq.*, and cases cited; 1 Greenl. Ev. §§ 21, 570, and cases cited; McKenire v. Fraser, 9 Sumner's Ves. 5, note (a). It is not necessary to call the subscribing witnesses, though they be living. Jackson v. Christman, 4 Wend. 277, 282, 283; Fetherly v. Waggoner, 11 Wend. 603; 1 Greenl. Ev. §§ 21, 570; Jackson v. Blanshan, 3 John. 232; Winn v. Patterson, 9 Peters, 674, 675; Bennet v. Runyon, 4

Dana, 422, 424; Cook v. Torton, 6 Dana, 110; Thurston v. Masterton, 9 Dana, 233; Hinde v. Vattier, 1 McLean, 115; Northrop v. Wright, 24 Wend. 221; 1 Phil. Ev. (Cowan & Hill's ed. 1839) 478.

⁶ Gilb. on Evid. 89; and see Taylor, § 74; 1 Phil. Ev. (Cowan & Hill's ed. 1839) 478, note 906, in 3 *ib.* 1317, 1318; 1 Greenl. Ev. § 21, 570; Gresley Eq. Ev. (Am. ed.) 124, 125.

⁷ Man v. Ricketts, 7 Beav. 93, 101; Orange v. Pickford, 4 Jur. N. S. 649, V. C. K.; Doe v. Burdett, 4 Ad. & El. 1; Doe v. Wolley, 8 B. & C. 22.

⁸ 2 Phil. on Evid. 246; McKenire v. Fraser, 9 Ves. 5.

⁹ 6 Dow, 202.

¹ 1 Phil. Ev. (Cowan & Hill's ed. 1839) 503; 1 Greenl. Ev. § 21, and cases in notes, § 570, and note; Jackson v. Blanshan, 3 John. 392; Doe v. Deakin, 3 C. & P. 402; Doe v. Wolley, 8 B. & C. 22.

It appears to be doubted, whether the seal of a Court or corporation is within the rule as to thirty years; and in *Rex v. The Inhabitants of Barthwick*,² Lord Tenterden said, "that it might be argued that it was not within the principle of the rule: because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for, after such a lapse of time, yet the seals of Courts and of corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed."³

SECTION VI. — *Documentary Evidence which does not prove itself.*

Having pointed out the species of documentary proofs which may be used in Courts of Equity, without the aid of any other evidence to authenticate them, or which, in other words, "prove themselves:" the next subject for consideration is the nature of the proofs requisite, to enable a party to make use of documents which do not come under the same description. The rules upon this subject are, in general, the same in Equity as at Common Law; and will be found more fully set forth in any Treatise upon the Law of Evidence.⁴

With respect to the cases in which different rules prevail in Courts of Equity, from those which are adopted at Law, the most important are those of wills devising real estates.⁵ At Law, it is sufficient to *875 examine one witness to prove a will, if he can prove *the due execution of it, unless it is impeached;¹ but, in Equity, in

² 2 B. & Ad. 648.

³ 2 Phil. on Evid. 247; Taylor, § 74; 1 Greenl. Ev. § 570.

⁴ 2 Phil. on Evid. 242 *et seq.*; Taylor, §§ 1368-1472, 1660-1679; Best, §§ 245-250; Gresley, 173 *et seq.*

⁵ The Courts of Probate in Massachusetts have complete jurisdiction over the probate of wills, of both real and personal estate, and their decrees are conclusive upon all parties, and not re-examinable in any other Court. *Tompkins v. Tompkins*, 1 Story, 547; see *Osgood v. Breed*, 12 Mass. 525, 533, 534; *Laughton v. Atkins*, 1 Pick. 535, 547, 548, 549. So in Connecticut. *Bush v. Sheldon*, 1 Day, 170; *Brown v. Lannan*, 1 Conn. 476. So in Rhode Island. *Tompkins v. Tompkins*, 1 Story, 547. So in New Hampshire. *Poplin v. Hawke*, 8 N. H. 124. So in Ohio. *Bailey v. Bailey*, 8 Ohio, 239. See as to Kentucky, *Robertson v. Barbour*, 6 Monr. 527; *Case of Wells's Will*, 5 Litt. 273. In North Carolina, said to be *prima facie* evidence. *Stanley v. Kean*, Taylor, 73. Illinois, see *Robertson v. Barbour*, 6 Monr. 527, 528. Alabama, see *Tarver v. Tarver*, 9 Peters, 174. It is not necessary in Virginia that a will should be proved in a Court of

Probate in order to give it validity as a will at Law. *Bogwell v. Elliot*, 2 Rand. 196. As to New York, see *Dubois v. Dubois*, 6 Cowen, 494; 2 Rev. St. 57, § 7, *ib.* 58, § 15. [In Tennessee, see Code, § 2197, 2198, and *Traford v. Young*, 3 Tenn. Ch. 500.]

¹ Seton, 227, citing *Peake's Evid.* 401; 2 Greenl. Ev. § 694; *Jackson v. La Grange*, 19 John. 386; *Dan v. Brown*, 4 Cowen, 483. *Jackson v. Betts*, 6 Cowen, 377; *Turnipseed v. Hawkins*, 1 McCord, 272. In Pennsylvania, two witnesses are required in proof of every testamentary writing, whether in the general probate, before the Register of Wills, or upon the trial of an issue at Common Law; and each witness must separately depose to all the facts necessary to complete the chain of evidence, so that no link may depend upon the credibility of but one. *Lewis v. Maris*, 1 Dall. 278; *Hock v. Hock*, 4 Serg. & R. 47. And if there are three witnesses, and the proof is fully made by two only, it is enough without calling the third. *Jackson v. Vanddyke*, 1 Cox, 28; *Fox v. Evans*, 3 Yeates, 506. But if one or both witnesses are dead, the will may be proved by the usual secondary evidence. *Miller v. Caruthers*, 1 Serg. & R. 205.

order to establish the will against the heir, all the witnesses must be examined.²

This rule, although general, admits of necessary exceptions, and perhaps does not apply where the will is not wholly, but only partially, in question.³ The rule also does not apply, in cases where one of the witnesses is dead, or is abroad:⁴ in which cases, proof of his handwriting has been held sufficient.⁵ It seems, however, that in such a case, the more regular course is not to declare the will proved, but to enter the evidence of the witnesses as read, and then to direct the trusts of the will to be carried into execution.⁶ Where a witness has become insane,⁷ or has not been heard of for many years, and cannot be found, his evidence has been dispensed with.⁸ It is also necessary, in Equity, where the object of the suit is to establish a will against the heir, to prove the sanity of the testator.⁹

We have seen before,¹⁰ that in some cases, where the proof of a will is defective, leave will be given to supply the defect at the hearing;¹¹ and we have also seen, that it is the common practice of the Court to carry the trusts of a will into execution, without declaring the will well proved.¹² Where the heir admits the will, *the Court will *876 establish it, without declaring it well proved;¹ but the admission of a will in the separate answer of a married woman, who was the heir-at-law, has been held insufficient to enable the Court to declare the will established.²

The Court of Chancery will establish a will made and proved in the colonies, on the production of a duly authenticated copy of it: provided

² *Bootle v. Blundell*, 19 Ves. 505; *G. Coop.* 136, 137; see also *Ogle v. Cook*, 1 Ves. S. 177; *Townshend v. Ives*, 1 Wils. 216; *Bullen v. Michel*, 2 Pri. 491; 2 Greenl. Ev. § 694, and note. Any person interested in the estate of the testator, may insist upon the production of all the subscribing witnesses to a will, at the probate thereof, if they are living, and subject to the process of the Court. *Chase v. Lincoln*, 3 Mass. 236. If it be impossible to procure any one of the witnesses, or he has become incompetent, the Court will proceed without him *ex necessitate rei*, and resort to the next best evidence of which the case will admit. *Ibid.*; *Sears v. Bellingham*, 12 Mass. 358; *Brown v. Wood*, 17 Mass. 63; see *Swift v. Wiley*, 1 B. Monr. 116; *Brown v. Chambers, Hayes, Exch.* 597; *Powell v. Cleaver*, 2 Bro. C. C. (Perkins's ed.) 504, note (b); *Lord Carrington v. Payne*, 5 Sumner's Ves. 404, Perkins's note (a), and cases cited.

³ Per Lord Eldon, in *Bootle v. Blundell*, *ubi sup.*

⁴ *Ibid.*

⁵ *Lord Carrington v. Payne*, 5 Ves. 404, 411; see also *Billing v. Brooksbank*, cited 19 Ves. 505; *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231; and *Grayson v. Atkinson*, 2 Ves. S. 454, where it was held, that a commission

should have been sent to examine the witness abroad; but the rule in *Lord Carrington v. Payne* seems to be the one now acted upon. *Seton*, 227.

⁶ *Hare v. Hare*, 5 Beav. 529, 630; 7 Jur. 336.

⁷ *Bernett v. Taylor*, 9 Ves. 381.

⁸ *James v. Parnell*, T. & R. 417; *M'Kenire v. Fraser*, 9 Ves. 5.

⁹ *Harris v. Ingledew*, 3 P. Wms. 93; *Wallis v. Hodgson*, 1 Atk. 56; *Seton*, 228.

¹⁰ *Ante*, p. 858.

¹¹ *Chichester v. Chichester*, 24 Beav. 239, where the will was allowed to be proved *vide voce* at the hearing; see, however, *Seton*, 228, and *Smith v. Blackman*, *ante*, p. 794, n. (v).

¹² See *ante*, p. 232; Ord. VII. 1; *Seton*, 228; *Binfield v. Lambert*, 1 Dick. 337; *Bird v. Butler*, *ib.* n. *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231; *Wood v. Stane*, 8 Pri. 613; *Boyse v. Rossborough*, Kay, 71; 3 De G., M. & G. 817; 18 Jur. 205; S. C. *nom. Colclough v. Boyse*, 6 H. L. Ca. 1; 3 Jur. N. S. 373.

¹ *Seton*, 228. For form of decree in case, see *ib.* 224, No. 2.

² *Brown v. Hayward*, 1 Hare, 432; *ante*, pp. 184, 185.

the due execution and attestation of the original are proved by the attesting witnesses.³

The rule that, where a will is to be established against an heir, it must be proved by all the witnesses, or by producing evidence of their death and handwriting, does not apply when proof of the will is required for other purposes: in such cases, one witness to prove it is sufficient.⁴

The rule, that all the witnesses must be examined, extends also to the trial of an issue *devisavit vel non* before a jury.⁵ In *Tatham v. Wright*,⁶ however, where the bill was not filed by the devisee to establish the will, but by the heir to set it aside, the defendant called one witness, and produced the other two, offering them to the plaintiff to call and examine them, which he declined, not wishing to make them his own witnesses: upon a motion for a new trial, the cause was held to have been sufficiently tried.⁷

Formerly, whenever the heir-at-law was a party to the suit, he was entitled, as a general rule, to an issue *devisavit vel non*;⁸ but under the present practice, the Court of Chancery has power,⁹ and it would seem is bound,¹⁰ to determine the question itself, either with or without a jury, as it may think fit:¹¹ though it may direct the question to be tried at the assizes, or at a sitting in London or Middlesex, where it appears to the Court that the question may be more conveniently so tried.¹²

With respect to wills of copyhold estates, it seems that it is not the practice to establish them against the heir-at-law; but what *877 * will be a sufficient proof to induce the Court to act upon them, when their validity is not admitted by the heir-at-law, does not seem quite clear.¹

The Ecclesiastical Courts had no jurisdiction to determine the validity of wills of real estate; and the production of probate was, therefore, no evidence of the validity of the will as to real estate.² But the Court of Probate has such jurisdiction conferred upon it;³ and when probate of a will, not confined to personalty, has been granted in solemn form,

³ *Rand v. Macmahon*, 12 Sim. 553; 6 Jur. 450.

⁴ *Concannon v. Cruise*, 2 Moll. 332.

⁵ *Pemberton v. Pemberton*, 11 Ves. 53; *Bootle v. Blundell*, 19 Ves. 505; *G. Coop.* 137.

⁶ 2 R. & M. 1, 17.

⁷ *Gresley Eq. Ev. (Am. ed.)* 123, 124; 2 *Greenl. Ev.* § 693.

⁸ See *post*, Chap. XXVII. § 1, *Trials of Questions of Fact*; and see *Man v. Ricketts*, 7 Beav. 93, 102; 8 Jur. 159; *S. C. nom. Ricketts v. Turquand*, 1 H. L. Ca. 472.

⁹ 21 & 22 Vic. c. 27, §§ 3, 4; and see *Ord. XLI.* 26, 52; and *post*, Chap. XXVII. § 1, *Trials of Questions of Fact*.

¹⁰ 25 & 26 Vic. c. 42, § 1; *post*, Chap. XXVII. § 1, *Trials of Questions of Fact*; *Baylis v. Watkins*, 8 Jur. N. S. 1165, L. J.J.; *Edmont v. Darell*, 1 H. & M. 563; *Faden v. Firth*, *ib.* 573; *Young v. Fernie*, 1 De G., J. & Sm. 353; 10 Jur. N. S. 58; *Re Catholic*

Publishing Company, 10 Jur. N. S. 192, M. R.; *Williams v. Williams*, 12 W. R. 140, M. R.; 33 Beav. 306; and see *Curlewis v. Carter*, 9 Jur. N. S. 1148; 12 W. R. 97, V. C. S. ¹¹ 21 & 22 Vic. c. 27, § 5; and 25 & 26 Vic. c. 42, § 3.

¹² 25 & 26 Vic. c. 42, § 2.

¹ *Archer v. Slater*, 10 Sim. 624; 11 Sim. 507; *Jervoise v. Duke of Northumberland*, 1 J. & W. 570.

² *Taylor on Evid.* 1565, A.

³ 20 & 21 Vic. c. 77, §§ 61-65; *Dodd & Brooke*, 595, 641; see also 21 & 22 Vic. c. 95. As to wills of personal estate, the Court of Chancery has looked at the original, for the purpose of determining the construction, in *Phillips v. Chamberlaine*, 4 Ves. 57; *Compton v. Bloxham*, 2 Coll. 201, 204; *Oppenheim v. Martin*, 9 Hare, 802, n.; *Manning v. Purcell*, 7 De G., M. & G. 55; see, however, *Gann v. Gregory*, 3 De G., M. & G. 777, 780; 18 Jur. 1063.

the probate is conclusive evidence, in all Courts, of the validity of the will as to real, as well as to personal estate.⁴ And when the will is not proved in solemn form, if ten days' notice of the intention to read the probate of the will, or copy thereof, stamped with any seal of the Court of Probate,⁵ as evidence, is given, it will be conclusive evidence against the person to whom notice is given: unless such person, within four days after receiving such notice, gives notice that he disputes the validity of the devise.⁶ The consequence of the above-mentioned alterations in the law is, that the practice of establishing a will in Chancery is of comparatively rare occurrence.

Where an original will is required to be produced in the Court of Chancery, the attendance with it of the proper officer, in whose custody it is deposited,⁷ may be procured, as in the other cases where the production of an original record, or instrument in the nature of a record, is required. Formerly, however, the practice was for the Court to make an order upon the officer of the Ecclesiastical Court to deliver the original will to the solicitor in the cause, upon his giving security (to be approved by the Judge of that Court) to return it safe and undefaced within a particular * time.¹ In *Fauquier v. Tynte*,² *878 Lord Eldon seemed at a loss to account for this deviation from the ordinary course, which he thought might be inoperative if the officer of the Ecclesiastical Court refused to obey the order; and he declined to extend it to any other case than that of a will.

There are several cases in which a Court of Equity has established a will, without the production of the original, where the fact of the will having been proved and retained abroad, or other circumstances,³ have rendered it impossible to bring the original before the Court;⁴ but it seems that, in such cases, strict proof of the execution and attestation must be given, unless they are admitted, or unless the will is old enough to prove itself.⁵ The contents of the will must be proved to the satisfac-

⁴ 20 & 21 Vic. c. 77, § 62. As to the advantage of proving a will in solemn form, see *Dodd & Brooke*, 641, n. (a); and for the practice, *ib.* 641-652.

⁵ The stamp is only required for the copy. *Rippon v. Priest*, 3 F. & F. 644.

⁶ 20 & 21 Vic. c. 77, § 64; see *Danby v. Poole*, 10 W. R. 515, V. C. S.; *Barraclough v. Greenough*, 1 W. N. 319; 15 W. R. 21, Q. B. Office copies of wills are not collated with the original, unless specially required; every copy so required to be examined will be certified under the hand of one of the principal Registrars to be an examined copy; and the seal of the Court is not to be affixed to an office copy unless the same has been so certified. Court of Probate Rules, 30 July, 1862, rr. 80, 81; *Dodd & Brooke*, 1076. An office copy not so certified and sealed is not, therefore, usually received in evidence. An extra fee of 7s. 6d. is charged for a certified office copy; and see 20 & 21 Vic. c. 77, § 69. For forms of notice, under section 64, see Vol. III.

⁷ A subpoena duces tecum will be issued for this purpose. *Wigan v. Rowland*, 10 Hare Ap. 18, 19; 17 Jur. 816. For the fees payable to the officer of the Court of Probate attending with the will, see Court of Probate Rules, 30 July, 1862; *Dodd & Brooke*, 1154, 1230; 8 Jur. N. S. Pt. 2, 392, 397.

¹ *Morse v. Roach*, 2 Strange, 961; 1 Dick. 65; *Frederick v. Aynscombe*, 1 Atk. 627; *Peirce v. Watkin*, 2 Dick. 485; *Laloe v. Causfield*, 3 Bro. C. C. 243; *Forster v. Wade*, 4 Bro. C. C. 476; *Hudson v. —*, 6 Ves. 135; *Ford v. —*, *ib.* 802; see also *Suton*, 226; and for forms of orders, see 2 Van Hey. 361, 362.

² 7 Ves. 292; and see 6 Ves. 135; *ib.* 802.

³ *Ellis v. Mollinott*, cited 4 Benc. 144.

⁴ A codicil destroyed without the testator's consent was established in *Clark v. Wright*, 3 Pick. 67 (2d ed.), 69, note 1; and cases cited.

⁵ *Rand v. Maemahon*, 12 Sim. 553, 556; 6 Jur. 450.

tion of the Court;⁶ and, in the absence of the original, there are various means of secondary evidence applicable for this purpose. In *Pullan v. Rawlins*,⁷ sufficient secondary evidence was given, by means of a copy admitted to probate in this country, certified by the Registrar of the place where the original was deposited.

Secondary evidence of the contents of written documents is admitted, both at Law and in Equity, when the party has not the means of producing them, because they are either lost or destroyed, or in the possession or power of the adverse party. At Law, where it is not known till the time of trial what evidence will be offered on either side, a party, in order to entitle himself to give secondary evidence of the contents of a written document, on the ground of its being in the possession of his adversary, ought to give him notice to produce it: for otherwise, *non constat* that the best evidence might not be had.⁸ But even at Law, when, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question, it is not necessary to give any notice for its production; and, therefore, in an action of trover for a deed,⁹ or upon an indictment for stealing a bill of exchange,¹⁰ it has been held, that, without previous notice, parol evidence may be given of the *contents of the instrument which is the foundation of the proceeding.¹

The same exception to the general rule appears to be equally applicable in Courts of Equity: for there it is held, that when, either from the pleadings or depositions, a party is apprised that it is the intention of the opposite party to make use of secondary evidence of the contents of a document in his possession, such secondary evidence may be used at the hearing, without serving the party in whose possession it is with notice to produce it.² This point was much considered by Sir William Grant M. R. in *Wood v. Strickland*,³ where a witness, who had been examined on the part of the defendant, deposed to the contents of a certain letter which had been written by the plaintiff to the witness, which the witness stated that he had himself subsequently returned to the plaintiff, who immediately threw it into the fire and destroyed it. At the hearing, an objection was taken, on the part of the plaintiff, to the admissibility of this evidence, on the ground that there was no proof of the letter being lost or destroyed, nor of any notice given to the plaintiff to produce it; but the objection was overruled by the Master

⁶ The evidence of the entire contents of the will must, in such cases, be most clear and satisfactory. *Davis v. Sigourney*, 8 Met. 487; *Durfee v. Durfee*, 8 Met. 490, note; *Huble v. Clark*, 1 Hagg. Eccl. 115.

⁷ 4 Beav. 142, where the cases are collected.

⁸ 1 Phil. Ev. (Cowen & Hill's ed. 1839) 439 *et seq.*; 3 *ib.* 1182, note, 834, and cases cited; 1 Greenl. Ev. § 560.

⁹ *How v. Hall*, 14 East, 274.

¹⁰ Aickles's case, 1 Leach, 234.

¹ See Taylor on Evid. §§ 379, 379; 1

Greenl. Ev. § 561. [Photographic copies of instruments are, like press copies, secondary evidence. *Eborn v. Zimpelman*, 47 Texas, 503. And see, as to photographs, *Locke v. Sioux, &c. Ry. Co.*, 46 Iowa, 109. *Blair v. Pelham*, 118 Mass. 420; *Udderzook v. Commonwealth*, 76 Penn. St. 340. Copy of a telegram held admissible on proof of the destruction of the original. *State v. Hopkins*, 50 Vt. 316.]

² See *Gresley Eq. Ev.* (Am. ed.) 118.

³ 2 Mer. 461, 465; and see *Lyne v. Lockwood*, 2 Moll 321; *Davison v. Robinson*, 6 W. R. 673, L. C.

of the Rolls, on the ground that the plaintiff must have seen, by the depositions, that the evidence of the case, set up as a defence to the bill, consisted of certain written communications which had taken place on the subject of the suit, and that it was impossible, therefore, that he could have been taken by surprise, or could not be prepared to produce any letter that might be in his possession. It is right, however, to state, that, in *Hawkesworth v. Dewsnap*,⁴ Sir Lancelot Shadwell V. C. came to a decision which was contrary to that in *Wood v. Strickland*;⁵ and that, in *Stulz v. Stulz*,⁶ he referred with approbation to his own decision in *Hawkesworth v. Dewsnap*: though he expressed himself willing to have the point again argued, in order that the practice might be settled. The point, however, was not argued, the objection having been waived.

It may be mentioned, with reference to this subject, that, in *Parkhurst v. Lowten*,⁷ Lord Eldon appears to have thought, that when a defendant admitted a deed to be in his possession, but declined to produce it, on the ground that it might convict him of simony, or any other criminal offence, secondary evidence of its contents might be received.

Where written documents are not admitted, and do not prove * themselves, they must be proved by the same evidence as at *880 Law:¹ the evidence, however, being taken according to the practice of the Court of Chancery.

Where an instrument, to the validity of which attestation is not requisite, has been attested, such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto;² and it is not requisite to prove it by the attesting witness, except in the case of *ex parte* applications: on which the evidence of the attesting witness will still be required,³ unless it can be shown that there is a difficulty in procuring it.⁴

To avoid unnecessary expense in the proof of documents, it has been enacted that, where all parties to a suit are competent to make admissions, any party may call on any other party, by notice, to admit any document saving all just exceptions; and that, in case of refusal or neglect to admit, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be: unless the Court shall certify that the refusal to admit was reasonable; and that no costs of proving any document shall be allowed,

⁴ Cited 5 Sim. 460.

⁵ 2 Mer. 461.

⁶ 5 Sim. 460.

⁷ 2 Swanst. 213.

¹ See *ante*, p. 874, and note; 1 Greenl. Ev. § 589 *et seq.* and note; Gresley Eq. Ev. (Am. ed.) 118, 119 *et seq.*

² 17 & 18 Vic. c. 125, § 26; see Homer v. Wallis, 11 Mass. 309.

³ *Re Reay*, 1 Jur. N. S. 222; 3 W. R. 312, V. C. K.; *Pedder v. Pedder*, cited Seton, 16.

⁴ *Re Dierdon*, 10 Jur. N. S. 673; 12 W.

R. 978, V. C. W.; *Jearrard v. Tracey*, 11 W. R. 37, V. C. K. In *Re Hall*, 9 W. R. 756, V. C. K., where no solemnities were required for the execution of a power, a bond was directed to be paid out of Court, without the evidence of the attesting witness; and see Taylor, § 1640.

[Proof by the attesting witness is, it seems, necessary, where the validity of the instrument, and payment of the consideration are contested by a person not a party to it. *Leigh v. Boyd*, 35 Beav. 455.]

unless such notice be given: except in cases where the omission to give the notice is, in the opinion of the Taxing Master, a saving of expense.⁵

Any document requiring to be stamped will not be received in evidence, until it has been stamped,⁶ except for a collateral purpose;⁷ and upon the production of any document (except such as cannot be stamped after execution, on payment of the duty and a penalty,⁸) as evidence at the trial of any cause, it is the duty of the officer of the Court, whose duty it is to read such document, to call the attention of the Judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, will not be received in evidence until the whole, or the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, has been paid; and thereupon such document is admissible in *881 evidence, saving all * just exceptions on other grounds.¹ No new trial will be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp.²

SECTION VII. — *Proving Exhibits at the Hearing, under an Order.*

Written documents, essential to the justice of the cause, may in certain cases be proved at the hearing as exhibits, *vivâ voce*, or by affi-

⁵ *Ante*, p. 849; 21 & 22 Vic. c. 27, § 7; Ord. XLI. 39, and Sched. N. No. 6; Taylor, § 707 A. [Under these provisions, a bankrupt and a married woman are competent to admit documents. *Churchill v. Collier*, 1 N. R. 82.] Section 7 is, in terms, generally applicable, and has been so acted upon; Seton, 21; it is framed on the Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76), § 117; and see Common Law Rules of H. T. 1853, r. 30; 17 Jur. Pt. 2, 9; Taylor, § 703. For the cases at Law on the construction to be put on § 117, and the practice thereunder, see Taylor on Evid. §§ 704-707; Chitty's Arch. 319-323; Chitty's Forms, 140-145. For forms of notice, admission thereunder, and affidavit of service, see Vol. III.

⁶ *Smith v. Henley*, 1 Phil. 391, 396; 8 Jur. 434.

⁷ *Blair v. Bromley*, 11 Jur. 617, L. C., and cases there cited.

⁸ See Seton, 16.

¹ The Stamp Act, 1870 (33 & 34 Vic. c. 97), § 16, on and after 1 Jan. 1871. The 17 & 18 Vic. c. 125, §§ 28, 29, is repealed on and from that date, by 33 & 34 Vic. c. 99. It seems there is no officer of the Court, strictly answering the description in § 16; the Registrar clearly does not. Seton, 16. The practice in the Court of Chancery is to direct the cause to stand over, or to allow it to proceed on the undertaking of the solicitor to procure

the document to be properly stamped; see Seton, 16; and see *ante*, pp. 848, 849; *Owen v. Thomas*, 3 M. & K. 353; *Coles v. Trecothick*, 9 Ves. 234, 239; *Carrington v. Pell*, 2 De G. & S. 512; *Browne v. Savage*, 5 Jur. N. S. 1020, V. C. K.; see also *Nixon v. Albion Marine Insurance Company*, L. R. 2 Exch. 338. Receipts for payments not duly stamped, and which could not be stamped either with or without a penalty, were received in evidence by consent, in *Orange v. Pickford*, and *Thompson v. Webster*, cited Seton, 16.

² 17 & 18 Vic. c. 125, § 31. In *Carpenter v. Snelling*, 97 Mass. 452, it was held that the provision of the United States Sts. 1866, c. 184, § 9, that no instrument or document not duly stamped, as required by the internal revenue laws of the United States, shall be admitted or used as evidence in any Court until the requisite stamps shall have been affixed thereto, applies only to the Courts of the United States. Bigelow C. J. in this case said: "We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the Courts of the several States which shall be obligatory upon them." See also *Lynch v. Morse*, 97 Mass. 458 in note; *Disbrow v. Johnson*, 3 C. E. Green, 36; *Davy v. Morgan*, 56 Barb. 218; [*Sporrer v. Eifler*, 1 Heisk. 633].

avit.³ This course may be adopted, where the cause is heard on bill and answer,⁴ or where the documents have not been proved before the evidence in the cause is closed.

Amongst the documents which may be thus proved, may be classed: "all ancient records of endowments and institutions, whether they are offered to be proved as original instruments, or as they are found collected and recorded in register books of great antiquity, deposited in the registries of the archbishops and bishops, * or of the * 882 deans and chapters of collegiate churches, or of the Ecclesiastical Courts, bulls of the Popes, records from the Bodleian, Harleian, and Museum libraries, or from any of the public libraries belonging to the two universities, or from the library at Lambeth: all or any of which ancient documents must be produced by those persons in whose immediate custody they are, who must be sworn to identify the particular record produced in his custody, before the same can be read."¹

So, in like manner may be proved, as exhibits, office copies of records² from any of the Courts at Westminster, or of grants or enrolments from the rolls or other records deposited in the Public Record Offices, or of records or proceedings from Courts of inferior jurisdiction in England: as those of the counties palatine of Chester, Lancaster, or Durham, or of the Courts of Great Session in Wales, or of the Courts of the universities of Oxford and Cambridge, or of the City of London, or of the Cinque Ports.³

Deeds, bonds, promissory notes, bills of exchange, letters, or receipts, of which proof must be made of the handwriting of the persons

³ The practice of proving such documents by affidavit was introduced by the 43d Order of August, 1841: Sand. Ord. 886; 3 Beav. xxv., which directed that, "In cases in which any exhibit may, by the present practice of the Court, be proved *vis à voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *vis à voce* at the hearing." This order is not included in the Consolidated Orders; but the Prel. Ord. r. 5, which preserves any established practice originated in, or sanctioned by, the Orders thereby abrogated, would, it is conceived, authorize the adoption of the practice, where necessary; see Seton, 14; see also 13 & 14 Vic. c. 35, § 28; and orders to prove exhibits *vis à voce* or by affidavits are frequently made; for recent instances, see *Jegon v. Vivian*, M. R., 17 Dec., 1869, Rolls' Lib.; *Feltham v. Turner*, M. R., 2 July, 1870, Rolls' Lib. Courts of Chancery have always had the power to examine witnesses *vis à voce*, for the purpose of proving certain written instruments. *Lever v. Redwood*, 9 Porter, 80; *Hughes v. Phelps*, 3 Bibb, 199; *Gresley Eq. Ev.* 126; *Latting v. Hall*, 9 Paige, 483; *Dana v. Nelson*, 1 Aiken, 254; see *De Peyster v. Golden*, 1 Edw. Ch. 63; *Nesmith v. Calvert*, 1 Wood. & M. 34; *Gafney v. Reeves*, 6 Ind. 71; *Morton v. White*, 5 Ind. 338.

It is provided, that the late change in the mode of taking evidence in Equity in Massachusetts shall not prevent the use of affidavits where they have heretofore been allowed. Genl. Sts. c. 131, § 60.

By Chancery Rule 95 of New Jersey, no documentary evidence, which is not made an exhibit before the Master, shall be read at the hearing of the cause. *Dick. Prec.* 25.

⁴ *Ante*, p. 828; *Rowland v. Sturgis*, 2 Hare, 520; *Chalk v. Raine*, 7 Hare, 393; 13 Jur. 981; *Neville v. Fitzgerald*, 2 Dr. & War. 530; *Wyatt's P. R.* 219; *capra*, *Jones v. Griffith*, 14 Sim. 262; 8 Jur. 733.

¹ 2 Fowl. Ex. Pr. 157.

² The office copies here mentioned are the copies of those records of which it is the duty of proper officers, appointed by the law, to furnish copies for general use, and are not those copies which it is the duty of the officer of the Court to make for the convenience of suitors in that Court, such as the ordinary office copies of pleadings and depositions in the Court of Chancery; which, although they are admissible in the Courts to which the officer belongs, are not admissible in other Courts without further proof of their accuracy. 2 Phil. on Evid. 197; *Taylor*, § 1382.

³ 2 Fowl. Ex. Pr. 158.

writing or executing the same, are all considered as exhibits, and may be proved at the hearing.⁴

With the exception of documents coming out of the custody of a public officer having the care of such documents (which are proved by the mere examination of the officer to that fact), no exhibit can thus be proved that requires more than the proof of the execution, or of handwriting, to substantiate it:⁵ if it be any thing that admits of cross-examination, or that requires any evidence besides that of handwriting, it cannot be received.⁶ This rule is strictly adhered to; and in many cases, where an instrument which, *primâ facie*, appears to be an exhibit, requires more formal proof, it cannot be received as one.⁷

*883 Thus, the Court refused * to admit certain receipts to be proved *vivâ voce*, although ordinarily they might be taken as exhibits: because, in order to make them evidence of the fact they were intended to substantiate, a further fact must have been proved, which the other side would have had a right to controvert and to cross-examine upon.¹ So also, where a power was required to be exercised by a deed executed in the presence of, and attested by witnesses, it was held that the deed by which the power was exercised could not be proved *vivâ voce* at the hearing of the cause;² and where a book, in which the collector of a former rector had kept accounts of the receipt of tithes, was offered to be proved *vivâ voce*, it was rejected, because, besides proving the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes.³

For the same reason, a will of real estate cannot be proved as an exhibit at the hearing: because, besides the mere execution of the will, the sanity of the testator must be established, and the heir has a right to cross-examine the witnesses.⁴ Under the present practice, however, a will has been allowed to be proved at the hearing, with liberty to the heir to cross-examine the witnesses.⁵

If a document is impeached by the answer of a defendant, it cannot be proved *vivâ voce*, on the part of the plaintiff, against such defendant.

⁴ 2 Fowl. Ex. Pr. 158; Hinde, 370.

⁵ See *Ellis v. Deane*, 3 Moll. 62; *Emerson v. Berkley*, 4 Hen. & M. 441.

⁶ *Lake v. Skinner*, 1 J. & W. 9, 15; *Bowser v. Colby*, 1 Hare, 109, 132. It seems, however, that the Court will, upon the suggestion of counsel, put questions to the witness; see *Turner v. Burleigh*, 17 Ves. 354.

⁷ *Bloxton v. Drewit*, Prec. in Ch. 64; *Ellis v. Deane*, 3 Moll. 63; *Emerson v. Berkley*, 4 Hen. & M. 441; *Gresley Eq. Ev. (Am. ed.)* 132 [199]. It is said not to be, strictly speaking, correct to say, that no questions, which will admit of a cross-examination, may be asked a witness thus proving exhibits; but the fact is, that the examination is restricted to three or four very simple points, such as the custody and identity of an ancient document produced by a librarian or registrar, the accuracy of an office copy produced by the proper officer, the execution of

a deed where the examinant is the attesting witness, the handwriting of a letter, or receipt, or promissory note, &c., &c. *Gresley Eq. Ev. (Am. ed.)* 126.

Where a minor is a party, the Court will not permit a witness to be examined *vivâ voce* at the hearing of the cause, to prove a deed or exhibit, which must be proved at the office, by an examination of the witness upon interrogatories. *White v. Baker*, 1 Irish Eq. 282.

¹ *Earl Pomfret v. Lord Windsor*, 2 Ves. S. 472, 479; and see *Bloxton v. Drewit*, Prec. in Ch. 64.

² *Brace v. Blick*, 7 Sim. 616.

³ *Lake v. Skinner*, 1 J. & W. 9, 15.

⁴ *Harris v. Ingledew*, 3 P. Wms. 93; *Niblett v. Daniel*, Bunb. 310; 2 Fowl. Ex. Pr. 158; *ante*, pp. 874, 875.

⁵ *Chichester v. Chichester*, 24 Beav. 289; see also *Hope v. Liddell*, 20 Beav. 438.

Thus, where the answer of one of the defendants in a cause insisted that a covenant was fraudulently inserted in a deed, the Court refused to admit such deed to be proved *vidâ voce* against that defendant; although it was held, that it might have been so proved against the other defendant, who had not impeached its authenticity.⁶ So, where a bill was filed for the payment of an annuity, the circumstances under which the annuity deed was executed being disputed by the parties, the plaintiff was not allowed to prove the deed *vidâ voce* as an exhibit; but leave was given to file interrogatories for that purpose.⁷

It is only, however, where the execution or the authenticity of a deed is impeached, that it cannot be proved as an exhibit: if the validity of it only is disputed, it may be so proved;⁸ and upon this principle, the plaintiff, in a foreclosure suit, was allowed to prove by affidavit the mortgage deed under which he claimed, where it was neither admitted nor denied by the defendant.⁹

It is, however, necessary, in order to authorize the proving of *an exhibit at the hearing of a cause, that the party intend- *884 ing to make use of the exhibit should previously obtain an order for that purpose.¹ This order may be obtained, by the party requiring it, on motion of course, or on petition of course, at the Rolls,² and it may be granted during the hearing of the cause:³ in which case, the cause will either be ordered to stand over for the purpose of enabling the order to be served and acted upon, or, if the witness is in Court, it may be acted upon immediately.⁴

The order, when drawn up, must describe minutely the exhibits to be proved;⁵ and it is always made, as of course, "saving all just exceptions."⁶

The order, being drawn up, passed, and entered, a copy thereof must be served, in the usual manner, upon the adverse solicitor, two days previous to the hearing of the cause.⁷

When the cause is called on, the original order, the exhibit described therein, and the witness to prove the same, must be produced in Court; and the Registrar then administers the oath and examines the wit-

⁶ *Barfield v. Kelly*, 4 Russ. 355, 357; *Joly v. Swift*, 3 Jo. & Lat. 126; *Hitchcock v. Carew*, Kay Ap. 14.

⁷ *Maber v. Hobbs*, 1 Y. & C. Ex. 585, 586.

⁸ *Attorney-General v. Pearson*, 7 Sim. 309.

⁹ *Rowland v. Sturgis*, 2 Hare, 520; *contra Jones v. Griffith*, 14 Sim. 262; 8 Jur. 733; and see *Chalk v. Raine*, 7 Hare, 393; 13 Jur. 981.

¹ *Hinde*, 370; *Clare v. Wood*, 1 Hare, 314; see *Emerson v. Berkley*, 4 Hen. & M. 441; *Barrow v. Rhineland*, 1 John. Ch. 559; *Gresley Eq. Ev. (Am. ed.)* 131 [188]. The order may be obtained after the affidavit, in proof of the exhibits, is made. S. C.

² See *Graves v. Budget*, 1 Atk. 444. For form of order, see *Seton*, 1237, No. 3.

³ *Bank v. Farques*, Amb. 145.

⁴ But see *Bird v. Lake*, 1 H. & M. 111.

⁵ As, if a deed, the date and parties' names; if a letter, the date, and the names of the persons by whom it was written, and to whom it was addressed. *Gresley*, 188; *Gresley Eq. Ev. (Am. ed.)* 131 [188]. To authorize a party to produce, at the hearing, documentary evidence which is not made an exhibit before the Examiner, nor distinctly referred to in the pleadings, the notice of intention to make use of such evidence should state sufficient of the substance of the document intended to be produced to enable the adverse party to see that it is evidence of some fact against him. *Miller v. Avery*, 2 Barb. Ch. 582.

⁶ *Hinde*, 370.

⁷ *Hinde*, 370; *Gresley*, 188; *Ord. III. 1.*

ness;⁸ or, if proved by affidavit, the order and exhibit must be produced with the affidavit.⁹

No documents but those mentioned or described in the order, can be thus proved at the hearing;¹⁰ and as the order saves just exceptions, all objections which can be taken to the admissibility of the document as evidence, may then be urged by the opposing party.

The attendance of an unwilling witness, to prove an exhibit at the hearing, may be enforced by *subpœna*,¹¹ and, unless an order to prove *vivâ voce* at the hearing has been obtained, an order for leave to issue the *subpœna* appears to be necessary, and may be obtained on *ex parte* motion.¹² The *subpœna* is prepared and issued in the manner

*885 hereafter explained:¹³ and is made returnable * at the time and place specified in an accompanying notice; being usually the day on which the cause will be in the paper for hearing, and the Court of the Judge who is to hear it.¹ The order to prove *vivâ voce*, or to issue the *subpœna*, as the case may be, must be produced at the time the *subpœna* is sealed. Personal service is necessary, and a tender of expenses, as in the case of an ordinary *subpœna ad testificandum*.²

The adverse party has no right, in the absence of special circumstances to compel the production, before the hearing, of an exhibit, however it has been proved:³ unless, perhaps, where the deposition proving it sets it out *verbatim*;⁴ nor even to inspect it: for he is not, before the hearing, to “see the strength of the cause, or any deed to pick holes in it.”⁵

SECTION VIII. — *Who may be Witnesses.*

Formerly, persons interested in the matters in question in the suit, or parties thereto;⁶ or who had been found guilty of cer-

⁸ Hinde, 371; Bowser v. Colby, 1 Hare, 132 n. (a). A witness may be examined to prove exhibits, though examined before in the cause. Neep v. Abbot, C. P. Coop. 191. For form of oath, see Vol. III.

⁹ The order should be entered as read in the decree. Seton, 14; *ib.* 24, No. 9. The Registrar will indorse each exhibit produced in evidence; for a form, see Seton, 26.

¹⁰ Hinde, 371; Wyatt's P. R. 186.

¹¹ Hinde, 371.

¹² Hinde, 371; Gresley, 191; Seton, 14; but see Holden v. Holden, 5 W. R. 217, V. C. K.; 7 De G., M. & G. 397; Seton, 14; Vorley v. Jerram, 6 W. R. 734; no formal order is drawn up; a note signed by the Registrar of the direction of the Court being sufficient; Raymond v. Brown, 4 De G. & J. 530.

¹³ See *post*, pp. 905 *et seq.*

¹ Sched. to Ord. E. No. 2.

² See *post*, p. 906.

³ Forrester v. Helme, M'Cl. 558; Lord v. Colvin, 2 Drew. 205; 5 De G., M. & G. 47; 13 Jur. 253.

⁴ Hodson v. Earl of Warrington, 3 P. Wms. 34.

⁵ Gresley, 192, citing Davers v. Davers, 2 P. Wms. 410; 2 Str. 764; Wiley v. Pistor, 7 Ves. 411; Fencott v. Clarke, 6 Sim. 8; Lord v. Colvin, *ubi sup.*; and see *post*, p. 896; Bell v. Johnson, 1 J. & H. 682.

⁶ In Chancery, parties to the record were always subject to examination, as witnesses, much more freely than at Law. A plaintiff might obtain an order as of course, to examine a defendant, and a defendant a co-defendant, as a witness, upon affidavit that he was a material witness, and was not interested on the side of the applicant, in the matter to which it was proposed to examine him; the order being made subject to all just exceptions. If the answer of the defendant had been replied to, the replication must be withdrawn before the plaintiff could examine him. But a plaintiff could not be examined by a defendant, except by consent, unless he was merely a trustee, or had no beneficial interest in the matter in question. Nor could a co-plaintiff be examined by a plaintiff, without the consent of the defendant. The course in the latter of such cases was to strike out his name as plaintiff, and make him a defendant, and in the former to file a cross-bill. 1

tain *crimes,¹ were incompetent to give evidence; but these *886 restrictions have been removed.²

Greenl. Ev. § 361; 1 Smith Ch. Pr. 343, 344; Eekford v. Dekay, 6 Paige, 565; see Hill v. Hill, 9 Gill & J. 81; DeWolf v. Johnson, 10 Wheat. 367; Gresley Eq. Ev. (Am. ed.) 242 et seq.; Second n. First Cong. Society in Hopkinton, 14 N. H. 315. Where one party was examined as a witness against another party in the same cause, he might be cross-examined like any other witness by the party against whom he was called, and his evidence could not be used in his own favor. Benson v. Leroy, 1 Paige, 122. [And his evidence must, as against the party introducing him, be taken as true, unless disproved. Powden v. Johnson, 7 Rep. 294, U. S. C. Pa.] But where a party was examined before a Master in relation to his own rights, and the examination was in the nature of a bill of discovery, he could not be cross-examined by his own counsel, nor could he give evidence in his own favor, any further than his answers were responsive to the questions put to him. *Ibid.* He must, however, accompany his answer by explanations responsive to the interrogatory, which might be necessary to rebut any improper inference arising from such answer. *Ibid.*; see Armsby v. Wood, 1 Hopk. 229.

If there were more defendants than one, an examination of a defendant might be had, and a decree obtained against another defendant upon the facts elicited by such examination; but a decree could not be had against the party examined, embracing such facts. Palmer v. Van Doren, 2 Edw. Ch. 192; Bradley v. Root, 5 Paige, 633; [Lingan v. Henderson, 1 Bland, 258; Mann v. Ward, 2 Atk. 288; Weymouth v. Boyer, 1 Ves. Jr. 416. And if the examination release a person primarily liable, it releases those secondarily liable also. Thompson v. Harrison, 1 Cox, 344. And see, as to the effect on the liability of persons jointly bound, Meadbury v. Isdall, 9 Mod. 438; Gould v. O'Keefe, 1 Beat. 356; Massy v. Massy, 1 Beat. 353; Bernal v. Lord Donegal, 3 Dow. P. C. 133; Hulston v. Sandys, 1 Younge, 602. The reason of the rule is that plaintiff shall not compel a defendant to assist, and to act against him. But it is not for the sake of the defendant that the rule has been established, for he might protect himself by demurring to the interrogatory. It is for the sake of the other defendants, and they alone can make the objection. Nightingale v. Dodd, Amb. 584. Under the present law of evidence, the rule itself is, perhaps, obsolete. Jenkins v. Greenwald, 1 Bond, 134.] Where a defendant had been examined under the usual order, as a witness, a plaintiff might have a decree against him upon other matters, to which he was not examined. Palmer v. Van Doren, 2 Edw. Ch. 192. The rule that a plaintiff could not have a decree against a defendant, whom he had examined as a witness in the cause, did not apply to the case of a mere formal defendant, as an executor or trustee, against whom no personal decree was sought, and who had no personal interest in the question, as to which he was examined as a wit-

ness against his co-defendant; not to the case of a defendant, who, by his answer, admitted his own liability, or who offered the bill to be taken as confessed against him. Bradley v. Root, 5 Paige, 633; Palmer v. Coffin, 12 Gray, 288. [Nor when there is nothing to show that the defendant was examined at the suggestion, or request, or with the knowledge of the plaintiff; nor in any case in the United States Courts on their Equity side since the adoption of the 77th Rule by the Supreme Court, which rule authorizes the examination of parties by the Master on a reference. Jenkins v. Greenwald, 1 Bond, 134.] Where a defendant admitted that he was primarily liable to the plaintiff for the payment of the demand, for which the suit was brought, he might be examined either by the plaintiff or by his co-defendants, as a witness in the cause. Bradley v. Root, 5 Paige, 633; see Regan v. Echols, 5 Geo. 71; Palmer v. Van Doren, 2 Edw. Ch. 192; Fulton Bank v. Sharon Canal Co., 4 Paige, 127; Ormsby v. Bakewell, 7 Ohio, 98.

An order allowing a defendant to examine his co-defendant as a witness would always be granted upon a suggestion that the party to be examined had no interest in the cause, leaving the question of interest to be settled at the hearing, upon the proofs. Nevill v. Demeritt, 1 Green Ch. 321; Ch. Rule of New Jersey, 78; 2 McCarter, 529; see Harrison v. Johnson, 3 C. E. Green, 420; Graham v. Berryman, 4 C. E. Green, 29. The adverse party might at the hearing object to the competency of a defendant's examination, and if he appeared to be interested in the matters to which he was examined, the objection might be taken at the hearing, though it had not been made before. Mohawk Bank v. Atwater, 2 Paige, 54.

The evidence of a co-defendant is not rendered incompetent by the fact that no order was made for his examination. Since the New Jersey Act removing the disqualification of interest in a witness, as a party or otherwise, no order for his examination is necessary in that State. Giveans v. McMurtry, 1 C. E. Green, 468. Nor is it any objection to the competency of a co-defendant to testify, that he has not answered the bill, but has suffered a decree *pro confesso* against him. The plaintiff may, at his discretion, require him to answer. But if he do not, the defendant, by failing to answer, cannot deprive his co-defendant of his testimony, or disqualify him as a witness in the cause. Giveans v. McMurtry, *id.* *supra*.

1 As to persons laboring under defect of understanding, see 1 Greenl. Ev. § 365; Gresley Eq. Ev. (Am. ed.) 237; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 18, 19, notes (47), (48). As to the competency of deaf and dumb persons, see 1 Greenl. Ev. § 366; State v. DeWolf, 8 Conn. 93; Commonwealth v. Hill,

2 3 & 4 Will. IV. c. 42, §§ 26, 27; 6 & 7 Vic. c. 85; 14 & 15 Vic. c. 93; 16 & 17 Vic.

The witnesses should be sworn in such form, and with such ceremonies, as they may declare to be binding on their consciences; ³ and any person competent to be a witness may, if he objects to take an oath, or is objected to as incompetent to take an oath, and the presiding Judge ⁴ is satisfied that the taking of an oath would have no binding effect on his conscience, give evidence upon his promise and declaration. ⁵

*887 A peer, although privileged to * put in his answer upon his attestation of honor, must, when called upon to give evidence as a witness, do so upon oath. ¹

It is a contempt of Court to publish, while a cause is pending, comments upon the evidence which, being calculated to injure the litigants' cases, or to create ill feeling against the witnesses, may tend to hinder the course of justice. ²

14 Mass. 207; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 19, and note (49). As to the competency of children, 1 Greenl. Ev. § 367; Gresley Eq. Ev. (Am. ed.) 237; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 19, 20, notes (50), (51), (52).

c. 83; see Taylor, §§ 1211-1219. As to the competency of witnesses, see Taylor, §§ 1210-1257; Best, §§ 187-271; Powell, 25 *et seq.* By a late statute of Massachusetts, no person of sufficient understanding shall be excluded from giving evidence as a witness, in any civil proceeding, in Court or before a person having authority to receive evidence; subject to the qualification that neither husband nor wife shall be allowed to testify as to private conversations with each other; and the conviction of a witness of any crime may be shown to affect his credibility. A party to a cause who shall call the adverse party as a witness, shall be allowed the same liberty in the examination of such witness, as is now allowed upon cross-examination. St. Mass. 1870, c. 393, §§ 1, 3, 4; see *Metler v. Metler*, 3 C. E. Green, 270, 276; S. C. 4 C. E. Green, 457; *Harrison v. Johnson*, 3 C. E. Green, 420; *Bird v. Davis*, 1 McCarter, 467; *Marlott v. Warwick*, 3 C. E. Green, 108; *Doddy v. Pierce*, 9 Allen, 141; *Bailey v. Myrick*, 52 Maine, 132.

[In New Jersey, the competency of a witness in an Equity suit depends upon his qualification at the time he is examined. *Williams v. Vreeland*, 3 Stew. Eq. 576. In Tennessee, when the evidence is offered. *Oliver v. Moore*, 12 Heisk. 482; *Beaty v. McCorkle*, 11 Heisk. 593.]

³ 1 & 2 Vic. c. 105. Such is the law by statute of Massachusetts. Genl. Sts. c. 131, § 12. In this State, the oath is ordinarily administered, with the ceremony of holding up the hand. Genl. Sts. c. 131, § 8. But where the witness is a Roman Catholic, the oath is administered to him on the Holy Evangelists, on the ground that those who profess that faith, generally regard this to be the most solemn form of administering an oath. *Commonwealth v. Buzzell*, 16 Pick. 153. So in any case where the Court or

magistrate before whom a person is to be sworn, is satisfied that such person has any peculiar mode of swearing which is in his opinion more solemn or obligatory than holding up the hand, they may adopt that mode of administering the oath. Genl. Sts. c. 131, § 9.

⁴ This expression includes any person or persons having by law authority to administer an oath for the taking of evidence; see The Evidence Amendment Act, 1870 (33 & 34 Vic. c. 49), § 1.

⁵ The Evidence Further Amendment Act, 1869 (32 & 33 Vic. c. 68), § 4; and see before this Act, 7 & 8 Will. III. c. 34, § 1; 8 Geo. I. c. 6, § 1; 22 Geo. II. c. 30, § 1; *ib.* c. 46, § 36; 9 Geo. IV. c. 32, § 1; 3 & 4 Will. IV. c. 49; *ib.* c. 82; 1 & 2 Vic. c. 77; *ib.* c. 105; 17 & 18 Vic. c. 125, § 20; Taylor, § 1256. In Massachusetts, every person who declares that he has conscientious scruples against taking an oath, shall, when called upon for that purpose, be permitted to affirm in the manner prescribed for Quakers, if the Court or magistrate on inquiry is satisfied of the truth of such declaration. Genl. Sts. c. 131, §§ 10, 11. Conscientious scruples furnish ground for substituting an affirmation for an oath in the United States Courts. Rule 91 of the Equity Rules for United States Courts. As to the effect of a want of religious belief, see *Maden v. Catanach*, 7 H. & N. 360; 7 Jur. N. S. 1107; *Gresley Eq. Ev.* (Am. ed.) 237, 238; 1 Greenl. Ev. §§ 368-370, and notes and cases cited; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 20-27, and notes; *Smith v. Coffin*, 18 Maine, 157.

In Massachusetts, every person not a believer in any religion shall be required to testify truly, under the pains and penalties of perjury; and the evidence of such person's disbelief in the existence of God may be received to affect his credibility as a witness. Genl. Sts. c. 131, § 12.

¹ Taylor, § 1245.

² Anon., 2 Atk 469; S. C., *nom.* Roach v. Garvan, 2 Dick. 794; *Littler v. Thompson*, 2 Beav. 129; *Felkin v. Lord Herbert*, 10 Jur. N. S. 62; 12 W. R. 241, V. C. K.; *Tichborne v. Mostyn*, L. R. 7 Eq. 55, r. (i), V. C. W.

SECTION IX. — *Manner of, and Time for, taking Evidence.*

Formerly, the general mode of examining witnesses in Equity was by interrogatories in writing, exhibited by the party, plaintiff or defendant, or directed by the Court to be proposed to or asked of the witnesses in a cause.³ This practice has been abolished, and a new system substituted in its place.⁴ The Court may, however, if it shall think fit, order any particular witness, either within or out of the jurisdiction, to be examined upon interrogatories: and with respect to such witness or witnesses, the former practice of the Court in relation to the examination of witnesses continues in full force, save only so far as the same may be varied by any General Order of the Lord Chancellor in that behalf, or by any * order of the Court with reference to any particular case.¹ The Court has rarely, if ever, availed itself of this power to resort to the former practice in the examination of particular witnesses.² It is, therefore, thought undesirable to state the former practice in detail.

The evidence on interlocutory applications, in causes and matters depending in the Court, is usually taken by affidavit; but it may be taken by oral examination before an Examiner.³ And after a decree in a cause, the evidence may be taken, either by affidavit, or by oral examination before an Examiner, or Chief Clerk of the Judge.⁴

We have already seen,⁵ that a cause may be brought to a hearing on motion for decree, instead of replication being filed in the ordinary way. If this is done, the evidence is adduced by affidavit,⁶ and in such case an answer, if one has been filed, may be treated as an affidavit.⁷

³ *Ante*, p. 836, note.

⁴ In Massachusetts, "in proceedings in Equity, the evidence shall be taken in the same manner as in suits at Law, unless the Court for special reasons otherwise directs; but this shall not prevent the use of affidavits where they have heretofore been allowed." Genl. Sts. c. 131, § 60. Under the above statute, the evidence "is to be taken *viva voce* when it can be so taken, and when depositions would be allowed in an action at Law, they may be taken in Equity; and all the rules of Law, as to the taking and filing of depositions at Law, will apply in Equity. And this statute necessarily supersedes the rules of Court, as to the taking and filing of depositions in Chancery." And, in a suit in Equity, where a commission was applied for to take the testimony of a witness residing out of the Commonwealth, after the time fixed by the rules of Court for setting the cause down for hearing, the Court said: "The plaintiff, is, therefore, entitled to have a commission issue, as he would have been according to the established rule and practice at Law, where testimony is to be taken out of the jurisdiction of the Court." Per Shaw C. J. in *Pingree v. Coffin*, 12 Cush. 600, 601.

In Wisconsin, each party to a suit in

Equity has a right to have his witnesses examined in open Court, subject to the occasional exceptions provided for in cases at Law. *Noonan v. Orton*, 5 Wis. 60; *Brown v. Runals*, 14 Wis. 692.

¹ 15 & 16 Vic. c. 86, § 28. So under the amendment of the 67th of the Rules in Equity of the Supreme Court of the United States.

² See *London Bank of Mexico v. Hart*, L. R. 6 Eq. 467, V. C. G.; where a commission according to former practice was refused.

³ 15 & 16 Vic. c. 86, § 40; Ord. 5 Feb., 1861, r. 22; see *post*, p. 905 and note; *ante*, p. 821, note.

⁴ 15 & 16 Vic. c. 86, § 41; 15 & 16 Vic. c. 80, § 30; Ord. 5 Feb., 1861, r. 15.

⁵ *Ante*, pp. 819 *et seq.*; 15 & 16 Vic. c. 86, §§ 15, 16.

⁶ *Coles v. Morris*, L. R. 2 Ch. Ap. 701, 705, L. C. [Where the parties agree that the evidence shall be taken by affidavit, it is equivalent to an agreement to try the case before the Judge without a jury, although the case be a proper one for a jury. *Brooke v. Wigg*, 8 Ch. Div. 510.]

⁷ *Ante*, p. 821; 15 & 16 Vic. c. 86, § 15; Ord. XXXIII. 5, 6, 7.

If the cause is brought to a hearing by filing replication, the evidence is taken by affidavit, or by *ex parte* examination before an Examiner, except as to any facts or issues ordered to be proved by evidence taken *vivâ voce*, at the hearing:⁸ the parties having the advantage, which they have not on motion for decree, that they may thus have an *ex parte* oral examination of a witness who refuses to make an affidavit.⁹

Unless an order to take his evidence *de bene esse*¹⁰ has been obtained, it is irregular to examine a witness for the purposes of the hearing, previously to serving a notice of motion for a decree or the filing of replication,¹¹ and the power to examine a witness for the purpose of using his evidence on any claim, motion, petition, or other proceeding before the Court,¹² is confined to those cases in which the evidence is to be used on a claim, motion, petition, or proceeding which is actually pending.¹³

Witnesses who have made affidavits, or been examined *ex parte* before the Examiner, are liable to cross-examination at the hearing;¹⁴ and where a party has given notice to read an affidavit, he will not be allowed to withdraw the affidavit, and so prevent the *889 * witness from being cross-examined upon it.¹ There can be no cross-examination, however, upon an affidavit of documents.²

No affidavit or deposition filed or made before issue joined in any cause will, without special leave of the Court, be received at the hearing thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court, notice in writing has been given by the party intending to use the same, to the opposite party, of his intention in that behalf.³ An application to enlarge the month may be made by summons:⁴ which must be served on the other parties with whom issue is joined. Where the affidavit has been sworn before, but filed after issue was joined, it was allowed to be used, though the notice had not been given.⁵ Where, in consequence of the opposite party having absconded, the notice could not be served upon him, leave was given to advertise it.⁶

The evidence in chief on both sides, in any cause in which issue is joined, in respect of facts and issues not included in any order for taking evidence in chief *vivâ voce* at the hearing, whether taken by affidavit or before an Examiner (and including the cross-examination and

⁸ Ord. 5 Feb., 1861, r. 4. By consent, under r. 10, the examination, or cross-examination, of any particular witness may be taken in manner provided by 15 & 16 Vic. c. 86; see *post*, p. 904.

⁹ *Coles v. Morris*, L. R. 2 Ch. Ap. 701, 704, L. C.

¹⁰ As to taking evidence *de bene esse*, see *post*, pp. 932-941.

¹¹ *Rendle v. Metropolitan & Provincial Bank*, W. N. (1867), 239; 15 W. R. 1068, V. C. S.

¹² See 15 & 16 Vic. c. 86, § 40.

¹³ *Coles v. Morris*, L. R. 2 Ch. Ap. 701, 704.

¹⁴ 15 & 16 Vic. c. 86, § 38; Ord. 5 Feb., 1861, rr. 7, 19; and see *Fielden v. Goschen*, 18 W. R. 85, V. C. S.

¹ *Clarke v. Law*, 2 K. & J. 28; 2 Jur. N. S. 221; National Insurance Association v. Carstairs, 9 Jur. N. S. 955, M. R.

² *Manby v. Bewicke* (No. 2), 8 De G., M. & G. 470; 2 Jur. N. S. 672; overruling *Kay v. Smith*, 20 Beav. 566.

³ Ord. XIX. 12.

⁴ See Ord. XXXVII. 17.

⁵ *Nicholl v. Jones*, 36 L. J. Ch. 554, V. C. W.

⁶ *Murphy v. Vincent*, W. N. (1870), 217, V. C. B.

re-examination of any witness or other person) must be closed within eight weeks after issue joined, unless the time be enlarged by any special order.⁷ And no further evidence, except the cross-examination and re-examination of a witness who has made an affidavit, or been examined *ex parte* before the Examiner, will be received, without special leave of the Court, previously obtained for that purpose.⁸

Where the eight weeks expire in the long vacation, the time for closing evidence is extended by a General Order, to the fifth day of the ensuing Michaelmas Term.⁹

As a general rule, new evidence is only allowed to be received after the evidence is closed, in the following cases: where the party who desires to file an affidavit has not had an opportunity of seeing the evidence on the other side; where, though he has seen the evidence, he finds that it raises a new issue, not raised by the pleadings, and which is material to the decision of the case; [¹⁰] where an affidavit has been filed impeaching the character of a witness, in which case the person whose character is assailed is entitled to *adduce evi- *890

dence to meet the charges; and where new facts material to the issue have arisen after the closing of the evidence.¹ Where, by inadvertence, an affidavit, though prepared, was not filed until nine days after the time for taking evidence was closed, the Court, on motion, gave leave to use it, on payment of the costs of the motion;² and it is conceived that the Court will grant such special leave, in all cases where, under the circumstances, it thinks that justice requires it.³ Such special leave was refused where the application was made on the ground that a material witness had been discovered, whose evidence the applicant had no means of previously knowing to be attainable.⁴

The Court has also power, if it thinks fit, to allow such evidence to be used at the hearing, although no special leave has been previously obtained;⁵ and it has allowed a motion for this purpose to be brought on with the cause.⁶

⁷ Ord. 5 Feb., 1861, r. 5; see *post*, p. 890. Where the time is enlarged, after the cause has been set down for hearing, the order should be produced to the Order of Course Clerk in the Registrars' office, who will make a note thereof in the cause-book kept there; see Reg. Regul. 21 Jan., 1861.

⁸ 15 & 16 Vic. c. 86, § 38; Ord. 5 Feb., 1861, rr. 5, 19; see *Thexton v. Edmonston*, L. R. 5 Eq. 373.

⁹ Ord. XXXVII. 15; and it seems the rule applies where the eight weeks have been enlarged, and the enlarged time expires in the long vacation; see *Clark v. Malpas*, cited *Morgan*, 553; and see *Braithwaite's Manual*, 167, n. (46).

[¹⁰ *Leech v. Bolland*, L. R. 10 Ch. Ap. 362.]

¹ *Thexton v. Edmonston*, L. R. 5 Eq. 373, 375, M. R.; and see *Scott v. Mayor of Liverpool*, 1 De G. & J. 369; 3 Jur. N. S. 832, L. J.; *ib.* 533, V. C. S.; *Poupard v. Fardell*,

W. N. (1869), 236; 13 W. R. 37, 59, V. C. M.; *Philips v. Warde*, 2 Jur. N. S. 608, V. C. S.

² *Douglas v. Archbutt*, 23 Beav. 293.

³ *Scott v. Mayor of Liverpool*, 1 De G. & J. 369; 3 Jur. N. S. 832, L. J.; *Philips v. Warde*, 2 Jur. N. S. 608, V. C. S.; *Watson v. Cleaver*, 20 Beav. 137; 1 Jur. N. S. 270; *Hope v. Threlfall*, 1 Sm. & G. App. 21; 17 Jur. 1021; *McLachlan v. Lord*, 14 L. T. N. S. 98, V. C. S.; *Hodges v. Doulton*, 18 W. R. 58, V. C. M.

⁴ *Thexton v. Edmonston*, L. R. 5 Eq. 373, M. R.

⁵ *Boyse v. Colclough*, 1 K. & J. 124, 144; *Bayley v. Cass*, 10 W. R. 370, where V. C. Stuart said that this is the proper time. See also *Poupard v. Fardell*, W. N. (1869), 236; 13 W. R. 37, 59, V. C. M.

⁶ *Hope v. Threlfall*, 1 Sm. & G. App. 21; 17 Jur. 1021.

The application for leave to use affidavits, filed after the evidence is closed, may be made in Chambers by summons, or in Court by motion; it has, however, been usually made in Court. The summons, or notice of the motion, should be served on all parties.⁷

The application to enlarge the time for taking evidence is made in Chambers by summons,⁸ supported by affidavit, showing the grounds of the application. The costs of the application should be disposed of at the time it is heard; and will in general be made costs in the cause. The summons, whether taken out by the plaintiff or by a defendant, must be served by the applicant upon all the other parties to the cause with whom issue is joined.

The fact that the evidence of the other party was filed at the last moment allowed for so doing, is no ground for enlarging the time for taking evidence, if it is confined to matters distinctly put in issue by the pleadings.⁹

Whenever any party desires to cross-examine any witness who has made an affidavit, or been examined *ex parte* before the Examiner, he must give notice, within certain limited times, to the party by whom the affidavit was filed or the witness examined, to produce the witness for cross-examination;¹⁰ or he may serve the witness with a *891 *subpœna*, requiring him to attend for the same *purpose.¹ For the details of the practice on the subject of cross-examination, the reader is referred to the section on *vivâ voce* evidence.²

A plaintiff cannot, without giving notice, use the evidence adduced on behalf of a defendant against a co-defendant.³

SECTION X. — Affidavits and ex-parte Examinations before an Examiner.

An affidavit is a statement in writing sworn to, or affirmed,⁴ before some person having authority to administer oaths.⁵ It must, except in

⁷ See *Richards v. Curlew*, 18 Beav. 462.

⁸ 15 & 16 Vic. c. 80, § 26.

⁹ *Thompson v. Partridge*, 4 De G., M. & G. 794; 17 Jur. 1108; see *Scott v. Mayor of Liverpool*, 1 De G. & J. 371; 3 Jur. N. S. 832; and *S. C.*, before V. C. Stuart, 3 Jur. N. S. 533.

¹⁰ Ord. 5 Feb., 1861, r. 19.

¹ *Singer's Sewing Machine Manufacturing Company v. Wilson*, 2 H. & M. 584; 11 Jur. N. S. 58, V. C. W.; and see *Cox v. Stephens*, 9 Jur. N. S. 1144; 11 W. R. 929, V. C. K.

² *Post*, pp. 837 *et seq.*

³ *Fielden v. Slater*, L. R. 7 Eq. 523, 529, V. C. J.; but see *Lord v. Colvin*, 3 Drew. 222; *Sturgis v. Morse* (No. 2), 26 Beav. 562.

⁴ 17 & 18 Vic. c. 125, § 20; and *ante*, p. 887.

⁵ In *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, it was held that an affidavit in Chancery, not sworn before a Judge of the

Court, or a commissioner appointed to administer an oath, could not be received in evidence. An affidavit in New York may be sworn to before a State senator, he being *ex officio* a Judge of the Court for the Correction of Errors, which is a Court of record. *Craig v. Briggs*, 4 Paige, 548. An affidavit taken before a commissioner of deeds *de facto*, for a city, who is exercising such office under color of an appointment by the Governor and Senate, may be read in a suit between other persons; and the Court will not inquire collaterally into the legality of such appointment. *Parker v. Baker*, 8 Paige, 423. Oaths are to be administered in a reverent manner. Ord. XIX. 14. [There can be no such thing as an unwritten affidavit. *Windley v. Broadway*, 77 N. C. 333. Nor can the Court be required to act upon an oral statement, where the affidavit is waived. *Hart v. Scruggs*, 1 Tenn. Ch. 1.]

the case of a bill which is required to be accompanied with an affidavit,⁶ be made in some cause or matter actually pending at the time it is sworn: otherwise it cannot be received.⁷ An affidavit will be received, although the deponent has died since it was sworn: but the Court will not attach so much weight to it as it would have done, if an opportunity for the cross-examination of the deponent thereon had been afforded.⁸

Affidavits may be sworn before any of the persons authorized to take answers in Chancery. Who these persons are, and the nature and extent of their authority, has been already stated.⁹

The commissioner before whom the affidavit is sworn, must not be a solicitor in the cause.¹⁰ In a case before Lord Hardwicke, where the affidavits, in support of a petition, had been sworn before the petitioner's solicitor, the petition was dismissed, and the costs were directed to come out of the solicitor's pocket.¹¹ And in the case of *Wood v.*

Harpur,¹² Lord Langdale M. R. rejected affidavits, because *they *892 had been sworn before a solicitor who acted as clerk to the plaintiff's solicitor; but an affidavit may be sworn before a commissioner acting as a clerk to the plaintiff in the cause, where the plaintiff, though a solicitor, does not act as such in the cause.¹ It is not irregular to swear an affidavit before a solicitor, to whom it has been sent for the purpose of getting it sworn by the solicitor of the applicant, and who is the agent of the latter for that purpose only.²

The Court of Chancery is also in the habit of receiving affidavits made by parties resident out of the jurisdiction, though not sworn to before any of the functionaries before referred to, provided it is shown that the persons before whom they are sworn are persons who, by the law of the country in which the affidavit is sworn, are authorized to administer an oath, and the signature of such person is properly verified.*

⁶ *Ante*, pp. 392-396.

⁷ *Francome v. Francome*, 11 Jur. N. S. 123; 13 W. R. 355, L. C.; overruling *Fennell v. Brown*, 18 Jur. 1051, V. C. W. Affidavits filed after payment in of fund, but before presentation of petition for payment out, were received. *Re Varley*, 14 W. R. 98, V. C. K.; and see *Re Western Benefit Building Society*, 33 Beav. 368.

⁸ *Abadom v. Abadom*, 24 Beav. 243; *Williams v. Williams*, 10 Jur. N. S. 608; 12 W. R. 663, V. C. K.; *Davies v. Otty*, 13 W. R. 484, M. R.; *Ridley v. Ridley*, 34 Beav. 329; and see *Morley v. Morley*, 5 De G., M. & G. 610, 613, 614; 1 Jur. N. S. 1097, 1098; see also *Tanswell v. Scurrah*, 11 L. T. N. S. 761, M. R.; *Moore v. Harper*, W. N. 56; 14 W. R. 306, V. C. W.; *Braithwaite v. Kearns*, 34 Beav. 202.

⁹ *Ante*, pp. 743, 744.

¹⁰ But this rule is confined in New York to the solicitor on record. An affidavit may be sworn to before any proper officer, although he is counsel for one of the parties, or is a partner of the solicitor in the cause. The

People v. Spalding, 2 Paige, 326; *McLaren v. Charrier*, 5 Paige, 530.

¹¹ *In re Hogan*, 3 Atk. 812; but see *ante*, p. 749.

¹² 3 Beav. 290; *Hopkin v. Hopkin*, 10 Hare Ap. 2; and see cases collected, 2 C. P. Coop. t. Cott. 174, n.

¹ Per Turner L. J. in *Foster v. Harvey*, 3 N. R. 98; affirming S. C. 11 W. R. 899, V. C. W.; diss. Knight Bruce L. J.

² *Re Gregg*, *Re France*, L. R. 9 Eq. 137, M. R.

³ An affidavit taken before a Master of the Court of Chancery in New Jersey, at a place out of the State, will not be allowed to be read in that Court: the Master has no authority to take an affidavit out of the State. *Lambert v. Maris*, Halst. Dig. 173. But an affidavit sworn to before a Master in Chancery in another State, who was not a commissioner appointed by the State where the affidavit was offered, was held regular, in *Allen v. State Bank*, 1 Pex. & Bat. 7; in *Ramy v. Kirk*, 9 Dana, 267, an affidavit made out of the State was held not admissible.

Thus, in *Chicot v. Lequesne*,⁴ the Court ordered an affidavit to be sworn before a notary public in Amsterdam, with the intervention of a proper magistrate, if necessary, by the law of Holland, to the administration of the oath.

Although the Court will, in cases of this description, give credit to the fact, as certified under the seal or signature of a notary public or other person authorized to administer an oath,⁵ it will require some evidence that the person, whose seal or signature is affixed, actually fills the character he assumes. This may be effected, either by the production of an affidavit by some person resident in this country who can depose to the fact of his filling that character, or by the certificate of some British minister or consular agent, or of some public officer of the country in which the transaction took place, competent to give such certificate; and in the latter case, the certificate must be verified by the certificate of some British minister, or consular agent, or by the affidavit of some impartial person, cognizant of the fact that such public officer is what he assumes to be.⁶

*893 * An affidavit must be correctly intituled in the cause or matter in which it is made;¹ it will, however, be sufficient, if it

⁴ 1 Dick. 150; see also *Warren v. Swinburne*, 9 Jur. 510, Bail Court; *Pinkerton v. The Barnsley Canal Company*, 3 Y. & J. 277, n.; *Hutcheon v. Mannington*, 6 Ves. 823; *Garvey v. Hibbert*, 1 J. & W. 180. If there is a difficulty in taking the affidavit before the foreign authority, the Court will, it seems, appoint a special Examiner, and the evidence must be taken as a deposition. *Drevon v. Drevon*, 12 W. R. 66, V. C. K. As to the mode of taking evidence before an Examiner, see *post*, pp. 904 *et seq.*

⁵ *Hutcheon v. Mannington*, 6 Ves. 823; see *Raney v. Kirk*, 9 Dana, 267, as to an affidavit sworn to before a Justice of the Peace of another State.

[In Tennessee, the statement, in the caption and certificate of a deposition, that the person taking it sustains the necessary character, is sufficient evidence of the fact, and the Court will give credence to all he certifies in the line of his duty. *Wilson v. Smith*, 5 Yerg. 379; *Hoover v. Rawlings*, 1 Sneed, 287; *Carter v. Ewing*, 1 Tenn. Ch. 212. And see *Hay v. State*, 58 Ind. 337.]

⁶ *Haggett v. Iniff*, 5 De G., M. & G. 910; 1 Jur. N. S. 49; *Re Earl's Trust*, 4 K. & J. 300; *Seton*, 20; see *Re Davis*, L. R. 8 Eq. 98; *Mayne v. Butler*, 13 W. R. 128. Thus, in *Purkis v. Date*, M. R. in Chambers, 6 May, 1864, an affidavit was received and filed, which had been sworn before H., the clerk of the Circuit Court of Burton County, in the State of Indiana, America; who had subscribed his name to the jurat, and affixed thereto the seal of that Court; to which was appended a certificate under the hand of A., as Secretary of that State, and the seal thereof, that H. was such clerk, and was authorized to administer oaths; and a certificate, under the hand and seal of office of the British

acting-Consul at Chicago, that A. was such Secretary, and that his signature and the State seal were genuine. In *Mayne v. Butler*, 13 W. R. 128, V. C. K., the verification of the signature of a foreign notary was dispensed with; the fund being small, and the solicitor personally undertaking to apply it; see also *Smith v. Davies*, W. N. (1868), 269; 17 W. R. 69, V. C. M.; where the verification was dispensed with. In *Levitt v. Levitt*, 2 H. & M. 626, a certificate under seal of the Supreme Court of the United States of America, was received as sufficient evidence that the official had power to administer an oath. In *Re Scriven*, 17 L. T. N. S. 641, V. C. M., an affidavit under the great seal of one of the United States of America, and attested by the governor of the State, was received. In *Lees v. Lees*, W. N. (1868), 268, M. R., it appearing that the official was named in the list of judicial officers of the United States, the affidavit was received. Where the affidavit is sworn within the dominions of the Crown, no verification of the seal or signature of the official is required. *Hayward v. Stephens*, 1 W. N. 318, V. C. S.; *Re Goss*, *Liddall v. Nicholson*, W. N. (1866), 256; 12 Jur. N. S. 595, V. C. W.

¹ *May v. Prinsep*, 11 Jur. 1032, V. C. K. B.; *Mackenzie v. Mackenzie*, 5 De G. & S. 338; as to waiver of the irregularity, see *Blackmore v. Glamorganshire Canal Company*, 5 Russ. 151. Although in ordinary cases, the Court will disregard the misentitling of a paper, which could not have misled the opposite party, it is otherwise as respects affidavits; because the misentitling of an affidavit will exempt the defendant from the punishment of perjury, although his oath is false. *Hawley v. Donnelly*, 8 Paige, 415; see *Stafford v. Brown*, 4 Paige, 360.

was correctly entitled when it was sworn, although the title of the cause may have been subsequently altered by amendment.² Where a mistake occurred in the title of affidavits, by omitting the name of one of the defendants, they were received on its being shown by affidavit that there was no other suit pending to which they could relate;³ and where the names of the plaintiffs and defendants were reversed, the Court allowed the affidavits to be taken off the file and re-sworn, and then filed without affixing fresh stamps.⁴ In another case,⁵ the affidavits were allowed to be made exhibits to an affidavit properly intitled.

An affidavit made in one cause or matter cannot be used, to obtain an order in another cause or matter. The Court will, however, in some cases, specially direct this to be done: thus, where affidavits have been filed in a cause proving a pedigree, they were allowed to be used on the hearing of a petition under the Trustee Act, 1850.⁶

After an affidavit has been read at the hearing by any party, it cannot be withdrawn without the consent of the other parties.⁷

In all affidavits, the true place of residence, description, and addition of every person swearing the same must be inserted.⁸ This rule, however, will not apply to affidavits by parties in the *cause: *894 who may describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without specifying any residence, or addition, or other description; and even where a plaintiff so described himself in an affidavit, and it appeared, upon inspecting the office copy of the bill, that no addition had been given to him in the bill, the affidavit was considered sufficient.¹ In that case, also, there were several plaintiffs, and the plaintiff making the affidavit described himself as "the above-named plaintiff;" whereas, it was objected, that he ought to have called himself "one of the above-named plaintiffs;" but the objection was overruled.

All affidavits are to be taken and expressed in the first person of the deponent:² otherwise the solicitor, party, or person, filing the affidavit, is not to be allowed the costs of preparing and filing the same.³

The affidavit must commence by stating, that the party "makes oath and says:" for even though the jurat express that the party was sworn,

Where there are several defendants and there is but one suit pending between the plaintiff and the defendant first named therein with others, it is sufficient in the entitling of an affidavit, to entitle it in the name of the plaintiff against the first defendant and others, without setting forth the names of all the defendants at length. *White v. Hess*, 8 Paige, 544. Under special circumstances affidavits may be ordered to be filed though not intitled in any cause; *Salvidge v. Fulton*, 20 L. T. N. S. 300, V. C. M.

² *Hawes v. Bamford*, 9 Sim. 653.

³ *Fisher v. Coffey*, 1 Jur. N. S. 956, V. C. W.; and see *Re Harris*, 8 Jur. N. S. 166, V. C. K.

⁴ *Pearson v. Wilcox*, 10 Hare Ap. 35.

⁵ *Re Varteg Chapel*, 10 Hare Ap. 37.

⁶ *Re Pickance*, 10 Hare Ap. 35; *Jones v. Turnbull*, *In re Turnbull*, 17 Jur. 851, V. C. W.; which is apparently the same case, under a different name.

⁷ *Prule v. Soady*, L. R. 3 Ch. Ap. 220, L. C.

⁸ *Hinde*, 451; *Wyatt's P. R.* 9.

¹ *Crockett v. Bishton*, 2 Mad. 446; and see *Bodding v. Woodley*, 12 L. J. Ch. 15, M. R.

² Ord. XVIII. 1; see New Jersey Rule in Chancery, 90.

³ Ord. XVIII. 2; *In re Husband*, 12 L. T. N. S. 303, V. C. W., affidavits sworn in America, were received, though expressed in the third person.

it will not be sufficient, unless the affidavit also state that the party makes oath.⁴

Every affidavit must be divided into paragraphs, and every paragraph numbered consecutively, and, as nearly as may be confined to a distinct portion of the subject;⁵ and each statement in an affidavit must show the means of knowledge of the person making such statement.⁶

An affidavit must be pertinent and material.⁷ Scandalous and irrelevant matter should be carefully avoided, and, if any is inserted, the affidavit may be ordered to be taken off the file;⁸ or if the affidavit is intended to be used before the Court, the scandalous matter may be expunged, by the same process as scandal in a bill or other pleading;⁹ or if it is intended to be used in Chambers, a summons may be taken out to have the matter examined and expunged.¹⁰

If an affidavit contain impertinent matter, or be of improper length, the Court may, when it is used in Court, at once disallow *895 the costs of the improper part, or may disallow the costs of the part which the Taxing Master may distinguish as being improper;¹ and where it is used in Chambers, the Judge may at once disallow all unnecessary matter; and the part disallowed is to be distinguished by the initials of the Chief Clerk in the margin.²

The application for the costs of impertinent matter in an affidavit should be made when the affidavit is used.³ The Court generally leaves it to the Taxing Master to determine what part of the affidavit is unnecessary: merely expressing an opinion that it is of improper length.⁴

Affidavits ought to be fairly written upon foolscap paper bookwise; but the Clerks of Records and Writs may receive and file affidavits

⁴ *Phillips v. Prentice*, 2 Hare, 542; *Re Newton*, 2 De G., F. & J. 3; *Allen v. Taylor*, L. R. 10 Eq. 52, V. C. J. In the case of an affirmation, the words, "do solemnly, sincerely, and truly affirm and declare," are usually substituted for "make oath and say."

⁵ 15 & 16 Vic. c. 86, § 37.

⁶ Ord. 5 Feb. 1861, r. 23; and see *Woodhatch v. Freeland*, 11 W. R. 398, V. C. K.; *Meach v. Chappell*, 8 Paige, 135; *Sea Ins. Co. v. Stebbins*, 8 Paige, 563.

⁷ See *Meach v. Chappell*, 8 Paige, 135.

⁸ *Goddard v. Parr*, 24 L. J. Ch. 783; 3 W. R. 633, V. C. K.; *Kernick v. Kernick*, 12 W. R. 335, V. C. W.

⁹ See *ante*, pp. 347, 354. It is competent for the Court, upon the mere examination of an affidavit or other paper read before it, on a motion, to order scandalous or impertinent matter contained in it to be expunged without reference to a Master, and to charge the proper party with the costs. *Powell v. Kane*, 5 Paige, 265. A party who makes an affidavit to oppose a motion, is only authorized to state the facts; and it is scandalous and impertinent to draw inferences or state arguments in the affidavit, reflecting on the character or impeaching the motives of the ad-

verse party or his solicitor. *Powell v. Kane*, 5 Paige, 265.

¹⁰ Ord. XXXV. 60; *ante*, p. 354.

¹ Ord. XL. 9; as to this order, see *Moore v. Smith*, 14 Beav. 393, 396; *Mayor of Berwick v. Murray*, 7 De G., M. & G., 497, 514, 515; 3 Jur. N. S. 1, 5; *Hanslip v. Kitton*, 8 Jur. N. S. 835, 841, V. C. S.; *ib.* 1113, L. C.; *Re Farrington*, 33 Beav. 346; *Guest v. Smythe*, L. R. 5 Ch. Ap. 551, 558, L. J. G.; *Re Skidmore*, 1 Jur. N. S. 696; 3 W. R. 584, V. C. S.; *Scottish Union Insurance Company v. Steele*, 9 L. T. N. S. 677, V. C. W.; *ante*, p. 350. If a solicitor is compelled to pay the costs of expunging scandalous or impertinent matter, he has no legal or equitable claim upon his client to refund the amount. *Powell v. Kane*, 5 Paige, 265. For form of order, see *Seton*, 89, No. 17.

² Ord. XL. 10.

³ See Ord. XL. 9; *Horner v. Wheelwright*, 2 Jur. N. S. 367, V. C. S.

⁴ *Moore v. Smith*, 14 Beav. 393, 396; *Re Radcliffe*, *Seton*, 89, No. 17; *Re Skidmore*, 1 Jur. N. S. 696, V. C. S.; *Hanslip v. Kitton*, 8 Jur. N. S. 835, 841, V. C. S.; on appeal, *ib.* 1113; *Scottish Union Insurance Company v. Steele*, *ubi sup.*; *Guest v. Smythe*, L. R. 5 Ch. Ap. 551, 558, L. J. G.

written otherwise, if in their opinion it is, under the circumstances, desirable or necessary.⁵ The Clerks of Records and Writs may refuse to file any affidavit in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is improperly written, or so altered as to cause any material disfigurement; or in which there is any interlineation: unless the person before whom it is sworn authenticate such interlineation with his initials, so as to show that it was made before the affidavit was sworn, and to mark the extent of the interlineation.⁶

An affidavit in which there are interlineations or alterations, not so marked, may, however, be filed with the consent of the solicitors of all parties against whom it is intended to be used: such consent being indorsed on the affidavit and signed by the solicitors.⁷ And where two affidavits, by A. and B., were written on the same paper, and there were unauthenticated alterations in the affidavit of A., the document was allowed to be filed as the affidavit of B.: that of A. being rejected.⁸

Dates and sums may be written, either in words or in figures;⁹ but every quotation should be placed between inverted commas.

Schedules referred to in an affidavit as "hereunder written," * should be placed after the jurat; and the commissioner, or *896 other person before whom the affidavit is sworn, must sign his name at the end of each schedule. If a schedule is placed before the jurat, it should not be referred to as "hereunder written," but as "the schedule (or, first, &c., schedule) set forth in this my affidavit." The schedules may also be embodied in the affidavit.¹

Alterations in schedules, or in accounts made exhibits to affidavits, should be authenticated in the same manner as in the body of the affidavits.²

A document may be referred to in an affidavit, either as an exhibit, thus: "produced and shown to me at the time of swearing this my affidavit, and marked with the letter A," or as "hereunto annexed." If "produced and shown," the document is not filed with the affidavit; if "hereunto annexed," the affidavit cannot properly be filed without it; and it is therefore generally more convenient not to refer to it as "hereunto annexed;"³ and if intended to be used in Chambers, it must not be so referred to.⁴

Any document referred to, must be distinguished by some mark

⁵ Ord. 6 March, 1860, r. 16; Braithwaite's Oaths in Chan. 42.

⁶ Ord. I. 36; and see 15 & 16 Vic. c. 86, § 25.

⁷ Braithwaite's Pr. 340. But an irregularity in the jurat cannot be waived, see *post*, p. 897.

⁸ Gill v. Gilbard, 9 Hare Ap. 16.

⁹ The present practice in the Record and Writ Clerks' Office of allowing affidavits to be filed, notwithstanding that dates and sums

are written therein in figures, instead of in words, was adopted with the sanction of Lord Chancellor Campbell. A previous usage in the office to the contrary was recognized in *Crook v. Crook*, 1 Jur. N. S. 654, V. C. S.; Braithwaite's Pr. 340.

¹ Braithwaite's Pr. 341.

² See Regul. 8 Aug. 1857, r. 10.

³ Braithwaite's Pr. 341.

⁴ Regul. 8 Aug. 1857, r. 11; and see Ord. XXIV. 3.

placed upon it, and signed by the person before whom the affidavit is sworn.⁵

It is the usual practice, in all cases, to write the short title of the cause or matter on the exhibit; and this must be done in the case of documents made exhibits, and intended to be used in Chambers.⁶

Where a document is referred to as being produced and shown to the deponent, the person before whom the affidavit is sworn must inquire whether the deponent has seen the document, and is aware of the contents thereof; but this need not be done where the document is referred to as hereunto annexed: the document being annexed at the time the affidavit is sworn.⁷

Where one party has proved written documents in a cause, the other side has no right, upon that ground, and in the absence of special circumstances,⁸ to require them to be produced before the hearing; unless, perhaps, where the affidavit proving them sets them out *verbatim*:⁹ for a party can have no right to see the strength of his adversary's case, or the evidence of his title before the hearing.¹⁰ The documents may, however, be ordered to be produced, in order that the other side may cross-examine upon them.¹¹

The jurat should be written at the end of the affidavit, and is usually placed at the right-hand corner; it may, however, be written
*897 * on either side of the page, or, if necessary, in the margin; but not on a page upon which no part of the statements in the affidavit appears.¹ It must also correctly express the time when, and the place where, the affidavit is sworn, including the name of the city, borough, or county.²

The deponent must sign his name, or make his mark, at the side of the jurat: not underneath it.³ The person before whom the affidavit is sworn must sign his name at the foot of the jurat; to which must be added his full official character and description, not necessarily, however, in his own handwriting.⁴

If the deponent be a marksman or blind, the affidavit must be first truly, distinctly, and audibly read over to him: either by the person

⁵ Hewetson v. Todhunter, 2 Sm. & Giff. Ap. 2.

⁶ Regul. 8 Aug. 1857, r. 12.

⁷ Braithwaite's Pr. 341.

⁸ Lord v. Colvin, 2 Drew. 205; 5 De G., M. & G. 47; 18 Jur. 253; see also Forrester v. Helme, M'Clel. 558.

⁹ Hodson v. Earl of Warrington, 3 P. Wms. 34.

¹⁰ Davers v. Davers, 2 P. Wms. 410; Hodson v. Earl of Warrington, *ubi sup.*; Wiley v. Pistor, 7 Ves. 411; Fencott v. Clarke, 6 Sim. 8; Lord v. Colvin, *ubi sup.*; Gresley, 192; *ante*, p. 885.

¹¹ Bell v. Johnson, 1 J. & H. 682.

¹ Braithwaite's Pr. 342.

² *Ibid.*; 18 & 19 Vic. c. 134, § 15, Ord. IV.; but see Gates v. Buckland, 13 W. R. 67, V. C. S.

³ Anderson v. Stather, 9 Jur. 1085, V. C. K. B.

⁴ Braithwaite's Pr. 342; but see Gates v. Buckland, 13 W. R. 67, V. C. S. The words "before me" must precede the commissioner's signature. See Graham v. Ingleby, cited Braithwaite's Oaths in Chan. 46. [The failure of the officer to sign the jurat is fatal, and, it seems, cannot be cured by the officer afterwards signing it in open Court, in the case of a warrant of committal in bankruptcy. *Ex parte Heyman*, L. R. 7 Ch. App. 488. But see *infra*, 911, n. 1. In *Bewley v. Ottinger*, 1 Heisk. 354, the action of the Court below was sustained in permitting the commissioner, who took a deposition, to amend the caption and certificate to which exception had been filed. But the ruling was based upon the liberal statutes of jeofail.]

before whom the affidavit was sworn, or by some other person. In the first case, it must be expressed in the jurat that the affidavit was so read over, and that the mark or signature was affixed in the presence of the person taking the affidavit: in the second case, such other person must attest the mark or signature, and must be first sworn that he has so read over the affidavit, and that the mark or signature was made in his presence, and this must be expressed in the jurat.⁵

If the deponent be a foreigner, the contents of the affidavit must be interpreted to him; and the interpreter must be sworn that he has truly, distinctly, and audibly done so, and that he will truly interpret the oath about to be administered, and then the deponent may be sworn; and that these formalities have been complied with, must be expressed in the jurat.⁶

Formalities of a similar kind, by which it may appear that the deponent has fully understood the contents of his affidavit, before he is sworn, must be adopted in the case of a deaf, or deaf and dumb person, or in other similar cases.⁷

* The oath must be administered in a reverent manner; ¹ and, *898 if not administered in the usual form, the authority for administering it should appear in the jurat.²

Quakers, Moravians, and Separatists give their evidence on their solemn affirmation; ³ and any person who objects, from conscientious motives, to be sworn, may now give his evidence upon his solemn affirmation; ⁴ but the person qualified to take the affirmation, must be satisfied of the sincerity of the objection, and this must appear in the affirmat.⁵

It is an universal principle in all Courts, that jurats and affidavits, when contrary to practice, are open to objection in any stage of a cause. This does not depend upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all if in any respect objectionable with

⁵ If the deponent is blind, the officer should certify in the jurat, that the affidavit was carefully and correctly read over to him, in the presence of such officer, before he swore to the same. *Matter of Christie*, 5 Paige, 242. So where the affiant has been found by the inquisition of a jury to be a lunatic, the officer before whom the affidavit is sworn, should state in the jurat, that he has examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding the nature and contents of the affidavit. *Matter of Christie*, 5 Paige, 242. The attestation should be written near the jurat. *Wilson v. Clifton*, 2 Hare, 535; 7 Jur. 215; *Braithwaite's Pr.* 380. Where a marksman signed an affidavit with his name at length, his hand having been guided on the occasion, it was ordered to be taken off the file. — *v. Christopher*, 11 Sim. 409. For forms of special jurats, see Vol. III.

⁶ *Braithwaite's Oaths* in Chan. 35. For forms, see Vol. III.

⁷ *Reynolds v. Jones*, Trin. Term, 1818; *Braithwaite's Pr.* 383. For forms, see Vol. III.

¹ Ord. XIX. 14; *ante*, p. 887, note.

² 1 & 2 Vic. c. 105; see *Braithwaite's Pr.* 383, 384. For forms, see Vol. III.

³ 7 & 8 Will. III. c. 34, § 1; 8 Geo. I. c. 6, § 1; 22 Geo. II. c. 30, § 1; *ib.* c. 46, § 36; 9 Geo. IV. c. 32, § 1; 3 & 4 Will. IV. c. 49; *ib.* c. 82; 1 & 2 Vic. c. 77; and see *ib.* 105. For forms of affirmation in these cases, see Vol. III.

⁴ *Ante*, p. 887, note.

⁵ 17 & 18 Vic. c. 125, § 20. Where the affidavit is on affirmation, and the person taking it does not certify that the affiant is a Quaker or other person allowed by law to make affirmation, the affidavit can be of no avail. *Ringgold v. Jones*, 1 Band, 90. For forms, see Vol. III.

reference to the rule of the Court. Where, therefore, there was an irregularity in the jurat of an answer, a motion by the plaintiff to take it off the file, on the ground of such irregularity, was allowed, notwithstanding that he had taken an office copy of the answer.⁶ Where, however, in the case of an affidavit sworn abroad, before a notary, the place where it was sworn was omitted in the jurat, it was ordered to be filed: the Vice-Chancellor observing, that he thought the Court must assume that the notary was acting in pursuance of his duty, and that he would not perform a notarial act out of the jurisdiction in which alone he had authority.⁷

It is to be observed, particularly, that every affidavit of service of writs, or of orders, upon which process of contempt is to be founded, must truly and fully prove good service; and that if the plaintiff's name, the Court, the return of the writ, or any thing material, be omitted, no attachment can be thereupon regularly issued: for, until a due service be shown, no contempt appears to the Court.⁸

Before any affidavit is used for any purpose, it must have been filed in the Office of the Clerks of Records and Writs, and an office *899 copy be produced.⁹ Sometimes in vacation, however, when the matter was pressing, the Court has taken affidavits into its own hands, and then considered them as filed.¹

No affidavit, filed on or after the first day of Easter Term, 1861, is to be used as evidence, on any proceeding in any cause or matter, unless there be written at the foot thereof, at the time of filing the same, a memorandum stating by whom the same is filed, which memorandum is to be in the form following, or as near thereto as circumstances will admit (that is to say): "This affidavit is filed on the part and behalf of the plaintiffs" (or, "of the defendants M. and N.")²

Sometimes, when expedition is required, the solicitor filing the affidavit, instead of waiting until an office copy is made by the Clerk of Records and Writs, takes a copy of the affidavit to the office, at the same time that he takes the original affidavit to be filed, and then the Clerk of Records and Writs examines and marks the copy as an office copy, at the same time that he files the original.³

Where affidavits are filed in support of interlocutory applications, or to be used in proceedings under decrees, there is no particular time fixed for filing them; but they should be filed in time enough, before the application or proceeding on which they are intended to be used is brought on, to enable the adverse party to obtain copies: otherwise,

⁶ *Pilkington v. Himsworth*, 1 Y. & C. Ex. 612, 616; but see *Braithwaite's Pr.* 48, and *ante*, pp. 743, 895.

⁷ *Meek v. Ward*, 10 Hare Ap. 1; *Gates v. Buckland*, 13 W. R. 67, V. C. S.

⁸ *Hinde*, 453; Ord. XXVIII. 8.

⁹ Ord. XVIII. 5; *Jackson v. Cassidy*, 10 Sim. 325; *Darley v. Nicholson*, 1 Dr. & War. 66, 70; *Elsey v. Adams*, 4 Giff. 398; 9 Jur.

N. S. 788; see *Bloodgood v. Clark*, 4 Paige, 574, 576.

¹ Per Lord Langdale, in *Attorney-General v. Lewis*, 8 Beav. 179. [See *Mercer's Co. v. Great Northern R. Co.*, 14 Beav. 20; *Nieman v. Harris*, W. N. (1870), 6.]

² Ord. 5 Feb., 1861, r. 18.

³ *Braithwaite's Pr.* 494.

the application or proceeding will generally be directed to stand over; and where it is intended to make use of affidavits filed before the particular petition, notice of motion, or summons, was presented, served, or issued, express notice of such intention should be given in due time to the opposite party, as he is not bound to search for affidavits filed before those respective periods.⁴

The party filing an affidavit should, in all cases, take an office copy of it, except in the case of an affidavit filed by a claimant coming in pursuant to advertisement, under a decree: in which case, the office copy is to be taken by the party prosecuting the cause, unless the Judge otherwise directs.⁵ Upon filing an affidavit, it is the usual practice of solicitors in all cases to give notice of the filing to the adverse party; and such notice must be given by a claimant in the exceptional case just referred to.⁶

Formerly, any party who required a copy of an affidavit, had to obtain an office copy at the Record and Writ Clerks' Office; but now, where any party requires a copy of an affidavit filed by the adverse party, he is to make written application to the party by * whom the copy ought to be delivered, or his solicitor, with an undertaking to pay the proper charges;¹ and thereupon such party, or his solicitor, is to make such copy,² and deliver the same on demand within forty-eight hours;³ and is to produce the office copy in Court, or in Chambers, when required.⁴ In cases of *ex parte* applications for injunction, or writs of *ne exeat regno*, the copies must be delivered immediately upon the receipt of the request, or within such time as may be specified therein, or may have been directed by the Court.⁵

All copies to be delivered by parties or their solicitors, are to be written on paper of a convenient size, with a sufficient margin,⁶ and in a neat and legible manner, similar to that which is usually adopted by law stationers; and, unless so written, the parties or solicitors delivering them will not be entitled to be paid for the same.⁷ The folios of all copies are to be numbered consecutively in the margin, and the name and address of the party or solicitor, by whom the same are made, is to be indorsed thereon, in like manner as upon the proceedings in the Court;⁸ and such party or solicitor is to be answerable for the same being true copies of the originals, or of the office copies, of which they purport to be copies.⁹

⁴ See Ord. XXXV. 27; and *post*, Chap. XXIX., *Proceedings in Chambers*; Chap. XXXV. § 2, *Motions*; § 3, *Petitions*.

⁵ Ord. XXXVI. 1; Ord. XXXV. 39.

⁶ Ord. XXXV. 38. For form of notice, see Vol. III.; [and as to what is sufficient notice, *Bloxam v. Metropolitan R. Co.*, 16 W. R. 490, 492, note.]

¹ Ord. XXXVI. 4. The ordinary charges are 1*½*d. per folio to a pauper, and 4*d.* per folio to other persons. Regul. to Ord. Sched.

⁴ For forms of application and undertaking, see Vol. III.

² Ord. XXXVI. 5.

³ Ord. XXXVI. 6.

⁴ Ord. XXXVI. 10.

⁵ Ord. XXXVI. 9.

⁶ Foolscap paper, with a quarter margin, is ordinarily used.

⁷ Ord. XXXVI. 11.

⁸ See *ante*, pp. 453, 454; Ord. III. 2, 5.

⁹ Ord. XXXVI. 8. Each copy delivered should include a copy of the jurat, and should state the day on which the original affidavit was filed.

Where any party or solicitor who is required to deliver any such copy, either refuses or does not deliver the same within the period allowed for that purpose, the person making such application may procure a copy from the office in which the original has been filed, in the same way as if no such application had been made to the party or solicitor; and, in such case, no costs will be due or payable to the party or solicitor so making default, in respect of the copy so applied for.¹⁰

If a party or solicitor by whom any copy ought to be delivered, refuses, or does not deliver the same, within forty-eight hours, an addition of two clear days is to be made to the period within which any proceeding which may have to be taken after obtaining such copy ought to be taken; so that the person requiring such copy may be as little prejudiced as possible by the neglect of the party or solicitor to deliver such copy.¹¹

The Taxing Master is not to allow any costs in respect of any copy so taken, unless it shall appear to him to have been requisite,
*901 * and to have been made with due care, both as regards the contents and the writing thereof.¹

Parties requiring copies of affidavits should proceed in the manner above pointed out; but office copies of affidavits will, nevertheless, be made by the Clerks of Records and Writs, at any time, for any person, whether party to the cause or matter or not, who may prefer that course, at the risk of such copies being disallowed on taxation.²

Expenses incurred, in consequence of affidavits being prepared or settled by counsel, are to be allowed only when the Taxing Master, in his discretion, and on consideration of the special circumstances of each case, thinks such expenses properly incurred; and in such case, he is to be at liberty to allow the same, or such parts thereof as he may consider just and reasonable, whether the taxation be between solicitor and client or between party and party.³

Where a witness, of whose evidence a party desires to avail himself on the hearing of a cause in which issue has been joined,⁴ refuses to make an affidavit, the party may examine him *ex parte*,⁵ before an Examiner.⁶ The attendance of the witness is procured, and his exam-

¹⁰ Ord. XXXVI. 12.

¹¹ Ord. XXXVII. 16.

² Ord. XXXVI. 13.

³ See Braithwaite's Pr. 494.

⁴ Ord. XL. 17. Costs of settling an affidavit (which was an echo of the bill) by counsel were allowed in *Davies v. Marshall* (No. 2), 1 Dr. & S. 564; 7 Jur. N. S. 669.

⁵ An *ex parte* examination cannot, in strictness, be had where a notice of motion for decree has been given. *Ante*, pp. 823, 824. In *Smith v. Baker*, 4 N. R. 321, V. C. W.; 2 H. & M. 498, however, it was allowed to be used, on terms as to cross-examination thereon.

⁶ Ord. 5 Feb., 1861, rr. 4, 6.

⁶ See *Gresley Eq. Ev. (Am. ed.)* 50 *et seq.* Under the practice heretofore existing in New York, each party had a right to select his own Examiner, and the Court would not, on motion of the opposite party, interfere

with that right. But a direct examination might be had before one Examiner, and a cross-examination before another. *Troup v. Haight*, 6 John. Ch. 335.

The Circuit Courts of the United States have power to appoint Examiners in suits in Equity, and it is a matter of discretion whether they be standing Examiners, or be designated as the occasion arises for their services in any cause. *Van Hook v. Pendleton*, 2 Blatch. C. C. 85; 78th of the United States Equity Rules. But in the Circuit Courts of the United States, an oral examination of witnesses before an Examiner, previous to the amendment of the 67th Rule in March, 1862, was irregular, unless there was an agreement between the parties to waive written interrogatories; and such agreement ought to be in writing. *Van Hook v. Pendleton*, 2 Blatch. C. C. 85.

ination conducted, in the same manner as in the case of other examinations before the Examiner;⁷ but no party has a right to be present at such examination, except the party producing the witness, his counsel, solicitor, and agents.⁸ When the examination is concluded, the Examiner transmits it to the Office of the Clerks of the Records and Writs: having marked it as taken *ex parte*; and it will be deemed and dealt with by them as an affidavit.⁹ The party requiring the attendance of the witness, whether a party or not, must give to the opposite party forty-eight hours' notice at least of his intention to examine such * witness; and such notice must contain the name and descrip- *902 tion of the witness, and the time and place of the examination: unless the Court thinks fit to dispense with such notice.¹

All affidavits and depositions to be used on the hearing of any cause, or motion for a decree, must be printed:² except such as have been filed for the purpose of any interlocutory application, and of which office copies have been taken.³

Such affidavits and depositions are printed under the direction and superintendence of the Clerks of Records and Writs, upon paper of the kind and dimensions, and with the type prescribed for the printing of Bills, and in all other respects in such form and manner as the Clerks of Records and Writs deem most convenient.⁴

Solicitors and parties, on filing affidavits required to be printed, must leave with the Clerks of Records and Writs a fair copy of each affidavit filed, written on draft paper, on one side only, and certified by the solicitor or party to be a correct copy.⁵

In a cause in which issue is joined, the Clerks of Records and Writs will, upon the application of any party to the suit, cause such affidavits and depositions (other than depositions taken on the oral cross-examination of witnesses who have made such affidavits) to be printed after the expiration of the time fixed for closing the evidence; and such last-mentioned depositions, after the expiration of the time allowed for the oral cross-examination of such witnesses.⁶

In a cause in which a notice of motion for a decree has been given, the Clerks of Records and Writs will, upon the application of any party to the suit, cause the affidavits filed on behalf of the plaintiffs, the affidavits filed on behalf of the defendants, and the affidavits of the plaintiffs in reply, to be printed after the times respectively allowed for filing each set of such affidavits, and the depositions taken on the oral cross-

⁷ As to examinations before an Examiner, see *post*, p. 903 *et seq.*

⁸ Ord. 5 Feb., 1861, r. 6.

⁹ *Ibid.*

¹ Ord. 5 Feb., 1861, r. 22; and see *Ford v. Tennant*, 11 W. R. 275, M. R., where it was held that this rule applies to *ex parte* examinations.

² Ord. 16 May, 1862, r. 1. This order applies to cases where issue has been joined, or notice of motion for decree served, since the 18th June, 1862.

³ Ord. 16 May, 1862, r. 9.

⁴ Ord. 16 May, 1862, r. 2.

⁵ Ord. 16 May, 1862, r. 3. The copy should have the usual margin on the left-hand side of each page. R. & W. Clerks' Suggestions, No. 7. The certificate should be written on the left-hand margin of the first page of each copy, before being left at the office. *Ib.* No. 8. For form of certificate, see Vol. III.

⁶ Ord. 16 May, 1862, r. 4.

examination of the witnesses who have made such affidavits, after such depositions have been filed.⁷

It is desirable that the affidavits to be thus printed should be all presented for filing together at one time, and, if possible, on the last day of the time allowed for filing the same, that is to say, — where
 *903 issue has been joined: on the last day of the time fixed for *closing the evidence; and where notice of motion for a decree has been served: on the last day of each of the respective times allowed to the plaintiff and defendant for filing the affidavits; and that the fair copies left with such affidavits should be numbered consecutively (at the top of the first page) in the order in which it is desired that they should be printed.¹ Where the foregoing suggestion is complied with, the application to have the evidence printed may be made at the time the evidence is filed.² The application to have any evidence printed, which has been taken orally, may be made at any time after such evidence is filed: except that, in cases where a time for taking any oral examination has been specially fixed, and also in cases where issue has been joined, the application is not to be made until the time fixed for taking the examination, or for closing the evidence, has expired.³ A written or printed application to have the evidence printed, must be made; ⁴ and it is desirable that the number of printed copies of the evidence which may be required for general use in the cause, should be stated in such application.⁵

Every party who files an affidavit, or causes depositions to be taken, must take from the Clerks of Records and Writs a printed copy of every affidavit filed by him, and of all such depositions: for which he is to pay, in stamps, at the rate of twopence per folio; and unless such copy is taken, he is not to be allowed any thing in the taxation of costs, in respect of such affidavit or depositions.⁶ As a rule, such printed copy will be ready for delivery within forty-eight hours after the application to have the evidence printed is made.⁷

All parties are to be at liberty to take from the Clerks of Records and Writs as many other printed copies of their own and of their opponents' affidavits and depositions as they may require, on paying for the same, in stamps, at the rate of one penny per folio.⁸ These copies may be had at the same time as the official copy.⁹

⁷ Ord. 16 May, 1862, r. 5.

¹ R. & W. Clerks' Suggestions, No. 2.

² *Ib.* No. 3.

³ *Ib.* No. 4.

⁴ Printed copies of the form of application may be had, on application at the divisional seat in the Record and Writ Clerks'

Office. *Ib.* No. 9. For such form, see Vol III.

⁵ R. & W. Clerks' Suggestions, No. 5.

⁶ Ord. 16 May, 1862, r. 6.

⁷ R. & W. Clerks' Suggestions, No. 6.

⁸ Ord. 16 May, 1862, r. 7. As to the allowances to solicitors, see r. 8.

⁹ R. & W. Clerks' Suggestions, No. 6.

SECTION XI. — *Of viva voce Evidence.*

The *viva voce* examination of witnesses may take place, either before the Court, the Judge, or his Chief Clerk, in Chambers, or an Examiner of the Court, or an Examiner specially appointed. [1]

* Where the issue has been joined, there can be no *viva voce* *904 examination of witnesses in chief for the purposes of the hearing, except the *ex parte* examination before the Examiner, in manner before pointed out,¹ and except the evidence as to particular facts or issues, if so directed by special order;² and all cross-examinations of witnesses must take place before the Court itself at the hearing.³ The parties may, however, by consent in writing, which must be filed in the Record and Writ Clerks' Office, agree to take the examination or cross-examination of any witness, in manner provided by the 15 & 16 Vic. c. 86;⁴ and further, the Court, or Judge in Chambers, may direct, that the examination or cross-examination of any witness shall be taken in this manner, where by reason of the age, infirmity, or absence out of the jurisdiction of the witness, or for any other sufficient cause, it is expedient that such direction should be given. Such direction may be obtained on application to the Court, or the Judge in Chambers, on notice.⁵

According to the Act, above referred to, all witnesses to be examined orally are to be so examined by or before one of the Examiners of the Court, or by or before an Examiner to be specially appointed by the Court:⁶ the Examiner being furnished by the plaintiff with a copy of the bill, and of the answer, if any, in the cause; and such examination is to take place in the presence of the parties, their counsel, solicitors, or agents; and the witnesses so examined orally are to be subject to cross-examination and re-examination; and such examination, cross-examination, and re-examination, are to be conducted, as nearly as may be, in the mode in use in Courts of Common Law, with respect to a witness about to go abroad, and not expected to be present at the trial of a cause.⁷

The depositions so taken are to be taken down in writing by the

¹⁰ [The Court of the Examiner is not a public Court, and no one has a right to be present. *In re Western, &c. Oil Co.*, 6 Ch. Div. 109.]

¹ *Ante*, p. 901.

² Ord. 5 Feb., 1861, r. 3.

³ Ord. 5 Feb., 1861, r. 7; *Bodger v. Bodger*, 11 W. R. 80, V. C. K. Infirm witnesses (r. 11), and suits to perpetuate testimony (r. 16), are excepted from this rule.

⁴ Ord. 5 Feb., 1861, r. 10. For form of consent, see Vol. III.

⁵ Ord. 5 Feb., 1861, r. 11. For forms

of notice of motion and summons, see Vol. III.

⁶ The rules of Chancery in New Jersey provide, that every person who shall be appointed an Examiner of the Court of Chancery shall, before he enters upon the execution of his office, take, before the Chancellor or Clerk, an oath or affirmation immutably and justly to perform all the duties of the office, according to the best of his abilities and understanding. Rule 42; see *State v. Levy*, 3 Har. & McH. 501.

⁷ 15 & 16 Vic. c. 86, § 31. For the mode in use at Law, see *Chitty's Arch.* 329-336.

Examiner: not ordinarily by question and answer, but in the form of a narrative:⁸ and, when completed, are to be read over to the witness, and signed by him⁹ in the presence of the parties, or * such of them as may think fit to attend; but if the witness refuses to sign, then the Examiner is to sign the depositions; and the Examiner may, upon all examinations, state any special matter to the Court, as he shall think fit. It is in the discretion of the Examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to are to be noticed or referred to by the Examiner in the depositions, and he is to state his opinion thereon to the counsel, solicitors, or parties, and to refer to such statement on the face of the depositions; but he is not to have power to decide upon the materiality or relevancy of any question or questions. The Court deals with the costs of immaterial or irrelevant depositions as may be just.¹

There are two Examiners of the Court,² before whom the examination of witnesses is usually taken; but where, on account of the distance from London at which the witnesses reside,³ the pressure of business,⁴ or other sufficient reason,⁵ the examination cannot be conveniently taken before one of the Examiners of the Court, a Special Examiner may be appointed; but the Court is unwilling to appoint a Special Examiner, except in cases of absolute necessity.⁶ Any fit person may be a Special Examiner; but a barrister, or solicitor, is usually appointed.⁷ There was formerly a rule, that witnesses residing more than twenty miles from London could not be compelled to attend before an Examiner in London; but this rule no longer exists.⁸

The application for the appointment of a Special Examiner
*906 may * be made in Chambers by summons, or in Court by motion

⁸ See New Jersey Rule 71 of Chancery Practice.

⁹ [The rule was the same as to depositions. *Copeland v. Stanton*, 1 P. W. 414. But see 918 note, and 930 n. 2.]

¹ 15 & 16 Vic. c. 86, § 32; *Surr v. Walmsley*, L. R. 2 Eq. 439, V. C. W. The Rules of Practice for the Courts of Equity of the United States prescribe that either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon substantially the same course of proceeding is to be pursued as that directed by 15 & 16 Vic. c. 86, §§ 31, 32, stated in the text. Rule 95, amending Rule 67, see Vol. 3, App'x. By the same rule it is prescribed that "Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the Examiner may fix by order in each cause." Under this rule also "testimony may be taken on commission, in the usual way, by written interrogatories and cross-interrogatories, on motion to

the Court, in term time, or to a Judge in vacation, for special reasons satisfactory to the Court or Judge." For formal parts of depositions, see Vol. III.

² Appointed under 16 & 17 Vic. c. 22; see *ante*, p. 901, note.

³ *Re Foster's Trusts*, 2 W. R. 679, V. C. K.; *Ogilby v. Gregory*, 4 W. R. 67, V. C. W.; and see *Rawlins v. Wickham*, 4 Jur. N. S. 990, V. C. S.

⁴ *Brennan v. Preston*, 10 Hare Ap. 17.

⁵ *Pillan v. Thompson*, 10 Hare Ap. 76.

⁶ *Brocas v. Lloyd*, 21 Beav. 519; 2 Jur. N. S. 555; *Altree v. Sherwin*, 2 De G. & J. 92; *Townsend v. Williams*, 6 W. R. 734, V. C. W.

⁷ *Henderson v. Phillipson*, 17 Jur. 615, V. C. W.; *Reed v. Prest*, Kay Ap. 14; and see 16 & 17 Vic. c. 22, § 2. His fees are 5 guineas a day, and 5s. for his clerk. Regul. to Ord. Sched. 1; *Payne v. Little*, 21 Beav. 65.

⁸ *Altree v. Sherwin*, and *Brocas v. Lloyd*, *ubi sup.*, overruling *Reed v. Prest*, *ubi sup.*; and see *Townsend v. Williams*, *ubi sup.*

on notice;¹ and should be supported by an affidavit of his fitness, and that he has no adverse interest.²

The whole of the depositions of the witnesses must be written by the Examiner, with his own hand.³

The Examiner has no discretion to allow a witness to be treated as hostile by the party calling him;⁴ or to determine the relevancy of the evidence.⁵ Such questions must be determined by the Court; and, for that purpose, the Examiner should take down the questions and answers in writing.⁶ The Examiner has power to admit or exclude the public, as he thinks fit.⁷

Where it is intended to examine witnesses before an Examiner, an appointment must be obtained from him,⁸ and notice thereof given to the witness;⁹ and where there is reason to suppose a witness will not voluntarily attend to be examined, recourse must be had to the compulsory process of a writ of *subpœna ad testificandum*: which commands the witness to whom it is directed to appear before the Examiner, to testify on behalf of the party requiring his testimony.¹⁰ In case the witness is required to bring * with him any written document in *907 his possession, then the writ must be a *subpœna duces tecum*.¹

Every *subpœna*, other than a *subpœna duces tecum*, is to contain three

¹ Reed v. Prest, *ubi sup.*; Williams v. Williams, 10 Hare Ap. 45; 17 Jur. 434; 17 Beav. 156.

² Where the examination was to be taken *ex parte*, the Judge said that if the parties could not agree upon an Examiner, he would name one. Davenport v. Goldbery, 2 H. & M. 286. For forms of summons, notice of motion, and affidavit, see Vol. III.

³ Stobart v. Todd, 18 Jur. 618. V. C. K. A witness should go before the Examiner, free to answer all interrogatories, and not with a deposition already prepared. Underhill v. Van Cortlandt, 2 John. Ch. 339. A deposition, prepared and written by the party for whom it is taken, cannot be received as evidence. Amory v. Fellows, 5 Mass. 219; see Ray v. Walton, 2 A. K. Marsh. 71. Although it is copied by a third person. Griswold v. Griswold, 1 Root, 259. The deposition is equally inadmissible, if drawn by the agent of the party. Smith v. Huntington, 1 Root, 226; Allen v. Rand, 5 Conn. 322; Patterson v. Patterson, 2 Pennsylv. 200; Addleman v. Masterson, 1 *ib.* 454; see United States v. Smith, 4 Day, 121; Logan v. Steele, 3 Bibb, 230. The practice of having the questions shown to the witness, and his answers prepared beforehand, and reduced to writing and examined by counsel before coming before the Master to testify, was severely reprimanded in Hickok v. Farmers' and Mechanics' Bank, 35 Vt. 476, 490.

⁴ Wright v. Wilkin, 4 Jur. N. S. 804; 6 W. R. 643, V. C. K.

⁵ See 15 & 16 Vic. c. 86, § 32.

⁶ Buckley v. Cooke, 1 K. & J. 29; see form in Vol. III.

⁷ Wright v. Wilkin, *ubi sup.*

⁸ *Ante*, pp. 904, 905, note.

⁹ When the examination takes place before an Examiner of the Court, *3l.* must be deposited with the Examiner's clerk, by the party obtaining the appointment. This is returned to him if he duly attends; but, if he does not, and was not prevented by death, illness, or unavoidable accident, it is paid to the opposite party; or if the opposite party also fails to attend, or the examination was to have been *ex parte*, the *3l.* is paid to the suitors' fee fund. Ord. 1 Jan., 1862. The order does not apply to a plaintiff suing *in forma pauperis*. *Skeats v. Hunt*, 1 N. R. 50, V. C. W. For form of notice to the witness, see Vol. III.

¹⁰ Hinde, 236. See 78th Equity Rule of the United States Courts, by which it is provided that witnesses who live within the district, may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a Master or Examiner appointed in any cause, by *subpœna* in the usual form, which may be issued by the Clerk in blank, and filled up by the party praying the same, or by the commissioner, Master, or Examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court. The compulsory attendance of witnesses before the Examiner is provided for in New Jersey, by Chancery Rule 94. For form of writ, see Ord. Sched. E. No. 3; and *post*, Vol. III.

¹ As to the degree of particularity with which the documents must be described, see *Attorney-General v. Wilson*, 9 Sim. 326. For form of writ, see Ord. Sched. E. No. 3; and *post*, Vol. III. When served with a *sub-*

names, where necessary or required ;² and no more than three persons are to be included in one *subpœna duces tecum*, but the party suing out the same is at liberty to sue out a *subpœna* for each person, if it is deemed necessary or desirable to do so.³ In a *subpœna* of this nature, a husband and his wife are considered as two distinct persons, and her Christian and surname must be inserted accordingly.⁴

The *subpœna* must be indorsed with the name or firm, and place of business of the solicitor issuing the same, and of his agent, if any, or with the name and place of residence of the party issuing the same, when he acts in person ; and, in either case, with the address for service, if any.⁵

On presenting a *subpœna* to be sealed, a *præcipe*, in the usual form, must be filed at the Record and Writ Clerks' Office.⁶

The service of any *subpœna*, except a *subpœna* for costs, is to be of no validity if not made within twelve weeks after the *teste* of the writ ;⁷ and in the interval between the suing out and service of any *subpœna*, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ resealed, upon leaving a corrected *præcipe* of such *subpœna*, marked, " Altered and resealed," and signed with the name and address of the solicitor or solicitors suing out the same.⁸

The service of this *subpœna* must, in all cases, be personal ;⁹ and is effected by delivering a copy of the writ and of the indorsement thereon to the witness, and at the same time producing the original writ.¹⁰ At the time he is served with the writ, the witness should be served with a

pœna duces tecum, the witness must attend before the Examiner and produce the instrument required, unless he has some legal or reasonable excuse for withholding it. Upon trials in Courts of Law, the Court and not the witness is the judge of the validity of the objection. *Amey v. Long*, 9 East, 473; *Ball v. Loveland*, 10 Pick. 9. In Courts of Equity, the validity of the objection is considered, upon the witness being brought up, on an attachment for refusing to produce the instrument. *Bradshaw v. Bradshaw*, 3 Sim. 285; see *M'Pherson v. Rathbone*, 7 Wend. 216; *Jackson v. Denison*, 4 Wend. 558; *Newland v. Starr*, 11 Jur. N. S. 596; 13 W. R. 1014, V. C. K.; *Lee v. Angus*, L. R. 2 Eq. 59, V. C. W. A party cannot, by a *subpœna duces tecum*, procure the production of documents; the proper course is to apply for an order for that purpose. *Newland v. Starr*, *ubi supra*.

[A party to a cause who may be compelled to testify may also be required, by a *subpœna duces tecum*, to produce books and documents pertinent to the issues, unless he has a lawful excuse to be judged of by the Court. *Murray v. Elston*, 8 C. E. Green, 212. The highest official is bound to appear and testify when required by proper process, unless he has a lawful excuse; but will not be compelled to produce a paper or document if, in his opinion, his official duty requires him to

withhold it; and the Court will not entertain proceedings to compel the President of the United States, or the Governor of a State, to testify, by adjudging him in contempt. 1 *Burr's Trial*, 182; *Gray v. Pentland*, 2 S. & R. 23; *Thompson v. German Valley R. Co.*, 7 C. E. Green, 111. A *subpœna duces tecum* has been granted directed to the local manager of a Telegraph Company for the original telegraphic despatches on file. *Ince's Case*, 20 L. T. N. S. 421; *Natl. Bank v. Natl. Bank*, 7 West Va. 544; *Heinsler v. Friedman*, 2 Pars. Eq. Cas. 274; see also, *ex parte Brown*, 8 Cent. L. J. 378 (St. Louis Crt. of App.); *Commonwealth v. Jeffries*, 7 Allen, 548; *State v. Litchfield*, 58 Me. 267; *United States v. Babcock*, 3 Dill. 567. See also *Am. Law Reg.* for February, 1879, p. 65, an article by Judge Cooley.]

² Ord. XXVIII. 3. In New Jersey, the names of any number of witnesses may be inserted in the same *subpœna*. Rule 94.

³ Ord. XXVIII. 4.

⁴ *Hinde*, 327; *Braithwaite's Pr.* 264, n.

⁵ Ord. III. 2, 5, *ante*, pp. 453, 454. For form of indorsement, see Vol. III.

⁶ Ord. XXVIII. 1. For form of *præcipe*, see Vol. III.

⁷ Ord. XXVIII. 9.

⁸ Ord. XXVIII. 5.

⁹ *Spicer v. Dawson*, 22 Beav. 282.

¹⁰ Ord. XXVIII. 6.

notice in writing, specifying the time when he is to attend the Examiner in pursuance of it.¹¹

*No witness is bound to attend, unless his reasonable expenses *908 are paid or tendered to him; nor, if he appears, is he bound to give evidence until such charges are actually paid him;¹ and the rule is the same, where the witness is a party to the cause.²

If the witness whose attendance is required is a married woman, the *subpœna* should be served upon her personally, and the tender of the expenses made to her, and not to her husband.³

If the witness, upon being duly served with the *subpœna* and notice, neglects or refuses to attend to be examined, a certificate of his non-attendance must be procured from the Examiner, and filed in the Record and Writ Clerks' Office;⁴ and an application made to the Court, that the witness may be ordered to attend and be sworn and examined, at such time and place as the Examiner may appoint.⁵ This application is made by motion, which may be either *ex parte*, or on notice to the witness.⁶ The application must be supported by an affidavit of due service of the *subpœna* and notice,⁷ and by production of the Examiner's certificate of non-attendance, or an office copy thereof.⁸ When the order is made *ex parte*, it contains a clause that in default of attendance the witness do stand committed to Whitecross Street Prison;⁹ and should not direct him to pay the costs of the application.¹⁰ A further appointment must next be obtained from the Examiner, and notice thereof, and a copy of the order, duly served on the witness.¹¹ If the witness still neglect or

¹¹ Where the examination is adjourned, the witness is bound to attend the adjournment, without being served with a new *subpœna*; but he should be served with notice of the adjourned time; and see *Lawson v. Stoddart*, 10 Jur. N. S. 33; 12 W. R. 286, V. C. K. For forms of notice, see Vol. III.

[It is not irregular to issue the *subpœna* against persons who are residents out of the jurisdiction, and it may be enforced against them when they come within the jurisdiction. *Campbell v. Attorney-General*, L. R. 2 (h. App. 571.)]

¹ The amount payable is according to the scale fixed by the Common Law Judges: see *Directions to Masters*, Hilary Term, 1853; 17 Jur. Pt. 2, 41; *Taylor on Evid.* § 1126, n.; *Chitty's Arch.* 1765; see also *Clark v. Gill*, 1 K. & J. 19; *Nokes v. Gibbon*, 3 Jur. N. S. 282, V. C. K.; *Brocas v. Lloyd*, 23 Beav. 129; 2 Jur. N. S. 555; *Turner v. Turner*, 5 Jur. N. S. 839; 7 W. R. 573, V. C. K.; *Morgan & Davey*, 29; *Wiltshire v. Marshall*, 1 W. N. 80, V. C. W. For scale of allowances, see Vol. III.

² *Davey v. Durrant*, 24 Beav. 493; 4 Jur. N. S. 230, a case of cross-examination on affidavit.

³ 2 Phil. on Evid. 428; *Taylor on Evid.* § 1129.

⁴ *Seton*, 1234; but see *Cast v. Poyser*, 3 Sm. & G. 369, where an attachment was held regular, though the certificate had not

been filed. [See, as to how long a witness must wait before, in consequence of the absence of the examining party, he may leave, *Perks v. Stottart*, 1 N. R. 563.]

⁵ *Braithwaite's Pr.* 144. See 78th Equity Rule of the United States Courts, by which it is provided, that if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the Court, which being certified to the Clerk's office by the commissioner, Master, or Examiner, an attachment may issue thereupon by order of the Court or of any Judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. For forms of orders *nisi* and absolute, see *Seton*, 1233, 1234.

⁶ *Wisden v. Wisden*, 6 Hans. 549, 550. For forms of motion paper and notice of motion, see Vol. III.

⁷ For form of affidavit, see Vol. III.

⁸ *Seton*, 1234.

⁹ *Ibid.*

¹⁰ *Nokes v. Gibbon*, 3 Jur. N. S. 282, V. C. K.; *Brook v. Biddall* 2 Eq. Rep. 637; 2 W. R. 443, V. C. K.

¹¹ The copy of the order must be indorsed according to the provisions of Ord. XXIII. 10, and served in the same manner as in other cases; see *post*, Chap. XXVI § 7, *Enforcing Decrees and Orders*. For form of indorsement, see Vol. III.

refuse to attend, a further certificate of non-attendance must be obtained from the Examiner, and filed, as before explained. An attachment may then, if the order has been made *on notice, be issued against him on production to the Record and Writ Clerk of an affidavit¹ of due service of the order and notice, and the examiner's certificate of non-attendance, or an office copy thereof.² If the order has been obtained *ex parte*, an order for the committal of the witness to Whitecross Street Prison will be made, on an *ex parte* application by motion, supported by the same evidence.³ This order, when drawn up, passed, and entered, must be delivered to the tipstaff attending the Court: who will procure a warrant from the Lord Chancellor, and will then apprehend and lodge the witness in Whitecross Street Prison, where he must remain in custody, not only till he has been examined, but also until payment of taxed costs to the party requiring his testimony, and likewise the tipstaff's and keeper's fees for taking and detaining him.⁴

After the witness has been examined, he will, upon his motion or petition, and production of the Examiner's certificate of his examination being complete, be ordered to be discharged by the Court, on paying or tendering the costs of his contempt; or he may be discharged by the party at whose instance he was committed, if the jailer can be prevailed upon to take such discharge.⁵

The method is, *mutatis mutandis*, the same where a witness, having attended in obedience to the *subpœna*, refuses to be sworn, or to wait till his examination can be taken.⁶

If a witness, attending upon a *subpœna duces tecum*, refuse, without sufficient cause, to produce the document mentioned in the writ, when required, he may be ordered, upon special motion, to attend again and produce it, and to pay the plaintiff all the costs occasioned by his refusal.⁷

If a witness is in prison, under a common-law process, he may be brought up under a writ of *habeas corpus ad testificandum*.⁸ Formerly, the practice was, for the Examiner to attend the prison, if within twenty miles of London;⁹ and this practice may, it is presumed, still be followed: though it would probably be the more expensive course. The writ of *habeas corpus* is never issued without an order: the order may be obtained upon motion of course, or on petition of course at the

¹ For form, see Vol. III.

² Ord. XXIX. 3; Seton, 1234. For further information as to attachments, see *ante*, p. 463 *et seq.*, and *post*, Chap. XXVI. § 7, *Enforcing Decrees and Orders*.

³ For form of order, see Seton, 1234; and for form of motion paper, see Vol. III.

⁴ Hinde, 329.

⁵ *Ib.* 330; Seton, 1237; [Walter v. Rutter, 18 L. T. N. S. 788.]

⁶ *Hennegal v. Evance*, 12 Ves. 201; see amendment of Rule 67, of the Equity Rules of the United States Courts for the method of proceeding in such case.

⁷ *Bradshaw v. Bradshaw*, 1 R. & M. 358; *Hope v. Liddell*, 20 Beav. 438; 7 De G., M. & G. 331; *Re Cameron's Coldbrook Railway Company*, 25 Beav. 1. [And see, as to the interrogation of the witness touching documents before he is sworn, *Griffith v. Ricketts*, 7 Hare, 299; *Lee v. Angus*, L. R. 2 Eq. 59.]

⁸ *Buckeridge v. Whalley*, 6 W. R. 180, V. C. K., where the officer was ordered to attend with the witness *de die in diem*. For form of writ, see Vol. III.

⁹ Hinde, 331.

Rolls, supported by an *affidavit of the facts, and must be produced at the time the writ is sealed.¹

The Court, or the Judge in Chambers, may direct that the oral examination and cross-examination of any witness (whether a party or not), or the cross-examination of any person who has been examined *ex parte* before an Examiner, or made an affidavit, shall be taken before an Examiner of the Court or a Special Examiner, in the manner prescribed by the 15 & 16 Vic. c. 86,² in case it shall appear to the Judge that owing to the age, infirmity, or absence out of the jurisdiction of such witness or person,³ or for any other cause which to the Judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the Court or the Judge in Chambers, on notice.⁴ And in case the examination or cross-examination of any person in England or Wales is so directed, the party requiring such examination or cross-examination may apply to the Court or the Judge in Chambers for an order that one of the Examiners of the Court may attend, for the purpose of such examination or cross-examination, at any place or places in England or Wales to be named in such order.⁵

When the examination of witnesses before the Examiner has been concluded, the original depositions, authenticated by his signature, are transmitted by him to the Record and Writ Clerks' Office, to be there filed; and any party to the suit may have a copy of the whole, or any part.⁶

If the Examiner dies before signing the depositions, they must be signed by his successor.⁷ Where the Examiner omits to sign *the depositions, the Court has power, if it thinks fit, to order *911 them to be filed.¹ An Examiner, before whom witnesses who

¹ Braithwaite's Pr. 224. For form of order, see Seton, 1275, No. 3; and for forms of motion paper, petition, and affidavit, see Vol. III.

² *Ante*, p. 904.

³ For mode of taking evidence when the witness is out of the jurisdiction, see *post*, p. 848.

⁴ Ord. 5 Feb., 1861, r. 11; *ante*, p. 904. For form of notice of motion and summons, see Vol. III.

⁵ Ord. 5 Feb., 1861, r. 12. The Examiner is entitled, on production to him of the order, to one guinea a day for his expenses, and 1s. 6d. per mile for travelling expenses. These sums are to be paid him by the party obtaining the order, and, subject to any direction of the Court or Judge to the contrary, will be costs in the cause. Ord. 5 Feb., 1861, r. 13. Formerly the Examiner did not attend at any place farther than twenty miles from London; Hinde, 331; and the application was made *ex parte*; Anon., 4 Mad. 463; Pillan v. Thompson, 10 Hare Ap. 76; Watkins v. Atchison, *ib.* 46.

⁶ 15 & 16 Vic. c. 86, § 34. All interlineations or alterations in the depositions should be authenticated by the initials of the Ex-

aminer, and if the depositions are not left by him personally at the Record and Writ Clerks' Office, they should be sent there under a sealed cover. Braithwaite's Pr. 126. For the fees payable, see Regal to Ord., Schedules, 1, 4. By the Rules of Practice for the Courts of Equity of the United States, when the examination of witnesses before the Examiner is concluded, the original depositions, authenticated by the signature of the Examiner, shall be transmitted by him to the Clerk of the Court, to be there filed of record in the same mode as prescribed in the thirtieth section of the Act of Congress, Sept. 24, 1789. Rule amending Rule 57. The duty of Examiners to transmit depositions and examinations to the Clerk of the Court is fixed by the same Rule.

⁷ Bryson v. Warwick and Birmingham Canal Company, 1 W. R. 124, V. C. S. Felthouse v. Bailey, 14 W. R. 827, M. R. 1 Stephens v. Wanklin, 19 Bray. 385. [See *ante*, 897, n. 4.] As to what error in the title will invalidate depositions, see Hartford v. Reeves, 9 Hare Ap. 68, and the case there referred to. [See Prince Albert v. Strange, 2 De G. & S. 652, 709.]

have made affidavits are being cross-examined, for the purpose of obtaining evidence upon an interlocutory motion, may return part of these depositions at a time; but if the evidence is being taken for the hearing of the cause, it seems that he cannot return any until the examination is closed.²

The depositions are to be written on foolscap paper, bookwise or briefwise, as the Examiner thinks fit; but the Clerks of Records and Writs may receive and file depositions otherwise written, if, in their opinion, the circumstances of the case render such reception and filing desirable or necessary.³

Where issue has been joined, if either party desires the evidence as to any facts or issues to be taken *virâ voce* at the hearing, he may, at any time within fourteen days after issue joined, apply to the Judge in Chambers, by summons,⁴ to be served on the opposite party, for an order that the evidence in chief as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken *virâ voce* at the hearing of the cause; and the Judge may make an order that the evidence in chief as to such facts and issues, or any of them, be taken *virâ voce* at the hearing accordingly; and the facts and issues as to which any such order directs the evidence in chief to be taken *virâ voce* at the hearing, must be distinctly and concisely specified in such order; but in case the Judge is satisfied that such application is unreasonable, or made for the purpose of delay, oppression, or vexation, he may refuse to make any such order; and where any such order has been made, the examination in chief, as well as the cross-examination and re-examination, will be taken before the Court at the hearing, as to the facts and issues specified in such order; and no affidavit or evidence taken before an Examiner will be admissible at the hearing of any such cause, in respect of any fact or issue included in any such order.⁵

Where an order for the taking of the evidence as to any fact or issue *virâ voce* at the hearing has been made, the Clerk of Records and Writs makes, in the certificate that the cause is ready for hearing, an entry showing that such an order has been made; and the Registrar, in setting down the cause for hearing in the cause-book of the Judge to whose Court the same is attached, marks the same, so as to indicate that the taking of evidence in chief *virâ voce* at the hearing has been ordered; and the cause will not be allowed to come on to be heard without a special direction of the Court: which may be obtained upon an application to the Court, by either party upon notice, or to the Judge in Chambers, by summons, upon notice,¹ to fix a day

² Clark v. Gill, 1 K. & J. 19. For formal parts of depositions, see Vol. III.

³ Ord. 6 March, 1860, r. 16.

⁴ For form of summons, see Vol. III.

⁵ Ord. 5 Feb., 1861, r. 3; Edmunds v. Brougham, 12 Jur. N. S. 934; 15 W. R. 84.

V. C. S. [See also Bovill v. Bird, W. N. (1867) 96; Other v. Smurthwaite, L. R. 5 Eq. 437.]

¹ For forms of notice of motion and summons, see Vol. III.

for the hearing.² No order is drawn up on this application; but the Registrar, or the Chief Clerk, as the case may be, will deliver a note of the result of the application to the applicant's solicitor; and on production thereof to the Order of Course Clerk in the Registrars' Office, he will mark against the entry of the cause, in the cause-book, the day fixed for the hearing.

Where any such order has been made, each party is at liberty to sue out, at the Record and Writ Clerks' Office, *subpœnas ad testificandum* and *subpœnas duces tecum*, to compel the attendance, at the hearing, of witnesses whom he may desire to produce, on any issue or matter of fact included in such order.³

Upon any appeal, rehearing, or further proceedings, the Judges' notes of the *vivâ voce* evidence will, *primâ facie*, be deemed to be a sufficient note thereof.⁴

Upon the hearing of any cause, the Court, if it sees fit, may require the production and oral examination before itself of any witness or party in the cause; and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit, or in such manner, as it may think fit.⁵ This power will only be exercised by the Court at the hearing;⁶ and it seems doubtful whether the mode of exercising it is by an order directing the attendance of the witness,⁷ * or by directing a *subpœna* to issue.¹ The power is analogous to that of a Judge at *nisi prius* to recall a witness;² and is confined to witnesses who have been examined in the cause.³ The Court of Appeal may examine orally before

² Ord. 5 Feb., 1861, r. 8; [Boyd v. Potrie, W. N. (1869) 138.]

³ Ord. 5 Feb., 1861, r. 9; see also *post*, Chap. XXVII. § 2, *Trials of Questions of Fact*. For forms of *subpœna*, see Vol. III.

⁴ Ord. 5 Feb., 1861, r. 14. By consent, a short hand writer is often employed to take down the evidence; and his notes are then used, instead of the Judge's. The costs of such notes will be allowed on taxation as between party and party, if taken at the suggestion of the Judge. *Clark v. Malpas* (No. 2), 31 Beav. 554; 9 Jur. N. S. 612; and see *Flockton v. Peake*, 12 W. R. 1023, V. C. W., and *Morgan & Davey*, 356. By Rule of Chancery in Massachusetts, when a case is heard before a single justice of the Court upon any interlocutory question, or for a final decree, the evidence shall not be reported to the full Court, unless one of the parties, before any evidence is offered, shall request that the same be so reported; or the justice shall, for special reasons, so direct; and the justice will appoint a suitable disinterested person to take the evidence. The expense of taking the evidence shall be paid by the party requesting the taking of the same, to be allowed in the taxation of costs, if costs are decreed to him. The allowance

to the person appointed to take the evidence shall be fixed by the Court, and shall not exceed ten dollars a day. Rule 35. See *Granger v. Bassett*, 98 Mass. 462.

⁵ 15 & 16 Vic. c. 86, § 39. For cases on this section, besides the cases mentioned below, see *Oliver v. Wright*, 1 Sm. & G. Ap. 16; *Wilkinson v. Stringer*, 9 Hare Ap. 24; 16 Jur. 1033; *Deaville v. Deaville*, 9 Hare Ap. 22; *Chichester v. Chichester*, 24 Beav. 589; *Ferguson v. Wilson*, 1 W. N. 324; 15 W. R. 27, L. J.L.

⁶ *Raymond v. Brown*, 4 De G. & J. 350; 5 Jur. N. S. 1046; *May v. Biggenden*, 1 Sm. & G. 133; 17 Jur. 252; and see *Hope v. Liddell*, 20 Beav. 438; *East Anglian Railway Company v. Goodwin*, 6 W. R. 564, V. C. W.; but see *ante*, p. 820.

⁷ *May v. Biggenden*, *ubi sup.*; *Nichols v. Ibbetson*, 7 W. R. 430, V. C. W.

¹ *Braithwaite's Pr.* 254. A note or memorandum, signed by the Registrar, is evidence of the direction of the Court on which the Record and Writ Clerk will act.

² See *Chitty's Arch.* 395; *Taylor on Evid.* § 1331.

³ *East Anglian Railway Company v. Goodwin*, 6 W. R. 564, V. C. W.

it, a witness who has not been orally examined before the Court below.⁴

All witnesses who have made an affidavit or been examined *ex parte* before the Examiner are, as has been before stated, liable to cross-examination.⁵ If the affidavit is to be used at the hearing of a cause in which issue has been joined, the cross-examination takes place before the Court at the hearing;⁶ in other cases, before the Examiner:⁷ except that, after decree, the cross-examination on an affidavit used in Chambers may be before the Chief Clerk.⁸

An *ex parte* examination before an Examiner can, as we have seen,⁹ only take place in causes where issue has been joined; and the cross-examination upon it takes place at the hearing;¹⁰ but in other cases, as we have seen, where witnesses are examined before the Examiner, the cross-examination follows immediately upon the examination in chief.¹¹

Where in any cause or matter a party has filed an affidavit, or where in any cause in which issue has been joined a party has examined a witness *ex parte* before the Examiner, any opposite party, desiring to cross-examine the deponent or witness, is not obliged to procure the attendance of such deponent or witness for cross-examination, either before the Examiner or before the Court; but any such opposite party may serve upon the party by whom such affidavit has been filed, or witness examined, or his solicitor, a notice in writing¹² requiring the production of such deponent or witness for cross-examination before the Examiner, or before the Court, as the case may be: such notice to be served within the time mentioned below, or within such time as, in any case, the Court or the Judge in Chambers may specially appoint¹³

(that is to say): where such cross-examination is to be taken *914 before the * Court at the hearing of a cause in which issue is joined, then at any time before the expiration of fourteen days next after the closing of the evidence; and where such cross-examination is to be taken before the Examiner in a cause in which a notice of motion for a decree or decretal order has been served, and to be used at the hearing of such motion, then at any time before the expiration of fourteen days next after the end of the time allowed for the plaintiff to file affidavits in reply; and in every other case, within fourteen days next after the filing of the affidavit or examination upon

⁴ Hope v. Threlfall, 23 L. J. Ch. 631; 2 Eq. Rep. 307, L. J.J.; Langford v. May, 22 L. J. Ch. 978; 1 W. R. 484, L. J.J.; and see Hindson v. Weatherwill, 5 De G., M. & G. 301, 312; 18 Jur. 499; Martin v. Pycroft, 2 De G., M. & G. 785, 797; 16 Jur. 1125.

⁵ 15 & 16 Vic. c. 86, §§ 38, 40; Ord. 5 Feb., 1861, r. 6; *ante*, p. 888.

⁶ Ord. 5 Feb., 1861, r. 7.

⁷ Ord. 5 Feb. 1861, rr. 7, 15.

⁸ 15 & 16 Vic. c. 80, § 30.

⁹ *Ante*, pp. 824, 901; Smith v. Baker, 4 N. R. 321, V. C. W.; 2 H. & M. 498.

¹⁰ Ord. 5 Feb., 1861, r. 7.

¹¹ *Ante*, p. 904.

¹² For form of notice, see Vol. III.

¹³ Where an affidavit, which had been used in Court, was subsequently used in Chambers, the Court specially appointed a time within which the cross-examination was to take place. Spittle v. Hughes, 11 Jur. N. S. 151, V. C. K.; S. C. *nom.* Hughes v. Spittal, 13 W. R. 251. Where the cross-examination of a witness was proceeded with, without giving notice of it to the party who had given notice to read the affidavit, it was held void. Pennell v. Davison, 14 W. R. 174, V. C. W.

which such deponent or witness is to be cross-examined;¹ and unless such deponent or witness be produced accordingly, such affidavit or examination cannot be used as evidence: unless by the special leave of the Court.² The party producing such deponent or witness is entitled to demand the expenses thereof in the first instance from the party requiring such production; but such expenses will ultimately be borne as the Court shall direct.³

It has been held, that the foregoing rule does not prohibit the party desiring to cross-examine from taking the course provided by the Act;⁴ and that, therefore, a deponent served with a *subpœna*, under the Act, is bound to submit himself for cross-examination on his affidavit in opposition to a motion for an injunction, notwithstanding the lapse of fourteen days from the time when it was filed.⁵

An enlargement of the fourteen days, in any of the above cases, may, on sufficient reason being shown, be obtained on an application at Chambers, by summons: the summons must be served on the opposite parties.⁶

Where the notice to produce a witness is given, the party to whom it is given is entitled to compel the attendance of the deponent or witness for cross-examination before the Court at the hearing of the cause, or before the Examiner, as the case may be, in the same way as he might compel the attendance of a witness to be examined, if an order had been made for taking evidence ** vivâ voce* at the hear- *915

ing;¹ and if the notice is given for the production of any deponent or witness, for cross-examination at the hearing of a cause in which issue is joined, either party may, upon notice, apply to the Court, or to the Judge in Chambers, to fix a day for the hearing of the cause.²

Any party in any cause or matter, requiring the attendance of any witness, whether a party or not, before the Court, or before one of the Examiners of the Court, or a Special Examiner, for the purpose of being examined, or of being cross-examined, must give to the opposite party forty-eight hours' notice, at least, of his intention to examine or

¹ Where a petition came on for hearing before the expiration of the fourteen days, and the affidavit was withdrawn, it was held that the opposite party could not require the hearing to be postponed because the deponent was not produced for cross-examination. *Re Sykes Trusts*, 2 J. & H. 415.

² Ord. 5 Feb., 1861, r. 19. Where the witness was unable from illness to attend on the day fixed for the hearing of a cause, it was held that the defendant might insist on the affidavit being withdrawn, or the cause standing over. *Nason v. Clamp*, 12 W. R. 973, M. R.; but see *Tanswell v. Scurrah*, 11 L. T. N. S. 761, M. R. Affidavit allowed to be read, though no cross-examination. *Simpson v. Malherbe*, 13 W. R. 887, V. C. S.; *Braithwaite v. Kearns*, 34 Beav. 202. Leave given to use affidavits, but order made saving all just exceptions. *Ridley v. Ridley*, 34 Beav. 329.

³ Ord. 5 Feb., 1861, r. 19. As to whether the costs of cross-examination are costs in the cause, see *Hunt v. Pullen*, 34 Beav. 301. If it appear that the witness is kept back by the party, the latter will be ordered to produce him. *Catholic Publishing Co. v. Wyman*, 1 N. R. 512.

⁴ 15 & 16 Vic. c. 86, § 40.

⁵ *Singer Sewing Machine Manufacturing Company v. Wilson*, 11 Jur. N. S. 58, V. C. W.; 2 H. & M. 584; and see *Cox v. Stephens*, 9 Jur. N. S. 1144; 11 W. R. 929, V. C. K.

⁶ See Ord. XXXVII. 17. For forms of summons, see Vol. III.

¹ Ord. 5 Feb., 1861, r. 20; *ante*, p. 911. A witness will not be compelled to attend, if, from the matter being disposed of, or other cause, his cross-examination would be useless. *Hooper v. Campbell*, 13 W. R. 1003, L. C.

² Ord. 5 Feb., 1861, r. 21; see *ante*, p. 911.

cross-examine such witness: such notice to contain the name and description of the witness, and the time and place of the examination or cross-examination, unless the Court in any case thinks fit to dispense with such notice.³ So far, however, as the witness himself is concerned, the notice to be given must be according to circumstances; and if he resides in London, or has his office there, twenty-four hours' notice is ample.⁴

Where a witness is out of the jurisdiction, a commission, as we have seen, may still be issued,⁵ under an order: which may be obtained on special motion or summons, supported by affidavit;⁶ but the ordinary and more convenient course is to appoint a Special Examiner.⁷

Where a commission is directed to issue, it is prepared by the applicant's solicitor; and will be sealed at the Record and Writ *916 *Clerks' Office, on production of the order under which it is issued, and on a *præcipe* being left there.¹

The commission is directed to not less than four commissioners,² and commands them, any two or more of them, to summon the witnesses

³ Ord. 5 Feb., 1861, r. 22; Braithwaite's Manual, 178, n. (85). For form of notice, see Vol. III.

⁴ *Re* North Wheal Exmouth Mining Company, 31 Beav. 628; 8 Jur. N. S. 1168.

⁵ 15 & 16 Vic. c. 86, § 28; see *ante*, p. 888. In reference to the taking of depositions either at home or abroad, many cases will be found collected in note (42) to Phil. Ev. (Cowen & Hill's notes) pp. 32-41; see also 1 Greenl. Ev. §§ 320-325. To entitle depositions to be read in evidence, the rules of Court and statutes respecting them must be strictly complied with. *Wallace v. Mease*, 4 Yeates, 520; *Bell v. Morrison*, 1 Peters, 351; *Winooski Turnp. Co. v. Ridley*, 8 Vt. 404; *Bradstreet v. Baldwin*, 11 Mass. 229; *The Argo*, 2 Wheat. 287; *Evans v. Eaton*, 7 Wheat. 356; *Sanders v. Howe*, 1 Chip. 363; *Collins v. Elliot*, 1 Harr. & J. 1; *Den v. Farley*, 1 South. 124; *Hendricks v. Craig*, 2 *ib.* 567; *Worsham v. Gove*, 4 Porter, 441; *Wiggins v. Pryor*, 3 Porter, 430; *Shepherd v. Thompson*, 4 N. H. 213; *Welles v. Fish*, 3 Pick. 74; *Burroughs v. Booth*, 1 Chip. 106.

⁶ *Hinde*, 304. By 67th Equity Rule of the Supreme Court of the United States, after a cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the Clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*; and since the amendment of this rule, March 17, 1862, testimony may still be taken on commission, in the usual way, by written interrogatories and cross-interrogatories, on motion to the Court in term time, or to a Judge in vacation, for special reasons satisfactory to the Court

or Judge. For forms of notice of motion and summons, see Vol. III.

⁷ *Crofts v. Middleton*, 9 Hare Ap. 18; and form of order in that case, see *ib.* 75; *Rawlins v. Wickham*, 4 Jur. N. S. 990, V. C. S.; *Edwards v. Spaight*, 2 J. & H. 617; and see *Drevon v. Drevon*, 12 W. R. 66, V. C. K.

¹ Braithwaite's Pr. 186. The commission must be stamped with a 1*l.* Chancery fee fund stamp. Regul. to Ord. Sched. 4. For forms of commission, indorsement, *præcipe*, and oaths of the commissioners and their clerk, see Vol. III.

² By the 67th Equity Rule of the Courts of the United States, the commissioner or commissioners to take depositions, shall in all cases be named by the Court, or by a Judge thereof. But this rule has been so amended as to allow the presiding Judge of any Court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said Court, general power to name commissioners to take testimony in like manner that the Court or Judge thereof could do by the said 67th Rule.

For cases touching the competency of persons to act as commissioners, see *Heacock v. Stoddard*, 1 Tyler, 344; and *Chandler v. Brainard*, 14 Pick. 285.

Under the provision that no person interested shall draw up a deposition to be used in a cause, &c., a son-in-law of a party was held not disqualified, in *Heacock v. Stoddard*, 1 Tyler, 344. But a deposition taken before the uncle of a party to a suit was held inadmissible in New Hampshire. *Bean v. Quimby*, 5 N. H. 94; see *Smith v. Smith*, 2 Greenl. 408; *Coffin v. Jones*, 13 Pick. 441; *Wood v. Cole*, 13 Pick. 279.

In Pennsylvania, a commission was issued to four commissioners, jointly, to take the depositions of witnesses in England. It was executed and returned by three of the com-

and examine them upon interrogatories, on their oaths, upon the Holy Evangelists, or in such other solemn manner as is most binding on their consciences: and to take their examinations and reduce them into writing in the English language; and to send the same to the Court of Chancery without delay, or by the return day, if any, named in the order, closed up under their seals, or the seals of any three or two of them, together with the interrogatories and the commission, and a certificate in what manner the oath is administered to such witnesses as cannot speak or understand the English language. The commissioners are further commanded that, before any one of them acts in, or is present at, the swearing or examining of any witness, they severally take the oath first specified in the schedule to the commission;³ and which they, any three or two of them, are empowered to administer to the rest or any other of them, upon the Holy Evangelists; and all clerks employed in taking, writing, transcribing, or engrossing the depositions of the witnesses are, before they act, required to take the oath last specified in the schedule:⁴ to be administered by the commissioners or any *one of them. The commissioners are lastly *917 commanded, if necessary, to swear an interpreter or interpreters, to interpret the oaths and interrogatories to those witnesses who do not understand English, into the language of the witnesses, and also to interpret the depositions out of the language of the witnesses into the English language, and to keep such depositions secret.¹

As a commission for the examination of witnesses is rarely, if ever, resorted to under the present practice of the Court, it has not been thought necessary to set out the practice relative to the execution of such commission. The reader will, however, find such practice fully detailed in the second edition of this treatise.²

missioners only; two of whom, however, were of the defendant's nomination, and it was held inadmissible in evidence. *Guppy v. Brown*, 4 Dall. 410; see *Marshall v. Frisbie*, 1 Munf. 247. But depositions taken under a joint and several commission were held admissible, though the defendant's commissioners did not attend. *Penncock v. Freeman*, 1 Watts, 401. Where a commission was directed to five persons, or any one of them, and the examination was taken in conjunction with another person, not named in the commission, the deposition was held inadmissible. *Willings v. Consequa*, 1 Peters C. C. 301; see further as to commissions, *Cage v. Courts*, 1 Harr. & M'H. 239. A commission to take depositions, issued in blank as to the persons to whom directed, is inadmissible. *Worsham v. Goar*, 4 Porter, 441. [In Tennessee, the commission might be issued in blank, but was required to be filled up with the name of the commissioner at or before the taking of the deposition. *Oliver v. Bank of Tennessee*, 11 Humph. 74. And now depositions may be taken without commission. Code, § 3847.]

³ For form of oath, see Vol. III.

⁴ It is not necessary, in the United States, that there should be a clerk to the commission. *Beard v. Heide*, 2 Harr. & J. 442. The commissioner should himself examine the witness, and not leave so weighty an affair to his clerk or others. *Prac. Reg.* 124; *Hinde*, 348; *Cappeau v. Baker*, 1 Harr. & J. 154.

¹ See form of commission in *Braithwaite's* Pr. 183.

² See pp. 872-908; 3d Am. ed. 924-953. The practice in Chancery in the several States in relation to the issuing, execution, and return of commissions, is in general regulated by statute or by local rules, which could not usefully be set out in these notes. Many of the cases and rules will be found referred to in 2 Phil. Ev. (Cowen & Hill's notes) pp. 32-41, in note (42); see also 1 Greenl. Ev. §§ 320-323; 1 Hall. C. Pr. 463, 474; *Hunter v. Fletcher*, 5 East. 426; *Lowell v. Lowell*, 4 Vt. 412. Depositions in a foreign country must be taken by commission. *Stearns v. Bowman*, 13 Peters, 209.

In New Jersey, when a cause is at issue, a commission for the examination of a witness out of the State may be applied for, either in

The commissioners have power in Scotland and Ireland, to
 *918 * call in the aid of the Courts of those countries to compel the at-

vacation or in term time, upon affidavit stating that the witness is material, and that the party applying cannot safely proceed to a hearing of the cause without his testimony. A stipulated notice is to be given; and the name or names of the witnesses, their residence, and the name or names and residences of such person or persons as the party applying intends to nominate as commissioner or commissioners. Chancery Rule 96. If the party to whom notice is given of the intended application for a commission intend to join in the commission, and to name any other commissioner or commissioners, he shall give notice to the adverse party, two days before the intended application, of the name or names, additions, and residence of the person or persons whom he proposes for a commissioner or commissioners; and the Chancellor shall appoint the commissioner or commissioners to execute the commission; and the party who shall first give notice of his intention to move for a commission, shall sue out and forward the same; but if he shall unreasonably delay to do so, the other party may forward, and cause it to be executed and returned; and every order for a commission shall fix a time for its return, and it shall not be used if not returned within said time, unless the time be extended by an order for that purpose. Rule 97. See *Barrett v. Pardow*, 1 Edw. Ch. 11. The name of every witness to be examined shall be inserted in the commission, and the interrogatories to be put to the witnesses annexed to the commission; and copies of the interrogatories shall be furnished to the opposite party, that is to say, copies of all direct interrogatories shall be furnished six days, and copies of the cross-interrogatories two days, before the time of submitting the same to the Chancellor for his approval; and notice of the time and place of such submission shall be served with the interrogatories, at which time and place the cross-interrogatories shall also be submitted. Rule 98; *Dick. Prec.* 25.

In Massachusetts, where the testimony of witnesses, residing out of the jurisdiction of the Court, is to be taken, the plaintiff is entitled to have a commission for that purpose; and all the Rules of Law as to the time and manner of taking and filing depositions at Law, will apply in Equity. *Pingree v. Coffin*, 12 Cush. 600.

No notice of the time and place of executing a commission out of the State is necessary to be given to the opposite party in Maryland. *Owings v. Norwood*, 2 Harr. & J. 96. But time should be given, to allow the opposite party to exhibit interrogatories. *Ibid.* The services of copies of the interrogatories, which accompany a commission, on the adverse party, a sufficient time before the issuing of the commission, to enable him to file cross-interrogatories, is sufficient notice of the issuing of the commission, and of the time and place of executing it. *Law v. Scott*, 5 Harr. & J. 438.

Under the New York Act of 17th of April, 1823, parties and their counsel have a right to be present at the examination of witnesses and to cross-examine in all cases; and this as well upon commissions issued to examine witnesses out of the State as in other cases. *Steer v. Steer*, Hopk. 362. [So in Tennessee. And, therefore, if the notice designate the day on which the deposition is to be taken, without more, the commissioner has no power to adjourn until the next day, even for want of time to complete the deposition. *Brandon v. Mullinix*, 11 Heisk. 446. But see *Parker v. Hayes*, 8 C. E. Green, 186, where it was held that, although the commissioner had no power to adjourn the examination, yet he might continue it, whenever commenced, from day to day while actually proceeding with the examination.] For the practice in New Hampshire on this subject, see *Marston v. Brackett*, 9 N. H. 345, 346.

It is not necessary in Alabama, that, previous to the issuing of a commission to take the deposition of a non-resident witness, the interrogatories should be filed in the clerk's office. The party may examine the witness before the commissioners. *Wiggins v. Pryor*, 3 Porter, 430.

[In New Jersey, the deposition must be signed by the witness. *Flavell v. Flavell*, 5 C. E. Green, 211.]

In Pennsylvania, a deposition taken under a commission need not be subscribed by the witness. *Moulson v. Hargrave*, 1 Serg. & R. 201. In Kentucky, it is no objection to a deposition that the witness omitted to subscribe his name. *Moble v. Hamit*, 1 A. K. Marsh. 590. So in North Carolina. *Rutherford v. Nelson*, 1 Hayw. 105; *Murphy v. Work*, *ib.* So in Virginia. *Barrett v. Watson*, 1 Wash. 372. So in Alabama. *Wiggins v. Pryor*, 3 Porter, 430. A deposition taken under a commission to take the deposition of John Priestly, may be read in evidence, though signed John G. Priestly. *Brooks v. M'Kean*, Cooke, 162; see *Breyfogle v. Beckley*, 16 Serg. & R. 264. [*Ante*, 904, n. 9.]

A deposition, to which the witness is not sworn till his testimony is reduced to writing, is irregular. *Armstrong v. Burrows*, 6 Watts, 266.

The magistrate who takes a deposition is to judge of the mental capacity of the witness. *Hough v. Lawrence*, 5 Vt. 299.

It will be presumed that commissioners have done their duty in keeping and forwarding depositions, unless the contrary appear. *Glover v. Millings*, 3 Stew. & P. 28. Commissioners to take depositions should certify, in their return, that they caused the witness to be examined on oath upon the interrogatories annexed, and that they caused the examination to be reduced to writing; otherwise the depositions cannot be read. *Bailis v. Cochran*, 2 John. 417; see *Glover v. Millings*, *ubi supra*; *Pettibone v. Derringer*, 4 Wash. C. C. 215. It is sufficient that the commissioners certify, in their return, that the oath

tendance of any witness who may neglect to obey their notice to attend;¹ and it is conceived that Special Examiners have the same power.²

Where the witness is resident at any place in her Majesty's dominions, the commissioners, or Special Examiner, may obtain an order from the Court having jurisdiction in such place, that the examination may proceed in accordance with the order of the Court of Chancery; and may obtain from such first-mentioned Court such further orders as may be necessary, for the purpose of compelling the attendance of the witness.³

It may be noticed in this place, that, where the Examiner has to examine witnesses who cannot speak English, the usual and proper course is to take down the depositions from an interpreter in English.⁴ This, however, does not appear to be absolutely necessary: since, in some cases, examinations taken down in a foreign language have been recognized by the Court. If the depositions are taken down in the language of the witness, they must afterwards * be translated out of that language into English, by a person appointed by an order of the Court: who must be sworn to the truth of his translation;¹ and must either make such translation before the depositions are filed, or afterwards attend at the Record and Writ Clerks' Office for that purpose: for the Court will not make an order for the record of the deposition to be delivered out, in order that they may be translated.²

The translation, after the truth thereof has been sworn to, is annexed to the depositions, and an office copy made of it: which will be permitted to be read at the hearing, saving all just exceptions, when, as is usually the case, the order so directs. The order for the appointment of a translator of the depositions, and for leave to use them at the hearing, is obtained by motion of course, or by petition of course at the Rolls.³ Where a witness disputed the correctness of an alleged translation of letters in a foreign language, on which translation he was being cross-examined before an Examiner, but as to the correctness of which there was no evidence, it was held that the witness should be

has been duly taken by them. *Wilson v. Mitchell*, 3 Harr. & J. 91; *Glover v. Millings*, *ubi supra*.

As to objections to the deposition, see *Strike v. McDonald*, 2 Harr. & J. 29, 192.

¹ 6 & 7 Vic. c. 82, § 5; Taylor on Evid. §§ 1183, 1183 A. For the Practice at Law under this Act, see Chitty's Arch. 341-344.

² See 15 & 16 Vic. c. 86, § 35.

³ 22 Vic. c. 20, § 1; Taylor on Evid. § 1183 B. Commissioners may summon a witness to attend before them; and the Court will compel the witness to do so; but a commission should be issued so as to have the examination at a reasonable distance from the residence of the witness. *Maccubbin v. Matthews*, 2 Bland, 250; see 78th Equity Rule of the United States Courts, by which it is provided that witnesses may be sum-

moned to appear before the commission by *subpoena* in the usual form, which may be issued in blank by the clerk, and filled up by the party praying the same, or by the commissioner. See Rule 94 of the New Jersey Chancery Rules.

⁴ Lord Belmore v. Anderson, 4 Bea. C. C. 90. In *Gilpins v. Consequa*, 1 Peters C. C. 85, it was held no objection, that the deposition was in English, though taken before Dutchmen, who did not appear to have been assisted by a sworn interpreter. See *Amory v. Fellows*, 5 Mass. 249.

¹ 1 Newl. 439. For form of affidavit, see Vol. III.

² *Fauquier v. Tynte*, 7 Ves. 292; see *Gilpins v. Consequa*, 1 Peters C. C. 85.

³ For forms of motion paper and petition, see Vol. III.

cross-examined at the hearing in open Court, and if any difficulties then arose, the Court would, if necessary, consider how to dispose of them.⁴

It seems that an examination of witnesses abroad will not be affected by an abatement of the suit; and that the depositions (provided neither the Examiner nor the witnesses have received notice of the abatement) will be good evidence.⁵ The same principle has been applied to an abatement, pending an examination of witnesses in this country.⁶

In all cases whatever, the re-examination of a witness is to follow immediately upon his cross-examination.⁷

The evidence, when taken, whether by affidavit or otherwise, and whether in chief or on cross-examination, is open to all parties;⁸ and a defendant has, consequently, a right to cross-examine his co-defendant's witnesses.⁹

The costs of a commission, or Special Examiner, to take evidence abroad, will be taxed in this country: but on the scale allowed in the country where the evidence was taken.¹⁰ The costs of the solicitor here, of attending the examination abroad, will not be allowed.¹¹

* SECTION XII. — *Of Interrogatories.*

The general mode of examining witnesses in Equity formerly was by interrogatories in writing, exhibited by the party, plaintiff or defendant, or directed by the Court to be proposed to or asked of the witness in a cause touching the merits thereof or some incident therein. The practice is now, however, almost entirely abolished; but, as it may still be resorted to with respect to any particular witness within the jurisdiction of the Court, and with respect to all witnesses in the cause out of the jurisdiction of the Court,¹ and as it continues to prevail in some Courts in the United States,² it is proper here to consider and state the rules by which it is governed. These interrogatories are questions in writing, adapted to sustain the case made by the party exhibiting them, and are administered to the witnesses either by the regular Examiners of the Court, or through the medium of commissioners specially appointed for the purpose.³ They are termed *original*, when exhibited on the part of the person who produces the witness; or *cross-interrogatories*, if filed on behalf of the adverse party, to examine a witness produced on the other side.⁴

⁴ Foster v. Gladstone, 12 W. R. 525, V. C. W.

⁵ Thompson's case, 3 P. Wms. 195; Winter v. Dancie, Tothill, 99.

⁶ Curtis v. Fulbrook, 8 Hare, 29.

⁷ Ord. XIX. 8.

⁸ Lord v. Colvin, 3 Drew. 222; Sturgis v. Morse (No. 2), 26 Beav. 562.

⁹ Lord v. Colvin, *ubi sup.*; Feilden v. Slater, L. R. 7 Eq. 523, 529.

¹⁰ Wentworth v. Lloyd, 13 W. R. 486, M. R.; 34 Beav. 455; see as to costs of perusing the depositions, S. C. L. R. 2 Eq. 609; 12 Jur. N. S. 581, M. R.

¹¹ Hammond v. Wordsworth, 1 Dick. 381.

¹ *Ante*, pp. 887, 888.

² See 37 Maine, 585, Ch. Rule, 14; Eq. Rule of U. S. Courts, 67; Code of Tenn. §3855.

³ Hinde, 317.

⁴ *Ibid.*

Interrogatories should be short and pertinent, and necessarily they must not be leading.⁵ If they are leading, the deposition taken thereon will be suppressed; and so it will be where the interrogatories are too particular, and point to one side of the question more than the other.⁶

* Leading questions are such as instruct a witness how to *921 answer on material points, such as, "Did you not see or do such a thing?"¹ or which, embodying a material fact, admit of an answer by a simple negative or affirmative, though the question does not suggest which.² "Such questions, as well as those which fall more directly under the denomination of leading questions, are objectionable, because the evidence elicited by them is presented to the Court, which is to judge of the effect of it, not as it would be if it were the unassisted testimony of the witness, but in the form, and with the coloring, that are prompted by professional skill and a previous knowledge of the case which it is desired to prove. If such a mode of proof were admitted, there would not be the same probability that a witness would state the whole transaction, and part only might be elicited; the chance too, of detecting discrepancies in perjured or mistaken testimony would be diminished; nor are those objections removed by the power of cross-examination, which, as it often must be conducted without previous knowledge of the answers which the witnesses will give, is not a counterbalance to the facility afforded of presenting a selected portion of the evidence in chief."³

It is to be observed, that, in order to render an interrogatory objectionable, on the ground of its being leading, it must relate to some material point in the cause. "Questions which are intended merely as introductory, and which, whether answered in the affirmative or nega-

⁵ As to the forms of interrogatories, see *Gresley Eq. Ev. (Am. ed.)* 44-48. Leading questions are those which suggest to the witness the answer desired. See 1 *Greenl. Ev.* §§ 434, 435; 1 *Stark. Ev.* 149; 1 *Phil. Ev. (Cowen & Hill's ed. 1839)* 268-272, and notes referred to; *Parkin v. Moore*, 7 C. & P. 408. In some cases leading questions are permitted, even in a direct examination; namely, where the witness appears to be hostile to the party producing him or in the interest of the other party, or unwilling to give evidence; or where an omission in his testimony is evidently caused by want of recollection, which a suggestion may assist. Thus where the witness stated, that he could not recollect the names of the component members of a firm, so as to repeat them, without suggestion, but thought he might possibly recollect them if suggested to him, this was permitted to be done. So where the transaction involves numerous items or dates. So where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry, without a particular specification of it. So where a witness is called to contradict another, who has testified to particular expressions, the contradicting witness may be asked whether such expressions were used.

When and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the Court, and not a matter which can be assigned for error. 1 *Greenl. Ev.* § 435; *Clarke v. Saffery*, Ry. & M. 125, per Best C. J.; *Regina v. Chapman*, 8 C. & P. 558; *Acerro v. Petroni*, 1 *Stark.* 100; 2 *Phil. Ev.* 404, 405; *Moody v. Rowell*, 17 *Pick.* 498.

⁶ 1 *Harr. ed. Newl.* 259. Objections to interrogatories, filed before the issuing of a commission to take a deposition, should specify the ground of the objection, in order that the adverse party may have an opportunity to vary the interrogatories. *Allen v. Babcock*, 15 *Pick.* 56; see *Craddock v. Craddock*, 3 *Litt.* 77; *Jones v. Lucas*, 1 *Rand.* 268. A leading interrogatory in a deposition, taken when both parties are present, must be objected to at the time it is put to the witness, if at all. *Woodman v. Goodenoth*, 7 *Greenl.* 181; *Sheeler v. Spear*, 2 *Ram.* 159; see *Amos*, 2 *Pick.* 165.

¹ See *Craddock v. Craddock*, 3 *Litt.* 77.

² 1 *Harr. Ed. Newl.* 259; see also *Phil. & Amos*, 886; *Lincoln v. Wright*, 4 *Bay* 166.

³ *Phil. & Amos*, 887.

tive, would not be conclusive on any of the points in the cause, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked whether the one defendant has interfered in the business of the other.”⁴

It is difficult, however, to suggest any rules, in the abstract, with regard to what will or will not be considered as a leading question, as much, in every case, must depend upon the peculiar circumstances attending it; nevertheless, the avoiding such questions as may be considered leading, is a point very important to be attended to in the framing of interrogatories, as the consequences of them may be a motion to suppress the evidence taken upon them, whereby the party will, in all probability, be deprived of an important part of the evi-

*922 dence upon which he intends to rely. * Indeed, it seems that, where interrogatories are obviously leading, the Court will, without any motion being made to suppress the deposition, think it a good ground to reject the evidence taken upon it at the hearing.¹ It may be observed, however, that where depositions are offered in evidence in a trial at Law, they may be read notwithstanding the interrogatories on which they were taken are leading;—the other side ought to have applied to the Court in which they were taken to have them suppressed.²

Cross-interrogatories are not subject to the same objections, on account of their leading the witness, as interrogatories for examination in chief; care must be taken, however, in framing them, not to adapt them to the proof of new facts which it is not likely the party examining in chief will attempt to substantiate by his evidence; for, although the adverse party may cross-examine as to the points upon which a witness has been examined in chief, he cannot make use of the same process to prove a different fact.³ If, therefore, there should be any parts of a case which can only be proved by a witness examined on behalf of the adverse party, the proper course is, not to endeavor to establish them by cross-examining that witness, but to exhibit original interrogatories for the examination of such witness in chief; otherwise there will be a risk that the evidence of the witness, as to these points, will be lost; for, if the reading of the deposition of the witness to the cross-interrogatory be objected to at the hearing as involving new points, the other party may also prevent the reading of the cross-deposition by refusing to read the examination in chief.⁴

Interrogatories, like all other proceedings in the Court, may be the

⁴ *Ibid.*

¹ *Delves v. Lord Bagot*, 2 Fowl. Ex. Pr. 129.

² 4 M. & S. 497.

³ *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44.

⁴ *Smith v. Biggs*, 5 Sim. 392; see 1 Greenl. Ev. § 445 *et seq.*; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 272 *et seq.* and notes referred to; *Gresley Eq. Ev.* (Am. ed.) 49. [But see *infra*. 950, n. 8.]

subject of a reference for scandal.⁵ It seems, however, that they cannot be referred for impertinence alone.⁶ If the witness himself objects to the interrogatory upon this ground, he should do so, by demurrer, before he answers it.⁷

Interrogatories for the examination of witnesses in a cause are entitled, "Interrogatories to be exhibited to witnesses to be produced, sworn, and examined in a certain cause now depending and at issue in the High Court of Chancery, wherein A. B. is plaintiff, and C. D. is defendant, on the part and behalf of the above-named plaintiff" (or defendant, as the case may be). Care must be taken, in framing the interrogatories, that the title of the cause⁸ is properly set out; as any mistake in this particular may be fatal to the depositions. Thus, where the plaintiff's Christian name was mistaken in the title of the interrogatories, the depositions could not be read, nor would the Court permit the title to be amended, though most of the witnesses had, since their examination, gone to sea.¹ The reason of requiring this particularity, in the title, is the impossibility there would be of maintaining an indictment for perjury, if such variance between the title of the cause and that of the interrogatories should appear.

It is usual to prefix to all interrogatories, a general inquiry "as to the witness's knowledge of the parties, and the time when the witness first became acquainted with each," &c. Orders appear to have formerly been promulgated by the Court, to restrict this practice, by which it is directed "that the articles which are usually thrust into the beginning of every schedule of interrogatories, as it were of form, or course, touching the witness's knowledge of the parties, plaintiffs or defendants, of the lands, towns, and places in the pleadings, and the like, be not so needlessly used as they are;"² but, notwithstanding this order, the practice of introducing a general inquiry of this nature is almost invariably resorted to.³

The interrogatories are broken into distinct interrogatories, according to the subject-matter or the witnesses to be examined, but each interrogatory concludes with the following words: "Declare the truth of the several matters in this interrogatory inquired after, according to the best of your knowledge, remembrance, and belief." These words, however, are mere matter of form, and are not generally inserted in the draft, but are supplied in the engrossment.

It has frequently happened, that, in framing the interrogatories, some point to which it is important that a witness should depose, has been omitted; or else it has been found that a witness is capable of deposing as to some matter as to which it was not, at the time, known

⁵ *Cox v. Worthington*, 2 Atk. 236.

⁶ *White v. Fussell*, 19 Ves. 113; see *Pyncent v. Pyncent*, 3 Atk. 557.

⁷ *Jeffris v. Whittuck*, 2 Pri. 486; but see *Ashton v. Ashton*, 1 Vern. 165; 1 Eq. Ca. Ab. 41, S. C.

⁸ *Jones v. Smith*, 2 Y. & C. 42; *Lincoln v. Wright*, 4 Beav. 166; *Pritchard v. Feakes*, 2 Beav. 133.

¹ *White v. Taylor*, 2 Vern. 445.

² *Beames's Ord.* 71.

³ *Gresley Eq. Ev. (Am. ed.)* 48, 49.

that any witness could speak, in consequence of which, evidence which would be important to the party would be omitted, from the circumstance of no question being addressed to the witness calculated to elicit it; it therefore became the practice to add to each set of interrogatories a general interrogatory calling upon the witness to state whether he knew or could set forth any matter or thing which might in any wise tend to the benefit or advantage of the party for whom he appeared,

other than what he had been interrogated to? And the witness, *924 being examined upon *this interrogatory, then stated whatever matter he had to prove, to which no special interrogatory had been addressed. This form has, however, been altered; and now, by the 32d Order, of December, 1833, it has been directed, "that the last interrogatory now commonly in use be in future altered, and shall stand and be in the words or to the effect following: 'Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause?' If yea, set forth the same fully and at large in your answer."¹

But although the order directs where a general interrogatory of the nature of that formerly used as the last, is made use of, the form shall be that prescribed, it does not compel a party to use it.² So that it is optional with the draftsman to insert a general interrogatory or not. Where, however, he does insert one, it must be in the form prescribed by the 32d Order, otherwise the deposition taken upon it may be suppressed upon motion.³

The interrogatories being drawn and signed by counsel, must be copied upon parchment, and, if intended for the examination of witnesses in London, or within twenty miles of it, they must be left with one of the Examiners of the Court, which is termed filing interrogatories;⁴ but if any of the witnesses are to be examined by commission, the plaintiff should file, with the Examiner, such interrogatories only as apply to witnesses resident within the jurisdiction of the Examiner's office.⁵

The practice is, to draw all the original interrogatories exhibited on behalf of one party in one set or schedule, leaving the selection of such as are proper for the particular witnesses to the solicitor,⁶ and where some of the witnesses of a party reside in London, and some in the country, it is necessary to have one set of interrogatories only drawn by counsel; and the solicitor, in procuring the same to be engrossed,

¹ This last interrogatory is the same as that adopted by the Supreme Court of the United States in Rule 71 of the Equity Rules of that Court. See *Gresley Eq. Ev.* (Am. ed.) 49. It is a fatal defect if this general interrogatory does not appear to be answered.

Richardson v. Golden, 3 Wash. C. C. 109; *Dodge v. Israel*, 4 Wash. C. C. 323.

² *Gover v. Lucas*, 8 Sim. 200.

³ *Ibid.*

⁴ 1 T. & V. 191.

⁵ *Ibid.*; *Hinde*, 320, n.

⁶ See *Beames's Ord.* 71.

distinguishes and copies those intended for the examination of town witnesses, separate from those intended for country witnesses.

If the interrogatories are to be exhibited in the Examiner's office, and witnesses are examined thereon, either party may, without application to the Court or order for that purpose, exhibit one or more interrogatories, or a new set of interrogatories for the further examination of the same or other witnesses.¹ But when a commission is taken out, the practice has been different. In *Campbell v. Seegal*,² it appears to have been represented at the bar, that the practice in country causes is to feed the commissioners from time to time with interrogatories for the examination, as they can be presented either for original or cross-examination, until the commissioners find that the supply of witnesses is exhausted; and although Lord Eldon observes that there was no doubt, that of late, interrogatories had been sent down into the country, from time to time, as often as prudence required, and were returned, and that the Court had acted upon examination so taken and returned, yet his Lordship said the practice was not so formerly; and that he had frequently, when at the bar, drawn interrogatories guessing at what any witness to be examined to any fact in issue, could possibly represent, and that the interrogatories, both for the cross-examination and for the original examination of the defendants' witnesses, were prepared before the commission was opened: and, notwithstanding the representation made at the bar, the practice of the Court appears to have been in conformity with his Lordship's recollection. Indeed it obviously must have been so, from the nature of the oath which was administered to the commissioners, which was limited to the examination of witnesses upon the interrogatories — "Now (*i. e.*, at the time of administering the oath), produced and left with you."³ This word "Now" has been left out of the oath hereafter to be administered to the commissioners, under the 104th Order of May, 1845; whether, therefore, hereafter new interrogatories may be exhibited before a commission, remains to be seen.

Under the former practice, where additional interrogatories were required to be exhibited after the commission had been opened, an order for that purpose must have been obtained.⁴

It is to be observed, however, that notwithstanding a commission has been issued, and the parties have joined in it, and witnesses have been examined, new interrogatories may be exhibited into Court (*i. e.* before the Examiner), for the examination of new witnesses at any time before publication;⁵ but if a witness has been examined by commissioners in the country, he cannot be examined again before the Examiner, without a special order.⁶

¹ Smith Ch. Pr. ed. 1838, 354.

² 19 Ves. 552.

³ *Post.*

⁴ *Carter v. Draper*, 2 Sim. 53; *King of Hanover v. Wheatley*, 4 Beav. 78.

⁵ *Lewis v. Owen*, 1 Dick. 6; *Beames's Ord.* 96, S. C.; *Hinde*, 333.

⁶ *Hinde* 333.

Interrogatories for the cross-examination of witnesses differ very little in form from original interrogatories; they may be filed
 *926 * with the Examiner who examines in chief.¹ Formerly this could not be done without a special order.²

SECTION XIII. — *Of the Examination of Witnesses by the Examiner on Interrogatories.*³

Witnesses in Chancery are examined either by an Examiner or by commissioners specially appointed for that purpose by commission under the Great Seal.⁴

The first thing to be done by the party intending to examine witnesses before the Examiner, is to file his interrogatories, or such of them as apply to the witnesses to be examined, in the manner before pointed out.⁵ He must then procure the attendance of his witnesses at the Examiner's office; for which purpose he ought to fix a day with the Examiner, when he will be able to examine them, and to give notice of such day to the witnesses.⁶

If the witness be in prison, his situation must be represented to the Examiner, who will fix a day for attending at the prison to swear and examine the witness. The Examiner (with whom the interrogatories for the examination of such witness should have been previously left) will then proceed to the prison, taking the interrogatories with him, and, the witness being sworn thereto in the common form, the examination is taken in the usual manner, and the depositions and interrogatories are returned by the Examiner to the office, to be kept, as in ordinary cases, until publication pass in the cause.⁷

In like manner, if a witness be incapable, by reason of sickness, of attending at the Examiner's office to be examined, and it is not thought necessary to sue out a commission to take his examination, the
 *927 Examiner may go to the place of the witness's residence * and administer the oath and take the deposition of the witness.¹ In

¹ Ord. 26, 1833.

² *Turner v. Burleigh*, 17 Ves. 354.

³ By rule of Chancery in New Jersey, when any cause shall be at issue, &c., it shall be the duty of the parties to proceed and examine their witnesses within a reasonable time thereafter; and on a notice for the examination of witnesses given by either party, both parties may produce and examine their witnesses; but the Examiner, if required so to do, shall first examine the witnesses of the party who first gave notice. Rule 78.

⁴ In the United States Courts the commissioner or commissioners shall be named by the Court or a Judge thereof in all cases. Equity Rule 67.

⁵ *Supra*, p. 914.

⁶ Notice that witnesses will be examined at

a particular tavern in a city named in the notice, without naming the Christian name of the tavern-keeper, is good, unless it is shown that there were in the same city two tavern-keepers of the same surname. *Overstreet v. Thompson*, 1 Litt. 120. An irregularity in the service of notice of examination will be considered as waived by a neglect to complain of it in due season. *Skinner v. Dayton*, 5 John. Ch. 191.

⁷ Before the stat. 3 & 4 Will. IV. c. 94, it was necessary that the Master should go to the prison, as well as the Examiner, for the purpose of administering the oath. *Hinde*, 330.

¹ An order for this purpose seems to be necessary. See *Anon.*, 4 Mad. 463. *Sed quære*, if the Examiner is willing to go without an order.

either of the above cases notice must be given in the usual manner to the other party of the time and place of examination.

The form of the oath administered to witnesses in Chancery is as follows : —

“ You shall true answer make to all such questions as shall be asked of you on these interrogatories, without favor or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth : So help you God.”

After the witness has been sworn to the interrogatories, a *jurat* stating the producing and swearing of the witness to the interrogatories, with his name, and the day and year when sworn, is inscribed upon the interrogatories, and signed by the Examiner.² If, after the witness has been sworn, any alteration is made in the title, or any part of the interrogatories, they must be re-sworn, but not re-produced.³

When new interrogatories are added, the witness must be sworn to them in the same form.

Before the witnesses are examined, the Examiner ought to be, and generally is, furnished with instructions as to which of the interrogatories each witness is to be examined upon. The solicitor also supplies a minute of the evidence he expects his witness to give ; but of such minute no use can be made in the examination.⁴

After the examination is begun, the Examiner ought not to confer with either party touching the examination, or take new instructions respecting the same.⁵

With respect to the method of examining a witness,⁶ Lord Clarendon's orders, which have been before referred to, direct, that “ the Examiner is to examine the deponent to the interrogatories directed *seriatim*, and not to permit him to read over, or hear read, any other interrogatories, until that in hand be fully finished ; much less is he to suffer the deponent to have the interrogatories, and pen his own depositions, or depart, after he hath heard an interrogatory read over, until he hath perfected his examination thereto. And if any witness shall refuse so to conform himself, the Examiner is thereof to give notice to the clerk of the other * side, and to proceed no further in his examination without *928 the consent of the said clerk or order made in Court to warrant his so doing.”¹ The same Orders afterwards direct, that “ the Examiners, in whom the Court repositeth great confidence, are themselves in person to be diligent in the examination of witnesses, and not to intrust the same to mean and inferior clerks, and are to take care and hold the witness to the point interrogated, and not to run into extravagances

² Hinde, 322.

³ See Mr. Plumer's return of the duties of Examiners to the Chancery Commission, Chan. Rep. Appx. B. No. 22, p. 542.

⁴ Mr. Plumer's statement, *ubi supra*.

⁵ Hinde, 325 ; 4 Inst. 278.

⁶ In the United States Courts, these examinations may now be conducted orally, and the testimony taken down in writing by the

Examiner, the examination and cross-examination to be conducted in the mode pursued in Common Law Courts. *Ante*, p. 905, note ; United States Courts Equity Rule, 67, and the amendment thereof, March 17, 1862, 24 Law Rep. 380, 381. In Massachusetts, see *Pingree v. Coffin*, 12 Cush. 600.

¹ Beames's Ord. 187 ; see *Hickok v. Farmers' and Mechanics' Bank*, 35 Vt. 476.

and not pertinent to the question.”² “Moreover, they are not to use any idle repetitions or needless circumstances, nor to set down any answer to a question to which the examinant cannot depose other than thus, ‘to such an interrogatory this examinant cannot depose;’ and in case such impertinences be observed by the Court, the Examiner is to recompense the charge thereof to the party grieved, as the Court shall direct.”³

The Examiner is not strictly bound to the letter of the interrogatories, but ought to explain every matter or thing which ariseth necessarily thereupon;⁴ and forasmuch as the witness, by his oath, which is so sacred, calleth Almighty God (who is truth itself, and cannot be deceived, and hath knowledge of the secrets of the heart) to witness that which he shall depose, it is the duty of the Examiner gravely, temperately, and leisurely to take the depositions of witnesses, without any menace, disturbance, or interruption of them in hinderance of the truth.”⁵

The Examiner, having read an interrogatory to the witness, takes down the answer in writing upon paper, concluding the answer to each interrogatory before the following one is put.

A witness may be permitted to use such short notes as he brings with him to refresh his memory, but not the substance of his depositions; nor may he transcribe such notes *verbatim*.⁶ The rule at Law is, in this respect, the same; and in an anonymous case in Mr. Ambler’s reports,⁷ Lord Hardwicke said, “that, at Law, a witness is allowed to refresh his memory by notes as to dates and names, because there is nothing to guide the memory as to them; but he never knew a Court of Law admit the whole evidence to be given from writing. There is no certain rule how far evidence may be given from notes; some Judges had thought, and he was (he said) inclined the same way, that the witness might speak from notes which were taken at the time of the transaction in question, but not if they were written afterwards.”⁸

*929 * In that case, a motion was made to suppress a deposition taken before commissioners, because the attorney for the plaintiff had written down the whole in the exact form of the deposition before it was taken; and, though it appeared that the witness had told him the facts and circumstances mentioned in it, yet his Lordship said it would be of dangerous tendency to permit it to be read; for in depositions, it is natural to state the evidence as given by the witnesses, but that, in the case in question, the attorney had methodized and worded it; and that it was, therefore, no more than an affidavit.¹

In order to secure the statement of the evidence upon the depositions

² *Ib.* 188.

³ *Ib.* 190.

⁴ *Hinde*, 325; 4 *Inst.* 278; see also Peacock’s Case, 9 *Rep.* 70.

⁵ *Hinde*, 325; 4 *Inst.* 278.

⁶ *Curs. Canc.* 260; *ante*, p. 906, note.

⁷ *Anon. Amb.* 252.

⁸ See *Phil. & Amos*, 891; see *Hickok v.*

Farmers’ and Mechanics’ Bank, 35 *Vt.* 476; *ante*, p. 906, note.

¹ *Phil. & Amos*, 891; see also *Shaw v. Lindsey*, 15 *Ves.* 380; *Ferry v. Fisher*, cited *ib.* 382; *Phil. & Amos*, 896; *St. Catherine Dock Co. v. Mantzgu*, 1 *Col.* 94; see *Hickok v. Farmers’ and Mechanics’ Bank*, 35 *Vt.* 476; *ante*, p. 906, note.

in the very words of the witness, the stat. 3 & 4 Will. IV. c. 94, § 27, has enacted, that all depositions of witnesses examined in the High Court of Chancery are to be taken in the first person; formerly the practice was to take them in the third person.²

If a witness to be examined does not understand English, an order should be obtained to appoint an interpreter to interpret the interrogatories and depositions.³ The person so appointed must be sworn to interpret truly, and the depositions of the witnesses are to be taken down by the Examiner, from the interpretation, in English.⁴ It was Lord Nottingham who established the rule that "no alien should be examined as a witness without a motion first made in Court to swear an interpreter, that the other side might know him, and take exceptions to the interpreter."⁵

When all the interrogatories, upon which the Examiner has been instructed to examine the witness, have been gone through, the Examiner carefully reads over the whole deposition to the witness, who, if he be satisfied with it, signs each sheet of it in the presence of the Examiner.

If the witness wishes to vary his testimony, or to make any alteration in or addition to it, he must do so before signing the deposition; for, by an order of the Court, when witnesses are examined in Court, they are to perfect and subscribe their depositions to such interrogatories as they have answered, before they depart from the Examiner or his deputy; and they are not to be permitted to make any alteration thereof at any time thereafter * without leave of the Court, unless it be *930 in some circumstance of time or the like, or for making perfect of a sum upon view of any deed, book, or writing, which the witness shall show to the Examiner before he permits such alteration.¹

It is to be noticed, that the signature of a witness to his examination is absolutely necessary, and that if a witness should die after his examination is completed, but before it is signed, the deposition cannot be

² By Chancery Rule 92, in New Jersey, the Examiner shall number each page, of the examination taken by him, and also every tenth line of the same, leaving sufficient margin for the purpose; and where more than one witness is examined, he shall annex a separate leaf to the examination, containing a list of the names of the witnesses, and a reference to the pages on which their examination respectively commences; and no costs are to be taxed for any examination where this rule is not strictly complied with.

³ See *Gilpins v. Consequa*, 1 Peters C. C. 85; *Amory v. Fellows*, 5 Mass. 219.

⁴ *Smith v. Kirkpatrick*, 1 Dick. 103; see also *Lord Belmore v. Anderson*, 2 Cox, 288, and 4 Bro. C. C. 90, S. C.

⁵ 2 Swanst. 261, n.

¹ Beames's Ord. 74. A witness may explain or correct a mistake made by him at any time before his examination is finally closed; but no part of his testimony, pre-

viously reduced to writing, can be erased or altered. 1 Hoff. Ch. Pr. 463. Under the former practice in Chancery in New York, amendments of testimony were allowed in open Court, after publication and at the hearing, on an allegation of mistake in taking down the testimony. *Denton v. Jackson*, 1 John. Ch. 526. So a re-examination has been allowed on the affidavit of the witness that his testimony in material parts was not truly taken down. *Kingston v. Tappen*, 1 John. Ch. 363. The existence of the mistake ought to be made out to the perfect satisfaction of the Chancellor. *Gray v. Murray*, 4 John. Ch. 413; see *Halloch v. Smith*, 4 John. Ch. 649; *Newman v. Kendall*, 2 A. K. Marsh. 236. A witness examined while incompetent, by reason of interest, may be re-examined after his competency is restored. *Haddix v. Haddix*, 5 Litt. 202; see *Dunham v. Wiaans*, 2 Paige, 24.

made use of.² It seems, however, that if a witness, having signed his examination in chief, dies before he is cross-examined, his depositions may be read as evidence; the Court, however, bearing in mind the fact that the cross-examination has not taken effect, especially if it should appear that the party had lost any material fact which was within the knowledge of the witness, and could not have been proved by other means.³

If a witness refuses to be cross-examined, his deposition cannot be read.⁴

By the 26th of the Orders of 1828,⁵ the Examiner who takes the examination in chief is at liberty to take his cross-examination also; before that time, the cross-examination of a witness was taken before a different Examiner from the one who examined him in chief;⁶ a practice which appears to have been sanctioned by the stat. 50 Geo. III. c. 8, by which it was directed, that the witnesses on different sides of the same cause, should (if the same was practicable) be examined by different Examiners.⁷

We have seen before, that, previously to the examination of a witness, a notice in writing of the name and description of the *931 * witness is to be served upon the adverse solicitor. The object of this notice is, that in case the adverse party shall have occasion to cross-examine the witness, he may have an opportunity of doing so. The cross-interrogatories ought to be filed before the examination in chief is completed; and if they are so filed the party producing the witness is obliged to procure him to stay or return to be examined.¹

Where the interrogatories for cross-examining a witness are not filed, or the witness is not required to be cross-examined whilst he is under original examination, but is allowed to depart about his business, the party who intends to cross-examine that witness must procure his ex-

² *Copeland v. Stanton*, 1 P. Wms. 414; [*Flavell v. Flavell*, 5 C. E. Green, 211.] The signature of the witness seems not to be held necessary to a deposition in many of the States; see *Moulson v. Hargrave*, 1 Serg. & R. 201; *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Rutherford v. Nelson*, 1 Hayw. 105; *Barnett v. Watson*, 1 Wash. 372; *Wiggins v. Pryer*, 3 Porter, 430. [*Ante*, 904, n. 9; 918 note.]

³ *O'Callaghan v. Murphy*, 2 S. & L. 158; [*Arundel v. Arundel*, 1 Rep. Ch. 90; *Nolan v. Shannon*, 1 Molloy, 157.] A witness became interested by a death while under examination. The death occurred during his cross, but before further direct examination. The Court allowed the deposition to stand so as to embrace the direct and cross-examination, but struck out the further direct. *Fream v. Dickinson*, 3 Edw. Ch. 300.

⁴ *Prac. Reg.* The testimony of the witness is complete, so far as the party calling him is concerned, when the direct examination is finished and signed by the witness; but the party calling him is bound to keep

the witness before the Examiner a sufficient length of time afterwards, to enable the adverse party to complete the examination, or the deposition may be suppressed. *Watertown v. Cowen*, 5 Paige, 510.

[In *Courtenay v. Hoskins*, 2 Russ. 253, Lord Eldon held that if the witness appeared for cross-examination and refused to answer, his direct examination should not be suppressed, because it was in the power of the party wishing to cross-examine to compel him to answer. And see *Goss v. Stinson*, 3 Sumn. 98, where there was great delay in cross-examining, and the examination in chief was heard although the witness had in the meantime died. See also *Flavell v. Flavell*, 5 C. E. Green, 214. But if the witness secrete himself, the deposition may be suppressed. *Flowerday v. Collet*, 1 Dick. 288.]

⁵ Ord. 1828.

⁶ See *Troup v. Haight*, 6 John. Ch. 335.

⁷ *Turner v. Burleigh*, 17 Ves. 354.

¹ *Hinde*, 323.

amination in the best manner he can: the adverse party is not bound to produce him again; but as it is usual after the witness is sworn, if he be resident in London, for the Examiner to appoint some other day for him to attend to be examined,² the party intending to cross-examine has generally sufficient opportunity to prepare and file his interrogatories. In the mean time, however, to prevent the examination being taken without the cross-examination, a note in writing may be stuck up in the Examiner's office, that if *such a person* comes to be examined in *such a cause*, let him be cross-examined.³

In the case of *Keymer v. Pering*,⁴ it is stated, that "the practice of the Examiner's office is, that where a party produces a witness to be examined by one of the Examiners, the opposite party having notice, and intending to cross-examine the witness, makes an appointment with the other Examiner for that purpose, and then gives notice of the time appointed to the witness, and also to the solicitor of the party producing the witness." It appears from the case, that if the party intending to cross-examine neglects to make the appointment, he loses the right to cross-examine.

If a witness refuses to attend to be cross-examined, an application may be made to the Court (it is presumed in the same manner already pointed out in the case of a witness refusing to be examined in chief),⁵ which will compel the witness to do what the party has a right to require of him.⁶

Some doubt appears to exist whether a subpoena will lie to compel a witness to attend for the purpose of being cross-examined.

If a party examining a witness does not allow a sufficient time for cross-examination before the time for passing publication expires, and cross-interrogatories are left, such party must either enlarge publication or the deposition will be suppressed.⁷

* A witness who is cross-examined must be sworn to the cross- *932 interrogatories as well as to the original interrogatories.

Under the practice, before the Orders of May, 1845, came into operation, where the Examiner was served with a copy of a rule to pass publication, he could not, after the day fixed by such rule for passing publication, examine any more witnesses, even though the witnesses had been already sworn,¹ unless he was served with an order to enlarge publication; in which case either party might examine his witnesses as long as the publication continued enlarged.² Where, however, a witness was examined, by mistake, two days after publication had passed, and was cross-examined by the defendant, the Court would not suppress the deposition.³ Now, as we have seen, publication passes without rule

² Hinde, 323. The depositions, however, always bear date the day of the swearing.

³ Hinde, 323.

⁴ 10 Sim. 181.

⁵ *Ante*, p. 926.

⁶ *Courtenay v. Hoskins*, 2 Russ. 253.

⁷ 1 Smith's Ch. Pr. 3d ed. 476; and see *Keymer v. Pering*, 10 Sim. 179; *ante*, p. 930, note.

¹ Beames's Ord. 73. 186.

² *Anon.*, 1 Vern. 253.

³ *Hammond v. —*, 4 Dick. 50.

at the expiration of two months after the filing of the replication, unless such time expires in the long vacation, or is enlarged by order. It is presumed, that, under the present practice, any examination of witnesses after the time for publication has arrived, will be irregular, whether notice be served upon the Examiner or not.⁴

SECTION XIV. — *Examination of Witnesses de bene esse.*

The Court of Chancery, in its original institution, participated much in the practice adopted by the Courts of Civil Law. The civilians had a manner of examining witnesses, *in perpetuum rei memoriam*, which was twofold: either the common examination, or *in meliori formâ*. The common examination was where the witnesses were very old and infirm, sick, in danger of death, or were going into distant countries. In this case, it was usual to file a libel, and, without staying for the *litis contestatio*, the plaintiff examined his witnesses: immediately giving notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross-examine such witnesses, if he thought fit; and these depositions stood good in case the witnesses died, or went abroad; but the plaintiff was obliged *edere actionem* within a year: otherwise, the depositions went for nothing. If the witnesses lived, or did not go abroad into distant countries, then they were to be examined *post litem contestatam*.⁵ The examination *in perpetuum*

*933 *rei memoriam in meliori formâ* was *ad transumenda *instrumenta*; and in that case, there must have been a *litis contestatio* before the examination: because there was no need of so much celerity in proving the instruments as there was where the witnesses were likely to die, or were going into remote parts. In these cases, the plaintiff was not bound to proceed in any action upon those instruments within the year. But in both cases, it seems that *publicatio testium* took place, when the judgment was begun before the ordinary Judge, or, which is the same thing, when there was a *litis contestatio*.¹ The examination *in perpetuum rei memoriam in meliori formâ*, has been adopted by the Court of Chancery; and the practice with regard to it will be considered when we treat of suits instituted for the purpose of perpetuating the testimony of witnesses.² The common examination *in perpetuum rei memoriam* has likewise been adopted by Courts of Equity, in their practice of examining witnesses *de bene esse*:³ which forms the subject of the present section.

⁴ In the case of *Green v. Wheeler*, decided New York Chancery, Aug. 16, 1842, Mr. Chancellor Walworth held, that where an examination of witnesses is commenced before the time for taking testimony expires, it may be continued by the Examiner, if necessary, after the expiration of such time; and

until an order to close the proofs is actually entered.

⁵ Gilb. For. Rom. 118, 119; Hinde, 365.

¹ Gilb. For. Rom. 118; Hinde, 365.

² See *post*, Chap. XXXIV. § 4, *Bills to Perpetuate Testimony*.

³ Hinde, 368.

The examination of a witness *de bene esse* ordinarily takes place; where there is danger of losing the testimony of an important witness from death, by reason of age (as where the witness is seventy years old and upwards;⁴ or dangerous illness);⁵ or where he is about to go abroad;⁶ or where he is the only witness to an important fact.⁷ In such cases, the Court, to prevent the party from being deprived of the benefit of his evidence, will permit his depositions to be taken before the cause is at issue, in order that, if the witness die, or be not forthcoming to be examined after issue joined, the depositions so taken may be used at the hearing.⁸

The examination of a witness *de bene esse* may be incidental to *every suit; whereas the examination for the purpose of per- *934petuating the testimony, is the fruit of a suit instituted for that particular purpose. It may even be incidental to a suit to perpetuate testimony, where there is danger of the evidence of the witnesses, whose testimony is intended to be perpetuated, being lost before the suit for perpetuating is ripe for a regular examination.¹

In general, the Court will not allow the examination of a witness *de bene esse* after the closing of the evidence; and, therefore, where upon a hearing, an issue had been directed, and an order made that the depositions of the plaintiff's witnesses might be read at the trial, in case such witnesses, or either of them, should be dead, and an application was afterwards made that the trial should be postponed, and that the plaintiff should be at liberty to examine another witness *de bene esse*: Lord Eldon, after consulting with Sir William Grant M. R., said, that the motion was one which could not be made with effect, without laying before the Court very strong circumstances to induce it to permit the examination; and although he would not say that it could not be granted

⁴ Rowe v. —, 13 Ves. 261; Forbes v. Forbes, 9 Hare, 461, where the witness was a party to the cause. Lingan v. Henderson, 1 Bland, 238; Ails v. Sublit, 3 Bibb, 204.

⁵ Bellamy v. Jones, 8 Ves. 31; see Clark v. Dibble, 16 Wend. 601.

⁶ Bown v. Child, 3 Sim. 457; Grove v. Young, 3 De G. & S. 397; 13 Jur. 847; McIntosh v. Great Western Railway Company, 1 Hare, 328. Where a witness is about to depart from the State, to reside abroad, the Court, on petition, verified by affidavit and motion for the purpose, will order him to be examined *de bene esse*, without previous notice of the motion. Rockwell v. Folsom, 4 John. Ch. 165. In South Carolina, an attorney, prevented from being a witness by duties in another Court, may be examined *de bene esse*, by commission. Huffman v. Barkley, 1 Bailey, 34. So if the witness is going from one State to another. Story Eq. Pl. § 308.

⁷ Shirley v. Earl Ferrers, 3 P. Wms. 77; Pearson v. Ward, 2 Dick. 648; Hankin v. Middleditch, 2 Bro. C. C. 641; Brydges v. Hatch, 1 Cox, 423. In Earl of Cholmondeley

v. Earl of Orford, 4 Bro. C. C. 157, two witnesses were ordered to be examined *de bene esse*: being the only persons who knew the material facts.

⁸ Hinde, 368; Gilb. For. Rom. 140; 2 Phil. Ev. (Cowen & Hill's notes) note (42), pp. 38 and 39, and cases cited; 2 Story Eq. Jur. §§ 1513-1516; Story Eq. Pl. §§ 407, 410. By the 70th Equity Rule of the United States Courts, it is provided that "After any bill is filed, and before the defendant hath answered the same, upon affidavit made, that any of the plaintiff's witnesses are aged, or infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the Court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as a Judge of the Court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking the testimony."¹

¹ Frere v. Green, 19 Ves. 319; Campbell v. Attorney-General, 11 Jur. N. S. 922; 14 W. R. 45, V. C. S.

in any case, he refused it in the one before him.² It seems, however, that where a witness, who has not been before examined in this Court, has been produced at a trial at Law, and another trial of the same matter is to be had, the Court will entertain a motion for the examination of such witness *de bene esse*, with a view to such second trial.³ And so, after the trial of an issue in the cause, an application on the part of the plaintiff, for liberty to examine a witness, who was above seventy years old, *de bene esse*, for the purpose of securing his testimony in case of his death, upon the ground that it was intended to move for a new trial, was granted.⁴

Sometimes it is required to examine a witness *de bene esse*, either in support of, or in defence to, an action at Law; in such case, it was formerly necessary that a bill should be filed in this Court, with the proper affidavit annexed to it, praying specifically that the witness might be examined *de bene esse*;⁵ and this may still be done, although the Courts of Law have now power themselves to take such evidence.⁶ It is to be observed that an order of this nature in aid of a proceeding at Law cannot be obtained upon a bill filed for any other purpose; and that where a bill was filed for a commission to examine witnesses abroad

in aid of a trial at Law, and a commission had been sent out *935 accordingly, but, before * it reached its destination, one of the witnesses returned to England, whereupon an application was made for leave to examine him, *de bene esse*, upon the ground that he was about to leave the country again before the trial could be had, Sir John Leach V. C. refused the motion: observing that this was a different relief, and that the bill must be amended.¹

The cases in which the Court will make an order for the examination of witnesses *de bene esse* are not confined to those of age or sickness, or in which the witness is the only person who can speak to the fact intended to be proved. The Court will give permission for such an examination of witnesses in other cases which come within the same principle; indeed it will do so, wherever the justice of the case appears to require it. Thus, where an application was made to examine the surviving witness to a will, *de bene esse*, on the ground that the parties concerned all lived in America, and that the surviving witness was greatly afflicted with the gravel, the order was made, although the witness was only stated to be "upwards of sixty years old."² So, also, where the age of the witness was not stated, but the affidavit, upon which the application was made, alleged only that the witness was sub-

² Palmer v. Lord Aylesbury, 15 Ves. 293.

³ Anon., cited by Lord Eldon, 15 Ves. 300.

⁴ Anon., 6 Ves. 573.

⁵ Ld. Red. 150; Philips v. Carew, 1 P. Wms. 116; Andrews v. Palmer, 1 V. & B. 21, 23; 1 Newl. 450; ante, p. 394; post,

Chap. XXXIV. § 4, *Bills to Perpetuate Testimony*.

⁶ 1 Will. IV. c. 22, § 4; see Taylor, 4; 72 et seq.; Chitty's Arch. 329 et seq.

¹ Atkins v. Palmer, 5 Mad. 19.

² Fitzhugh v. Lee, Amb. 65; but in such cases, an *ex parte* order is irregular; see M'Kenna v. Everitt, 2 Beav. 188; Hope v. Hope, 3 Beav. 317, 323; *ib. n.*

ject to violent attacks of the gout, and from these attacks was under the apprehension of dying, and that he was a material witness, his testimony being required to prove the draft of a bond which he had prepared, but which was lost, the Court of Exchequer made an order for his examination *de bene esse*.³ In like manner, where a witness is about to go abroad, an order may be obtained for his examination *de bene esse*.⁴ The Court, however, will not permit the examination of witnesses *de bene esse*, on the ground of their being about to go abroad, where it is in the power of the party applying to detain them till they have been examined in the ordinary course. Upon this ground, the Court of Exchequer refused to make an order, on the application of the East India Company, for the examination of witnesses *de bene esse*, who were going to the East Indies: because they were the Company's servants, and they might have kept them at home.⁵

It seems also, that, in a question of pedigree, where the case depends upon a chain of distinct circumstances in the knowledge of different individuals, the death of one of whom would destroy the whole chain, the Court will permit the examination of such individuals *de bene esse*, although none of them come within the description * of wit- *936 nesses whose testimony is in danger of being lost, either from age or serious illness.¹

The rule, however, that the examination of a witness *de bene esse* will be permitted where the individual proposed to be examined is the only witness, will not be extended to cases where there is more than one witness to the same fact, unless upon the ground of the age or infirmity of the witness: therefore where an application was made for leave to examine *de bene esse* one of two surviving witnesses to a will, who was neither of the age of seventy nor in a state of dangerous illness, on the ground that he was a prisoner in the Castle of York, charged with a capital felony, no order was made.²

From an observation which appears to have been made by Lord Eldon, in *Frere v. Green*,³ it may be inferred that an order of this nature cannot be obtained before appearance, unless the defendant is in contempt; but the practice is not so, and an order to examine a witness *de bene esse*, upon either of the grounds above stated will be granted, upon an affidavit of the facts, immediately after the filing of the bill, without waiting either for the defendant's appearance, or for his being in contempt for non-appearance.⁴ There seems however, to be no doubt that the contempt of a defendant, in not appearing, would

³ *Jepson v. Greenaway*, 2 Fowl. Ex. Pr. 103.

⁴ *Bown v. Child*, 3 Sim. 457; *M'Intosh v. Great Western Railway Company*, 1 Hare, 328; *M'Kenna v. Everitt*, 2 Beav. 188; *Grove v. Young*, 3 De G. & S. 397; 13 Jur. 847.

⁵ *East India Company v. Naish*, Bunb. 520.

¹ *Shelly v. —*, 13 Ves. 56, 58; *Shirley*

v. Earl Ferrers, 3 P. Wms. 77; *Hope v. Hope*, 3 Beav. 317, 323.

² *Anon.*, 19 Ves. 321.

³ 19 Ves. 320.

⁴ *Dow v. Clarke*, 1 S. & S. 108, 115; *Fort v. Ragusin*, 2 John. Ch. 146; see *Wilson v. Wilson*, cited 1 Newl. Ch. Pr. 287; *Allen v. Annesley*, 2 Jones Exch. 260.

at any time be a reason for giving permission to a plaintiff to examine his witnesses *de bene esse*, where a proper ground is laid for it, even where the case does not come within any of the three instances above mentioned.⁵

[The defendant is, equally with the plaintiff, entitled to examine witnesses *de bene esse*;⁶ and, on special application, the order may be made before answer filed.⁷]

An order for leave to examine a witness *de bene esse*, upon the ground of the witness being seventy years of age, or dangerously ill, or about to go abroad, may be obtained either by motion in Court, without notice, or upon petition of course at the Rolls;⁸ but where the application is not made on the ground of the age or dangerous illness of the witness, or that he is about to go abroad, the Court will not make an order for his examination *de bene esse*, as of course: so that, if a party wishes to examine a witness *de bene esse*, upon a ground which cannot be arranged under either of those classes, he must apply by *937 motion in Court, of which notice * must be given to the other side.¹ In the case of *Hope v. Hope*,² Lord Langdale M. R. had to consider, whether an order for the examination *de bene esse* of a person alleged to be the sole witness to a material fact, could be regularly obtained *ex parte*, and he came to the conclusion, that, in such a case, the application should be made on notice; and it seems that the affidavit, in support of such an application, ought to show the facts as to which it is proposed to examine the witness. If the order has been obtained as of course, in a case where a special application for it should have been made, the adverse party may move, on notice, to discharge it.³

It seems, however, that, where a defendant is in contempt for non-appearance, such an order may be obtained without notice, and this even where the defendants are infants. Thus, in *Frere v. Green*,⁴ where the defendants were infants and in contempt, and it appeared by the messenger's return that they had absconded and were not to be found, Lord Eldon, upon the usual affidavit of the materiality of the evidence of the witnesses, and the plaintiffs' undertaking to proceed with all due diligence, and with as much expedition as the course and practice of the Court and the contempt of the defendants would admit, to bring the cause to an issue, and examine their witnesses in chief, made an order that the plaintiffs should be at liberty to examine them

⁵ *Coveny v. Athill*, 1 Dick. 355; *Prichard v. Gee*, 5 Mad. 364.

⁶ [*Williams v. Williams*, 1 Dick. 92; *Grove v. Young*, 3 De G. & S. 397.]

⁷ [*Bown v. Child*, 3 Sim. 457.]

⁸ *Bellamy v. Jones*, 8 Ves. 31; *Tomkins v. Harrison*, 6 Mad. 315; *M'Kenna v. Everitt*, 2 Beav. 188; *M'Intosh v. Great Western Railway Company*, 1 Hare, 328, 330; *Grove v. Young*, 3 De G. & S. 397; 13 Jur. 847.

For forms of motion paper and petition, see Vol. III.

¹ *Bellamy v. Jones*, 8 Ves. 31. For form of notice of motion, see Vol. III.

² 3 Beav. 317, 323, n., and see *Pearson v. Ward*, 1 Cox, 177.

³ See *M'Kenna v. Everitt*, *ubi sup.*; *Hope v. Hope*, 3 Beav. 317; for form of notice of motion, see Vol. III.

⁴ 19 Ves. 319, 320; see also *Shelley v. —*, 13 Ves. 56.

de bene esse; but he provided, by the order, that, before publication of the depositions of such witnesses should be allowed to pass, proper evidence should be produced to satisfy the Court that the plaintiffs had complied with the above undertaking.

Although, in the instances above mentioned, an order to examine a witness *de bene esse* may be obtained upon motion or petition without notice, notice of the examination of the witness must, in all cases, be given, in order that the other side may have the power of cross-examination.⁵

The application for leave to examine a witness *de bene esse* must, in every instance, whether made by a petition at the Rolls or by motion to the Court, with notice or without, be supported by an affidavit of the facts which form the ground of the application: such as, the age of the witness, and that he is a material witness for the party making the application;⁶ and also by the Record * and Writ *938 Clerk's certificate that the bill has been filed, where the defendant has not appeared, or of such appearance, where an appearance has been entered by him. Where an application is made for an order to examine a witness on the ground that he is the only person who knows the fact, the affidavit should state the particular points to which his evidence is meant to apply:¹ and should show the ground which the person who makes it has for believing that the witness is the only person.²

The order to examine witnesses *de bene esse* names the witnesses to be examined, and only authorizes the examination of the persons named therein. Where the order is obtained without notice, after appearance, it must be served upon the solicitor on the other side; but where it has been obtained before appearance, so that there is no adverse solicitor upon whom it can be served, the order usually directs, that notice of the order be given to the defendant, or a copy thereof be left at his dwelling-house, or usual place of abode, with his servant, agent, or other person residing there, a specified number of days before the examination of the witnesses.³ This is done, in order to afford the adverse party an opportunity for cross-examination of the witnesses.

The examination of witnesses *de bene esse* is taken before an Examiner of the Court, or Special Examiner, in the manner prescribed by the 15

⁵ Loveden v. Milford, 4 Bro. C. C. 540; Ord. 5 Feb., 1861, r. 22; *ante*, pp. 901, 915; for form of notice, see Vol. III.

⁶ Grove v. Young, 3 De G. & S. 397; 13 Jur. 847; see Rockwell v. Folsom, 4 John. Ch. 165; Story Eq. Pl. § 309. For form of affidavit, see Vol. III. The affidavit should give the place of residence and description of the witnesses whom it is sought to have examined *de bene esse*. O'Farrel v. O'Farrel, 1 Moll. 364.

¹ Pearson v. Ward, 1 Cox, 177; 2 Dick. 648; Hope v. Hope, 3 Beav. 317, 322.

² Rowe v. —, 13 Ves. 261.

³ See order in Hope v. Hope, 3 Beav. 317; but see form of order in Seton, 1296, No. 2, which differs as to the notice. The statute of Illinois authorizes a person filing a bill, before issue joined, to take depositions substantiating its averments; and without an order to that effect, he may proceed to take his depositions *de bene esse*. [Should the necessity for such depositions be superseded by the answer, the party who takes them must pay the costs.] Doyle v. Wiley, 15 Ill. 576.

& 16 Vic. c. 86;⁴ and the depositions are transmitted by him to the Record and Writ Clerks' Office to be there filed.⁵

Formerly, it was necessary to give three days' notice of the time and place of the examination to the other side.⁶ Now, it is presumed, forty-eight hours will be sufficient; but the notice must also state the name and description of the witness to be examined, and the time and place of examination.⁷

As the examination of witnesses *de bene esse* is only a provisional measure, to guard against the loss of important evidence before the cause is in a state in which a regular examination can take place, it is the duty of the party examining to take the earliest opportunity to examine in the ordinary course, and if he is guilty of any *laches* *939 in so doing, the benefit of the examination **de bene esse* will be forfeited.¹ In the *Duke of Hamilton v. Meynal*,² however, Lord Hardwicke made an order for the publication of depositions taken *de bene esse*, although the original bill was filed, and the examination taken, above thirty years before the cause was brought to an issue; but it seems that this was done under particular circumstances, and that the delay was accounted for. We have seen before,³ that in the instance of an application to examine witnesses *de bene esse*, to prove a case against infant defendants who were in contempt for non-appearance, Lord Eldon made the order, upon the plaintiffs' expressly undertaking to proceed with all due diligence to bring the cause to issue, and to examine the witnesses in chief.

Depositions, taken *de bene esse*, cannot be made use of without an order. The ordinary course of the Court is not to allow of their use unless the witness dies before issue is joined in the cause, so that there has been no opportunity to examine him in the ordinary course; or unless he is at a great distance, so that it is impossible to have him examined again. These, however, although the usual, are not the only cases in which the Court will order depositions taken *de bene esse* to be used. It is in the discretion of the Court to determine whether the order shall be made or not; and whenever it can be established, to the satisfaction of the Court, that there is a moral impossibility in the examination of witnesses in chief taking place, it will make the order. Therefore, in *Gason v. Wordsworth*,⁴ where a commission was sent to Sweden, to examine witnesses there, which the Government of Sweden refused to permit, the Court allowed the depositions of those witnesses who had been examined *de bene esse* to be read at the hearing: because

⁴ Sects. 31, 32; see *ante*. pp. 903, 904; and see Ord. 5 Feb., 1861, r. 11; *Cook v. Hall*, 9 Hare Ap. 20.

⁵ Office copies of the depositions may be obtained at that office, as soon as they are filed. Braithwaite's Pr. 122.

⁶ *Tomkins v. Harrison*, 6 Mad. 315; *M'Intosh v. Great Western Railway Company*, 1 Hare. 328.

⁷ Ord. 5 Feb., 1861, r. 22; for forms of notice see Vol. III.

¹ See *Forsyth v. Ellice*, 2 M'N. & G. 209, 213; overruling S. C. 7 Hare, 290.

² 2 Dick. 788; S. C. *nom.* Anon., 2 Ves. S. 497.

³ *Ante*, p. 937; *Frere v. Green*, 19 Ves. 319.

⁴ 2 Ves. S. 325, 336; Amb. 108.

it was morally impossible to have them examined in chief. So also the Court has permitted depositions taken *de bene esse* to be read, although there has been no strict proof of the death of the witnesses; because the length of time which has elapsed since the depositions were taken, has afforded a just ground for presuming them to be dead.⁵

Sometimes the Court will allow depositions taken *de bene esse* to be made use of upon a trial at Law, on the ground that the witness, though alive, will be unable, from age or sickness, or other infirmity, to attend at the trial.⁶ In such cases, however, the more usual course is (especially where there is any doubt whether the grounds upon which the application is to be made are such as will be sufficient, *in *940 a Court of Law, to authorize the admission of the evidence), to make an order that the officer, in whose possession the original deposition is, shall attend with it at the trial, in order that, if it should be proved to the satisfaction of the Court of Law that the witness is unable to attend, the depositions should be tendered to be read:¹ it being the province of the Judge who tries the cause at Law, and not of this Court, to decide on the admissibility of the evidence, upon the facts as they appear before him.² Upon this ground the Court has frequently refused to make an order that the depositions, taken *de bene esse*, of a witness who was alive, though sworn by affidavit to be unable to attend at the trial of an issue at Law, should be read at the trial.³

Depositions of a witness, examined *de bene esse*, can only be used for the purpose of supplying the want of an examination in chief. Applications for leave to use them, for other purposes, have been refused.⁴ In *Pegge v. Burnell*,⁵ an application was made to the Court to allow a deposition *de bene esse* to be read at Law, in order to confront the witness and invalidate his testimony *visâ voce*, upon a new trial, on the ground that on his examination, at the first trial, his evidence differed materially from what he had before uniformly declared the fact to be; and as the case made in support of the motion was a very strong one, and abundantly sufficient to justify a departure from the strict practice, if it were possible in any case to dispense with it, Lord Thurlow at first made the order, but upon further consideration, and before the order was delivered out, he altered his opinion, and refused it.

An order for leave to use a deposition, taken *de bene esse*, of a witness

⁵ *Anon.*, 2 Ves. 497; S. C. *nom.* *Duke of Hamilton v. Meynal*, 2 Dick. 788; *Marsden v. Bound*, 1 Vern. 331; see also *M'Intosh v. Great Western Railway Company*, 7 De G. M. & G. 737.

⁶ *Bradley v. Crackenthorp*, 1 Dick. 182.

¹ *Andrews v. Palmer*, 1 V. & B. 21; see also *Corbett v. Corbett*, *ib.* 335; *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Attorney-General v. Ray*, 2 Hare, 518. and form of order, *ib.* 519, n.; *Gompertz v. Ansdell*, 1 Smith's P. 876.

² *Jones v. Jones*, 1 Cox, 184.

³ *Hinde*, 390.

⁴ *Cann v. Cann*, 1 P. Wms. 567. [Evidence taken *de bene esse* in one administration suit was not allowed to be read in another administration suit previously commenced. *Hill v. Hibbit*, L. R. 7 Eq. 421. And it seems doubtful whether such evidence taken in a suit can be used after an amendment by adding a co-plaintiff. *Peck v. Earl Spencer*, 18 W. R. 558.]

⁵ Cited, *Hinde*, 391; *Pasch*, 1781.

dying before he could be examined in chief, may be obtained on special motion with notice, supported by evidence proving his death, in the ordinary way.⁶

Where the application is made upon the ground that a witness is gone to parts beyond sea, or upon any other grounds, it must be supported by an affidavit of the facts relied upon as the foundation of the application.

The proper stage of the suit wherein this application should be made, seems to be after the closing of the evidence,⁷ unless it is in a suit, the sole object of which is the examination of a witness *de bene esse*, for the purpose of using his depositions on a trial at Law: in which case, the application should be made before the trial of the action. The

*941 party moving should be prepared with an affidavit *of service of the notice of motion, in order that, if the other side does not attend, the order may, notwithstanding, be obtained.¹

If any irregularity be discovered, or the adverse party be advised of any ground of objection to the reading of the depositions, he should give notice in writing to the adverse solicitor, and move to discharge the order immediately upon the service of it, or on the earliest opportunity: for it seems that although depositions taken *de bene esse* are irregular, yet it is too late to object to them, on the ground of irregularity, at the hearing of the cause;² and on this account, when the time between the closing of the evidence and the hearing of the cause is short, the Court will extend it, for the purpose of allowing the party an opportunity of examining whether the depositions are regularly taken or not.³ And so, where depositions taken *de bene esse* are read at the hearing of the cause, it is a matter of course, if an issue is directed, to order them to be read at the trial of the issue, notwithstanding an irregularity in the examination.⁴

With respect to the costs of examinations *de bene esse*, no specific rule appears to have been laid down, which makes any distinction between them and the costs of examinations under ordinary circumstances: except, indeed, in the case of bills filed for the purpose of having witnesses examined *de bene esse*, in order to render their evidence available on a trial at Law. In such cases, it is presumed, the costs must be regulated by the rule of the Court with regard to bills of a similar description, namely, bills to examine witnesses *in perpetuam rei memoriam*: in which case, a defendant is entitled to apply for his costs immediately after the examination of the witnesses has been perfected, upon the simple allegation that he did not examine any witnesses himself.⁵ It may be mentioned, that in *Dew v. Clarke*,⁶ where the plaintiff had filed

⁶ Hinde, 388; for forms of notice of motion and affidavit, see Vol. III.

⁷ Hinde, 388.

¹ For form of affidavit, see Vol. III.

² Dean and Chapter of Ely v. Warren, 2 Atk. 189; Hinde, 289.

³ Gordon v. Gordon, 1 Swanst. 171.

⁴ *Ib.* 166.

⁵ Foulds v. Midgley, 1 V. & B. 138; *post*, Chap. XXXIV. § 4, *Bills to Perpetuate Testimony*; Morgan & Davey, 53, 149.

⁶ 1 S. & S. 108, 115.

a bill for the purpose of obtaining the examination of witnesses *de bene esse* in aid of a proceeding at Law, and obtained an order, *ex parte*, for the examination of such witnesses, but afterwards the bill was demurred to, and the demurrer allowed, the Court, besides the usual costs of the demurrer, allowed the defendant his costs of the examination, but not those occasioned by his cross-examination of the witnesses.

* SECTION XV. — *Demurrers by Witnesses.*

*942

A witness examined before an Examiner may protect himself, by demurrer, from answering any question to which he has a legal objection.¹ The word "demurrer," however, is not, in this instance, used in a very appropriate sense: since it here signifies merely the witness's tender of reasons why he should not answer the question;² and is not, like a demurrer in pleading, confined to the facts appearing upon the record, but states the facts upon which the witness relies as the ground of his objection.

The grounds upon which a witness may protect himself from answering are, principally: 1. That the answer may subject him to pains and penalties, or to a forfeiture, or something in the nature of a forfeiture; 2. That he cannot answer the question without a breach of professional confidence.

1. With respect to the first ground of objection, namely, that the answer may expose the witness to pains and penalties, or to a forfeiture, or something in the nature of a forfeiture, the reader is referred to a former part of this Treatise,³ where the privilege of a defendant, to be protected from making the discovery required by the bill on this ground, has been discussed. It will be there found, that the privilege in such cases arises from an acknowledged principle of Law, that no man is bound to answer, so as to subject himself to punishment; and as this principle is applicable as well to witnesses as to defendants, the rules which are there found laid down with regard to its application to the latter case are equally applicable to the former.⁴

¹ 15 & 16 Vic. c. 86, § 33. A witness may, on assigning cause, demur to the questions propounded to him; upon which the examination must be suspended until the Court decides. *Winder v. Diffenderfer*, 2 Bland, 166. Counsel have no right to advise a witness that he is not bound to answer a particular interrogatory. It is the duty of the Examiner to inform a witness of his legal rights. *Taylor v. Wood*, 2 Edw. Ch. 94; 1 Hoff. Ch. Pr. 466. A witness who demurs to a question, is not the proper person to bring it before the Court. If the party putting the question does not ask for an attachment, nor in any way bring the point before the Court, no one else can. The question will be considered as waived, or the demurrer well taken, unless he who puts the question per-

sists in it, and takes measures to have the demurrer disposed of. *Mowatt v. Graham*, 1 Edw. Ch. 13. [*Ante*, 574.]

² *Parkhurst v. Lowten*, 2 Swanst. 194, 203.

³ *Ante*, p. 562.

⁴ See 2 Phil. on Evid. 487 *et seq.*; *Taylor on Evid.* § 1308 *et seq.*; *Best on Evid.* § 126 *et seq.*; *Gresley on Evid.* *et seq.*; *Osborne v. The London Dock Company*, 10 Exch. 988, 701; 1 Jur. N. S. 93; *Siddabatten v. Adams*, 3 Jur. N. S. 631; 5 W. R. 743. V. C. 8.; *Reg. v. Boyes*, 1 B. & S. 311; 7 J. N. S. 1158; *Re Aston*, 27 Beav. 474; 5 Jur. N. S. 615; 4 De G. & J. 520; 5 Jur. N. S. 779; *Ex parte Fernandez*, 10 C. B. N. S. 3, 35, 49; 7 Jur. N. S. 571.

2. The rules of exemption from discovery, on the ground of professional confidence, proceed upon the same principles as are applicable to the case of defendants; and the reader is, therefore, *943 *referred for information upon this head to a former portion of this Treatise, where these rules have been discussed with reference to the protection of a defendant from answering the bill.¹ It may, however, be noticed here, that the refusal of a client to allow his solicitor to disclose professional communications is not a reason for treating him as if he had kept a material witness out of the way, or refused or prevented the production of a document in his possession.²

Where the witness is served with a *subpœna duces tecum* to produce a deed or other document, and, upon being asked to produce it, objects to do so, either upon the ground of his having an interest in the deed, or upon any other ground,³ he may refuse, without a formal demurrer. The course to be adopted by the party seeking production, in such case, is to move, on notice to the witness, that he do attend and produce the deed, and pay the costs occasioned by his previous refusal: upon the hearing of which motion, the Court will decide whether the reasons alleged by the witness, for his refusal, are satisfactory or not.⁴

The question or questions put, and the demurrer or objection of the witness thereto, must be taken down by the Examiner,⁵ on paper, separate and distinct from the evidence; but there does not seem ever to have been any particular form for a demurrer by a witness.⁶ The witness should state clearly the grounds of his refusal to answer; thus, a witness, demurring on the ground that his answer would violate the confidence reposed in him as a solicitor, must name the party to whom he was solicitor.⁷ He must also swear that the facts, from the discovery of which he desires to be protected, came to him in his capacity of solicitor to a particular person: for a solicitor, like any other witness, is bound to discover all secrets of his client which he did not come to the knowledge of in his relation of solicitor to his client.⁸ It must also appear, that the knowledge came to him in the character of a professional adviser, and in such character only; and, therefore, where a demurrer stated that the witness was the attorney or agent for a person, it

¹ *Ante*, pp. 571 *et seq.*, 715, 716; see also *Greenough v. Gaskell*, 1 M. & K. 98, 101; C. P. Coop. t. Brough, 96; Lord Walsingham v. Goodricke, 3 Hare, 122, 130; *Gore v. Bowser*, 5 De G. & S. 30; S. C. *nom.* *Gore v. Harris*, 15 Jur. 1168; *Carpmael v. Powis*, 1 Phil. 687; 9 Beav. 16; *Thomas v. Rawlings*, 27 Beav. 140; 5 Jur. N. S. 667; *Marsh v. Keith*, 1 Dr. & S. 342; 6 Jur. N. S. 1182; *Ford v. Tennant*, 32 Beav. 162; 9 Jur. N. S. 292; *Charlton v. Coombes*, 4 Giff. 372; 9 Jur. N. S. 534, V. C. S.; [*Re Land Credit Society*, 15 W. R. 703.]

² *Wentworth v. Lloyd*, 10 H. L. Ca. 589; 10 Jur. N. S. 961; and see *Taylor on Evid.* § 101; *Bolton v. Corporation of Liverpool*, 1 M. & K. 88, 94, 95.

³ Such as, that the production of it may prove him to be guilty of a crime: see *Parkhurst v. Lowten*, 2 Swanst. 214.

⁴ *Bradshaw v. Bradshaw*, 1 R. & M. 358; *Hope v. Liddell*, 20 Beav. 438, 439; 1 Jur. N. S. 665; 7 De G., M. & G. 331. For form of notice see Vol. III. [*Ante*, 907, n. 1.]

⁵ 15 & 16 Vic. c. 86. § 33. For the former practice, see *Tippins v. Coates*, 6 Hare, 16; 11 Jur. 1075; and for formal parts of the demurrer, see Vol. III.

⁶ *Morris v. Williams*, 2 Moll. 342.

⁷ *Parkhurst v. Lowten*, 2 Swanst. 201.

⁸ *Morgan v. Shaw*, 4 Mad. 54, 58; *Thomas v. Rawlings*, 27 Beav. 140; 5 Jur. N. S. 667; [*Rundle v. Foster*, 3 Tenn. Ch. 658].

* was considered not to be sufficiently precise : for an agent may *944 be only a steward or servant.¹

In taking down a demurrer, the Examiner ought to take the witness's statement upon oath ; and it was held, under the former practice, that where this was not done, the demurrer must be supported by affidavit ; as it is necessary the Court should, in some way or other, have the sanction of an oath to the facts on which the objection is founded.²

The demurrer is transmitted by the Examiner to the Record and Writ Clerks' Office, and there filed ;³ and an office copy should be taken by the party to the cause who put the question objected to.⁴ The demurrer may then be set down for hearing, under an order of course, to be obtained on petition, in like manner as demurrers to bills ;⁵ and the validity of the demurrer will be decided by the Court.⁶ The order to set down the demurrer need only be served on the witness demurring,⁷ except where the witness, being the solicitor of the party in the cause, claims privilege on behalf of his client : in which case, it would seem, the client should also be served with the order.⁸

If the Court, upon argument, considers the demurrer to be bad, it will overrule it : in which case, an order will be made that the witness attend the Examiner, and be examined, or stand committed.⁹

Sometimes, however, where the ground for overruling the demurrer has been its informality, and the Court has considered that the witness may have a good reason to be excused from answering, it has ordered the demurrer to be overruled, without prejudice to the witness, upon his re-examination, objecting or demurring to the question, as he may be advised, upon such grounds as he shall state in such objection or demurrer.¹⁰

Sometimes the Court will allow a demurrer partially ; thus, in *Davis v. Reid*,¹¹ where a demurrer was put in to two interrogatories, Sir Lancelot Shadwell V. C. allowed the demurrer as to one, and part of the other ; and directed that half the costs should be paid by the witness : in analogy to the practice when * two exceptions are *945 taken, one of which succeeds and the other fails.

Instead of setting down the demurrer for hearing, the party who asked

¹ *Vaillant v. Dodemead*, 2 Atk. 524 ; and see *Reid v. Langlois*, 1 M. & G. 627, 637 ; 14 Jur. 467. [The protection does not extend to facts as distinguished from matters of confidential communication. *Sawyer v. Birchmore*, 3 M. & K. 572 ; *Desborough v. Rawlins*, 3 M. & C. 515 ; *Brandt v. Klein*, 17 Johns. 335 ; *Driggs v. Rockwell*, 11 Wend. 504 ; *Rundle v. Foster*, 3 Tenn. Ch. 658.]

² *Parkhurst v. Lowten*, 2 Swanst. 201 ; *Morgan v. Shaw*, 4 Mad. 54 ; *Bowman v. Rodwell*, 1 Mad. 266 ; *Davis v. Reid*, 5 Sim. 443 ; *Goodale v. Gawthorn*, 4 De G. & S. 97. As to the course, where a witness summoned before a Chief Clerk refuses to be sworn, see *The Electric Telegraph Company of Ireland, Ex parte Bunn*, 24 Beav. 137 ; 3 Jur. N. S. 1013.

³ 15 & 16 Vic. c. 86, § 33.

⁴ *Braithwaite's Pr.* 539.

⁵ *Braithwaite's Pr.* 539 ; *ante*, p. 594. For form of order to set down, see *Seton*, 1257, No. 10 ; and for form of petition, see Vol. III.

⁶ 15 & 16 Vic. c. 86, § 33.

⁷ *Braithwaite's Pr.* 539 ; 6 Hare. 22, 24.

⁸ *Marriott v. Anchor Reversamery Company (Limited)*, 3 Giff. 304 ; 8 Jur. N. S. 51 ; and see *Tippins v. Coates*, 6 Hare. 16, 25, 11 Jur. 1075.

⁹ *Parkhurst v. Lowten*, 2 Swanst. 205, 206.

¹⁰ *Morgan v. Shaw*, and *Parkhurst v. Lowten*, *ubi sup.*

¹¹ 5 Sim. 443, 448.

the question objected to may move that the witness may attend the Examiner at his own expense, and be further examined. Notice of this motion must be served upon the witness.¹ Upon hearing this motion, the Court either allows the objection,² or directs the witness to attend before the Examiner at his own expense.³

The costs of and occasioned by the demurrer, or objection, are in the discretion of the Court;⁴ and will be disposed of at the hearing of the demurrer or motion: the general rule being, that they follow the result.⁵

SECTION XVI. — *Publication.*

Publication, in a legal sense, is the open showing of depositions, and giving copies of them to the parties, by the clerks or Examiners in whose custody they are.⁶

By the Orders of the Court the depositions of witnesses are not to be disclosed by any of the persons before whom they were taken or by their clerks, but are to be closely kept, if taken in town, by the Examiners at their office; if by commissioners in the country, by the sworn clerk to whom the commission, after its execution, was delivered, until publication passes.

We have seen that now, under the Orders of May, 1845, publication is to pass without rule or order on the expiration of two months after the filing of the replication, unless such time expires in the long *946 vacation or is enlarged by order.⁷ And that if the * two months after the filing of the replication expire in the long vacation, pub-

¹ *Re Aston*, 27 Beav. 474; 5 Jur. N. S. 615; 4 De G. & J. 320; 5 Jur. N. S. 779; *Marriott v. Anchor Reversionary Company (Limited)*, 3 Giff. 304; 8 Jur. N. S. 51. As to service, where the witness is a solicitor claiming privilege for his client, see *ibid.*; *ante*, p. 944. For form of notice, see Vol. III.

² *Marriott v. Anchor Reversionary Company (Limited)*, *ubi sup.*

³ *Re Aston*, *ubi sup.*

⁴ 15 & 16 Vic. c. 86, § 33; and see *Sawyer v. Birchmore*, 3 M. & K. 572; *Langley v. Fisher*, 5 Beav. 443; 7 Jur. 164; 14 L. J. N. S. Ch. 302, L. C.

⁵ *Wright v. Wilkin*, 4 Jur. N. S. 527, V. C. K.; *Lee v. Hammerton*, 12 W. R. 975, V. C. K.; [*Re Newgong Tea Company*, 16 L. T. N. S. 47.]

⁶ *Prac. Reg.* 353.

⁷ 11th Ord. May, 1845. In Massachusetts, the opening and filing, in the Clerk's office, a deposition taken in a suit in Chancery, is equivalent to a publication in the English practice. A particular rule for publication is not necessary. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344. In Maryland, there is no publication of depositions, but all objections are open, and may be taken at the hearing. *Strike's Case*, 1

Bland, 96. By Rule 69 of the Equity Rules of the Supreme Court of the United States, it is provided that "immediately upon the return of the commissions and depositions containing the testimony, into the Clerk's office, publication thereof may be ordered in the Clerk's office by any Judge of the Court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass in the Clerk's office, such consent being in writing, and a copy thereof entered in the order book, or indorsed upon the deposition or testimony." A commission may be opened by a Judge in vacation in New Jersey. *Den v. Wood*, 5 Halst. 62. It is a fatal objection to a deposition taken under the Judiciary Act of 1798, c. 20, § 30, that it was opened out of Court. *Beale v. Thompson*, 8 Cranch, 70. A deposition opened by mistake out of Court, may be received and filed in Maine on affidavit of the fact. *Law v. Law*, 4 Greenl. 167. In Massachusetts, a deposition taken under a commission, so opened, may be used in the discretion of the Court, notwithstanding the rule, that "all depositions shall be opened and filed with the Clerk." *Burrell v. Andrews*, 16 Pick. 551; *Goff v. Goff*, 1 Pick. 475.

lication is to pass on the second day of the ensuing Michaelmas Term, unless the time is enlarged by order.¹ And that, "if the time is enlarged by order, publication is to pass without rule or order, on the expiration of the enlarged time, unless the enlarged time expires in the long vacation, in which case publication is to pass without rule or order on the second day of the ensuing Michaelmas Term, unless the time is further enlarged by order."²

As these Orders fix precisely the time at which publication is in all cases hereafter to pass, it will not be necessary to enter at length into the details of the practice by which the time of publication has hitherto been determined.

It is desirable, however, to state that before these Orders came into operation publication passed either by consent or rule.

A rule to pass publication was in the nature of an order of the Court, directing that publication should pass unless cause was shown by the other side. Before a rule to pass publication could be entered, it was necessary, in most cases, that there should have been a previous order or rule, called a *rule to produce witnesses*. This rule, which was in fact, a notice given by one side to the other to proceed with the examination of his witnesses, was sometimes called the *ordinary rule*.

When the prescribed period from the date of the rule to pass publication expired, publication passed as of course, unless the Examiner or the clerk in whose custody the depositions were, had been served with an order to enlarge publication; or unless a commission had been issued at the instance of a defendant, under the provisions of the 17th Order, for the examination of witnesses in the country, the time allowed for the return of which had not expired, in which case publication was directed by the 17th Order, to stand enlarged until the commission was returnable.

The recent Orders of May, 1845, do not appear to have made any alteration in the practice according to which applications of this kind are hereafter to be made; but care must be taken in future in every case, that the application to enlarge publication be made before the expiration of two months from the filing of the * replication.¹ *947 If this period has expired, it would appear, from the old practice, that the Master has no longer jurisdiction to allow any further examination of witnesses, as any subsequent application, although, in form, one to enlarge publication, is in effect one for leave to examine witnesses notwithstanding publication has passed.²

¹ 112th Ord. May, 1845.

² 113th Ord. May, 1845; *Moody v. Payne*, 3 John. Ch. 294.

¹ To enlarge publication is to stay or postpone the rule for passing publication, and a motion for that purpose may be granted, on reasonable cause shown; but this is very different from a motion to examine witnesses after publication has actually passed. *Ham-*

ersley v. Lambert, 2 John. Ch. 432, *post*, p. 948, note. It is not of course to enlarge the rule to pass publication, and it will be granted where there has been great delay. *Condit v. Van Cortlandt*, 1 John. Ch. 300.

² *Carr v. Applevard*, 2 M. & C. 479. *Anon.*, 5 Beav. 32; *Strickland v. Strickland*, 4 Beav. 146.

It has before been stated, that the Master has no jurisdiction to allow of the further examination of witnesses after the period has arrived at which publication, according to the general Order, passes.³

The Orders of May, 1845, have now, as we have seen, changed the manner in which publication passes, and it remains to be seen whether hereafter any terms or conditions will be annexed to the order to enlarge publication.

Hitherto in most cases publication would have been enlarged, and a party have had an opportunity given him of examining witnesses, even though publication had been enlarged by a precedent order, if any ground for doing it was shown and verified by affidavit; ⁴ as where witnesses resided in parts of the kingdom at any distance from each other, or where the party applying had not been able to examine all his witnesses under a joint commission, executed in the cause, by reason of some of the witnesses residing at a great distance from the party, and others at a great distance from the place of executing the commission; or where witnesses have refused or neglected to attend before the commissioners; or by any accident have not been examined at the execution of the commission.⁵ In *Barnes v. Abram*,⁶ publication, though often enlarged before, was enlarged again in order to enable the defendant in a title cause to search for records in the Vatican upon affidavit as to the probability of success there.

Under the practice before the Orders of 1845 came into operation, when any of the parties were desirous of obtaining a commission returnable at a period subsequent to that at which publication would have passed, the proper course seems to have been first to apply to *948 the Master to enlarge publication, and then *an order might have been obtained from the Court for the commission.¹ The same practice appears to continue, except that now the Master has jurisdiction to hear applications for additional commissions, and to determine questions relating thereto.

Where a cross-bill has been filed before the original suit has been proceeded in, and the defendant to the cross-suit (who is the plaintiff in the original suit) has not put in an answer to the cross-bill, the plaintiff in the cross-suit may have publication enlarged in the original suit till a fortnight after the answer to the cross-bill shall have come in, as the discovery afforded by such answer may be of service to him in framing his interrogatories.² But we have before seen, that if publication has been allowed to pass in the original suit, witnesses can no longer be

³ In New Jersey, if either party cannot complete his testimony within the prescribed period, his time may be enlarged upon motion, on notice served before the expiration of said time, for reasons verified by proof satisfactory to the Chancellor. The time limited for taking testimony shall not be extended, except by written consent, or by order of the Court, made upon notice. Rules 85, 86.

[In Tennessee, the time may be enlarged

by the Chancellor or Master on sufficient cause shown. Chancery Rules, Rule 2, § 4.]

⁴ *Hinde*, 383; *Moody v. Leaming*, 1 Mad. 85.

⁵ *Hinde*, 383.

⁶ 3 Mad. 103.

¹ *Maund v. Allies*, 4 M. & C. 503.

² *Creswick v. Creswick*, 1 Atk. 291; see also *Ramkissenseat v. Barker*, 1 Atk. 19.

examined in the cross-cause concerning matters in issue in the original one.³

It seems, however, that after proceedings have been taken in the original cause, publication can only be enlarged where the defendant in the cross-cause is in contempt, unless a special case is made. In *Cook v. Broomhead*,⁴ where the cross-bill was not filed till after a rule to pass publication had been entered in the original suit, and the defendant in the cross-suit was not in contempt, a motion by the plaintiff in the cross-suit to enlarge publication, which was not founded upon any special grounds, was refused with costs.⁵

It may be mentioned here, that the Court of Exchequer has determined, that an order to enlarge publication till the coming-in of the answer in a cross-cause, shall not be granted, unless upon affidavit of the truth of the facts stated in the cross-bill, and that the answer may furnish a good defence to the original bill.⁶ It is not necessary, however, that such affidavit should be made by the party himself, but if made by his solicitor, it will be sufficient.⁷

Sometimes, when, by accident or surprise, publication passes before a party has examined his witnesses, and there has been no blamable negligence, publication will be enlarged^{*} even after the *depositions have been delivered out, upon affidavit that they *949 have not been read. Such an order, however, cannot be made¹ except upon application to the Court itself,² nor unless some cause is shown why the witness was not examined before. And it is a rule of the Court, that the party, as well as his solicitor, must make oath that they have never seen, read, nor been informed of the contents of the depositions taken in the cause, nor will they, &c., till publication is duly passed.³

An instance is mentioned in the books, having occurred in Lord

³ *Pascall v. Scott*, 1 Ph. 110.

⁴ 16 Ves. 133.

⁵ See *Underhill v. Van Cortlandt*, 1 John. Ch. 500; *Gouverneur v. Elmendorf*, 4 John. Ch. 357; *Field v. Schieffelin*, 7 John. Ch. 250.

⁶ *Edwards v. Morgan*, 11 Pri. 939.

⁷ *Lowe v. Firkins*, M'Lel. 10; 13 Pri. 21, S. C.

⁸ The time for publication will be enlarged, or more properly, the time for taking testimony will be enlarged, after publication passed, though not in fact made according to the rules of the Court, provided some good cause is shown therefor upon affidavit, as surprise, accident, or other circumstances, which repel the presumption of laches. The affidavit is indispensable except in cases of fraud practised by the other party. *Wood v. Mann*, 2 Sumner, 316. In *Hamersley v. Lambert*, 2 John. Ch. 432, it was held, that after publication witnesses cannot be examined unless under very special circumstances. See also *Hamersley v. Brown*, 2 John. Ch. 428. The deposition of a witness, whose examination was not closed until after publication had passed, was allowed to be read; he having

been cross-examined by the opposite party, and no actual abuse appearing: but such practice is irregular. *Underhill v. Van Cortlandt*, 2 John. Ch. 339. The Court, by extreme rigor, endeavors to guard against the abuse of introducing testimony to meet that which has been produced; and accordingly it has been held, that if, after publication has passed, the substance of the testimony taken on a material point, upon which further testimony is sought, has been disclosed to the party applying, it is too late to move to open or enlarge the rule on affidavit. *Moody v. Payne*, 3 John. Ch. 294. See this subject discussed in *Wood v. Mann*, 2 Sumner, 316.

¹ 1 Harr. (ed. Newl.) 289

² *Anon.*, 5 Beav. 92; *Maund v. Allies*, 4 M. & C. 503.

³ *Ibid.*; but see *Lawrell v. Titchborn*, 2 Cox, 289; *Hamersley v. Lambert*, 2 John. Ch. 432. In this last case the Chief Justice remarks, that "such an oath ought not to be much encouraged. It is partly unnecessary, it may be difficult to be strictly kept, and is of dangerous and suspicious tendency," p. 433.

Somers's time, in which the Court granted an order to enlarge publication after it had actually passed, although the rule of the Court above stated could not be complied with; but in that case the solicitor on the other side, being an artful man, having procured copies of his client's depositions, immediately went with them to the adverse solicitor, and showed him the depositions, and read them over to him; the solicitor, being ignorant of the rule, told him he must, notwithstanding, have an opportunity of examining his witnesses, and soon after took his witnesses to the Examiner's office, where he was told they could not be examined, because publication was passed and the depositions delivered out. The solicitor, surprised at this, went to his clerk in Court to know what he was to do, and told him the whole story, which being laid before the Court, it enlarged publication, and gave the party an opportunity to examine his witnesses, and the adverse party narrowly escaped commitment for his misconduct.⁴

Where a defendant obtained an order to enlarge publication upon an allegation that it had not passed, which was untrue, the order was held to be informal, and an application, upon the usual affidavit, that publication might be again enlarged, or the evidence taken under the informal order, read at the hearing of the cause, was dismissed with costs.⁵

It seems that the Court will not only enlarge publication, upon the proper affidavits, after publication has actually passed, but it will, if a proper case is made, even grant a second commission to examine *950 witnesses, upon being satisfied, by affidavit, that the * party applying, and his solicitor, are ignorant of the contents of the depositions.¹

The order for enlarging publication² is signed and entered by the Master, and a copy of it must then be served, not only upon the other side, but upon the Examiner who took the depositions, and the Clerk of Records and Writs in whose custody the depositions, if taken by commission, are, on or before the day on which publication actually passes.³

This is necessary, as well to authorize the giving out copies of the depositions, and to preclude further examination after the period to which publication has been enlarged, as to authorize the examination of further witnesses.⁴

It is a fixed rule of the Court, that if one of the parties, after publication has passed, obtains an order to enlarge publication, upon the usual affidavit, the other party may not only cross-examine, but may examine at large, even though he has seen and read the former depositions.⁵

Where a cause has been set down for hearing, and publication is en-

⁴ 1 Harr. (ed. Newl.) 289.

⁵ Conethard v. Hasted, 3 Mad. 429.

¹ Turbot v. —, 8 Ves. 315; see also Dingle v. Rowe, Wightw. 99; Cutler v. Cramer, 6 M.d. 254; but see Mineve v. Rowe, 1 Dick. 18

² 24th Ord. 1833.

³ Hinde, 381.

⁴ Ibid.

⁵ Anon., 1 Vern. 253.

larged beyond the day on which the same is set down to be heard, the proper course, if the cause is likely to come on before the depositions are ready, is to apply to the Court for an order to adjourn the hearing for a certain time. An application for this purpose must be made to the Court⁶ upon motion, of which notice has been duly served, and the order made thereon should be served, in the usual manner, upon the adverse solicitor, before the day on which the cause is to be heard, otherwise the cause, when called on, will be struck out of the paper.⁷

Publication being passed, the Examiner or Clerk of Records and Writs, in whose custody the depositions are, is at liberty to permit them to be examined, and to deliver copies of them to the parties.

When an office copy of the depositions taken on behalf of an adverse party is delivered out, a copy of the interrogatories whereon such depositions were taken is always annexed.⁸

SECTION XVII. — *Suppression of Depositions.*

The ground upon which the Court suppressed depositions has been either that the interrogatories upon which they were taken were leading; or that the interrogatories and the depositions taken

* upon them, or the depositions alone, were *scandalous*; or else *951 that some irregularity has occurred in relation to them.¹ A dep-

⁶ 1 Smith's Ch. Pr. 388.

⁷ Hinde, 385, 386.

⁸ Hinde, 395. [If the party taking and filing a deposition does not, before trial, obtain leave to withdraw it, and fails to read it on the trial, the opposite party may introduce it. *Adams v. Russell*, 85 Ill. 284; *Brandon v. Mullenix*, 11 Heisk. 446.]

¹ In such cases the depositions are suppressed prior to the hearing, and the witness will be permitted to be re-examined. *Brown v. Bulkley*, 1 M'Carter, 294, 307, 308; *Van Namee v. Groot*, 40 Vt. 74, 80; *Underhill v. Van Cortlandt*, 2 John. Ch. 345; *Stubbs v. Burwell*, 2 Hen. & M. 536; *Pillow v. Shannon*, 3 Yerger, 508; *Ringgold v. Jones*, 1 Bland, 90; *Perine v. Swaine*, 2 John. Ch. 475; *Hemphill v. Miller*, 16 Ark. 271. It is a fatal defect, if the general interrogatory, "Do you know any thing further," &c., does not appear to be answered. *Richardson v. Golden*, 3 Wash. C. C. 109; *ante*, p. 924, note. So if the deposition is taken before persons not named in the commission. *Banert v. Day*, 3 Wash. C. C. 243. So if all proper interrogatories do not appear to have been answered, on each side, substantially. *Bell v. Davidson*, *ib.* 328; *Nelson v. United States*, 1 Peters C. C. 235. A deposition was rejected because a witness refused to answer a proper question; also because it was in the handwriting of the plaintiff's attorney. *Mosely v. Mosely*, Cam. & Nor. 522. [In *Fulton v. Golden*, 1 Stew. Eq. 37, a deposition of the defendant, taken by the plaintiff, was

suppressed on motion of the latter, for the refusal of the witness to answer proper questions, and to produce papers and books, and for the introduction of matter in his answer not responsive, and for scandal.] Depositions taken without notice will be rejected. *Honore v. Colmesnil*, 1 J. J. Marsh. 325. [And notice cannot be supplied by the commissioner's adjournment to a day fixed. *Palmer v. Hayes*, 8 C. E. Green, 186.] Such depositions taken after argument of the cause, without special order, will be suppressed. *Dangerfield v. Claiborne*, 4 Hen. & M. 397. *Exclusion of a fact not in issue*, may, upon motion, before the hearing, be suppressed, or it may be rejected at the hearing. *Trumbull v. Gibbons*, Halst. Dig. 174; see *Batterson v. Ritchie*, 6 Paige, 390. According to the practice pursued in New York by Chancellor Kent, motions to suppress depositions, although permitted to be made before the hearing, usually resulted, unless the point was very clear, in permitting the evidence to stand *de bene esse*, and reserving the question. 1 Hoff. Ch. Pr. 455. It is not in accordance with the practice of the Court to suppress testimony as incompetent, before the hearing. *Williamson v. Moore*, 1 Barb. S. C. 229; *Brown v. Bulkley*, 1 M'Carter, 307; [nor for impertinence. *Pyncent v. Pyncent*, 3 Atk. 557; *White v. Fennell*, 12 Vt. 112; *Osmond v. Findall*, Jan. 625; *James v. Smith*, 2 Tenn. Ch. 776; *W. James v. Vreeland*, 3 Stew. Eq. 576.] "The question, whether the deposition shall be suppressed," it was

osition may also be suppressed, because a witness has disclosed some matter which has come to his knowledge as solicitor or attorney for the party applying.²

The objection that the interrogatories are leading can scarcely now be taken, as the Examiner himself either puts the questions, or controls those by whom the witnesses are examined.

Formerly, when any valid objection could be taken to the depositions, it was the practice to move for a reference to the Master, and upon his report to move to suppress the depositions. Now that the Master's office is abolished, the proper course would be to move the Court at once, if any objection could be taken, for an order to suppress the depositions.

*952

* SECTION XVIII. — *Re-examination of Witnesses.*

The Court is always desirous that the examination of witnesses should be completed, as much as possible, *uno actu*, and that, whenever it can be accomplished, no opportunity should be afforded, after a witness has once signed his deposition,¹ and "turned his back upon the Examiner,"² of tampering with him, and inducing him to retract or contradict or explain away what he has stated in his first examination upon a second; but, notwithstanding this unwillingness to allow a second examination of the same witness, there are cases in which, if justice requires that a second examination of the same witnesses should take place, an order will be made to permit it.³

remarked by the Chancellor, in *Underhill v. Van Cortlandt*, 2 John. Ch. 345. "is a matter of discretion; and in *Hammond's Case*, Dickens, 50. and in *Debrox's Case*, cited in 1 P. Wms. 414, the deposition of a witness examined after publication was admitted in the one case, because the opposite party had cross-examined; and in the other, because the testimony would otherwise have been lost for ever." A deposition having been taken after a cause was set down for hearing in the Superior Court of Chancery, and no objection having been made in that Court, the Court of Appeals will presume that good cause was shown for admitting it. *Stubbs v. Burwell*, 2 Hen. & M. 536; *Pillow v. Shannon*, 3 Yerger, 508. Exceptions to the reading of depositions taken by virtue of commissions, issued after the cause for which they may be required is set down for hearing, may be made at any time before the cause is gone into, when called; after which such exceptions would come too late. *Foster v. Sutton*, 4 Hen. & M. 401; see further as to irregularities in taking, &c., depositions, and when they will or will not cause their rejection, *Gresley Eq. Ev.* 147-154; *Cravens v. Harrison*, 3 Litt. 92; *Clarke v. Tinsley*, 4 Rand. 250. A party is too late to move to suppress a deposition for irregularity after having ex-

hibited articles to discredit the witness. *Malone v. Morris*, 2 Moll. 324. [A motion to suppress depositions for irregularity in the notarial certificate comes too late after they have been on file for three years. *Bank of Danville v. Travers*, 4 Biss. 507. And see *Tadowe v. Esher*, 56 Ind. 443.]

² *Sandford v. Remington*, 2 Ves. J. 189; *Bernard v. Papineau*, 3 De G. & Sm. 498; *Attorney-General v. Dew*, 3 De G. & Sm. 493.

¹ *Beames's Ord.* 74.

³ *Lord Abergavenny v. Powell*, 1 Mer. 130.

³ The re-examination of a witness in Chancery rests in discretion, and though granted under peculiar circumstances, is against the ordinary practice of that Court. *Beach v. Fulton Bank*, 3 Wend. 573; *Phillips v. Thompson*, 1 John. Ch. 140. A witness, examined while incompetent by reason of interest, may be re-examined after his competency is restored. *Haddix v. Haddix*, 5 Litt. 202. But a party will not be allowed to re-examine a witness whose memory has been refreshed since his examination closed, except as to documentary evidence. *Noel v. Fitzgerald*, 1 Hogan, 135; see *Byrne v. Frese*, 1 Moll. 396. Nor can a witness, after a hearing and final decree in a cause, be re-exam-

Thus, where the whole depositions of the witnesses in a cause are suppressed, on account of some irregularity in the conduct of the cause, or in the examination of the witnesses, the Court will, when it is satisfied that the irregularity has been accidental and unintentional, direct the witnesses to be re-examined and cross-examined upon the original interrogatories.⁴

The cases, however, in which the Court will permit the re-examination of the same witnesses after publication, are not confined to those in which the original depositions have been suppressed for irregularity; it has, as we have seen, permitted it to be done in a special case, where the depositions had been suppressed, because the interrogatories upon which they were taken were leading.⁵

But, even where the original depositions have not been suppressed, the Court has frequently made an order, after publication, for the re-examination of witnesses, for the purpose of proving some fact which has been omitted to be proved upon the original deposition. This is frequently done upon inquiries in the Master's office, under decrees;¹ and even before the cause has been heard, the Court will entertain applications for the purpose of allowing fresh interrogatories to be administered to witnesses who have been already examined in the cause.²

In a case before Lord Erskine,³ an order was made, on the application of the witness himself, after publication, for his re-examination as to a point, upon which it appeared, by his affidavit, he had made a mistake. The order, however, was confined to permit his re-examination as to that particular point only, and it directed that the other side should have an opportunity of cross-examining him.

It is to be remarked, that the Court will not only entertain an application for this purpose, after publication has taken place in the cause, but will even at the hearing, where the defect in the evidence of a particular witness has not been discovered before, permit the cause to stand over, to enable the party to make an application to the Court for permission to re-examine the witness.⁴

Sometimes, in cases of this nature, the Court, instead of having the

ined to explain or correct his testimony taken on his examination in chief, and read at the hearing, unless under very special circumstances. *Gray v. Murray*, 4 John. Ch. 412; *Hallock v. Smith*, 4 John. Ch. 649; *Sterry v. Arden*, 1 *ib.* 62; *Newman v. Kendall*, 2 A. K. Marsh. 236.

⁴ Fresh interrogatories and re-examination have been permitted after publication, where depositions have been suppressed from the interrogatories being leading, or for irregularity, or where it has been discovered that a proper release has not been given, to make a witness competent. *Wood v. Mann*, 2 Sumner, 316; see *Healey v. Jagger*, 3 Sim. 494;

Chameau v. Riley, 6 Beav. 419; *Shaw v. Lindsey*, 15 Ves. 380; *Attorney-General v. Nethercote*, 9 Sim. 341.

⁵ See *Spence v. Allen*, *Proc. in Chan.* 40; 1 Eq. Ca. Ab. 232; *Lord Arundel v. Park*, Amb. 585; *Hinde*, 398.

¹ See *post*, "Proceedings in Master's office."

² *Cox v. Allingham*, Jac. 337; *Turner v. Trelawcy*, 9 Sim. 451; *Reese v. Price*, 1 Mell. 396; *Potts v. Tates*, Youngs, 343; *Bridge v. Bridge*, 6 Sim. 362.

³ *Kirk v. Kirk*, 14 Ves. 286.

⁴ *Cox v. Allingham*, Jac. 337.

witness re-examined, will, if the mistake involves only a verbal alteration, permit the original deposition to be amended.⁵

But before the Court makes an order, either for the re-examination of a witness, or for amending a deposition after publication, it will examine very strictly into the circumstances of the case; and if, upon such examination, it is not satisfied that the error has been wholly accidental, or the effect of mistake or omission either on the part of the witness or of the Examiner, it will refuse the application.⁶ And, in general, before making an order for the amending of the deposition, it will, unless the case is very clear, examine both the witness and the Examiner.⁷

In all the cases where a correction has been permitted in the deposition itself, a direction that the witness should re-swear his depositions after the alteration, has formed part of the order.

It was stated by Lord Hardwicke, in *Bishop v. Church*,⁸ that the Court had sometimes directed a witness to attend personally when it had a doubt; but in that case the witness, having spoken
*954 * so generally in his depositions as to leave a doubt in his mind upon a particular point, he refused to proceed in the cause till the witness had been examined upon interrogatories before the Master.

An order to re-examine a witness, for the purpose of supplying a defect in his former examination, will not, in general, be made before publication has passed in the cause; the reason of which is the difficulty the Court, without seeing the depositions, would have in coming to a correct conclusion as to the propriety of granting or refusing the application.¹

The reader is reminded here, that where the examination of a witness is before an Examiner, either party may, up to the period of publication, exhibit new interrogatories for the further examination of the same or of other witnesses there, without an order to warrant it; but that when a commission is taken out, the practice has hitherto been different.² It is, however, to be here observed, that the power of exhibiting additional interrogatories for the further examination of a witness already examined before the Examiner is confined to the period of a witness being under examination. If the examination of the witness has been closed, and he has perfected and signed his deposition (although he may be permitted to perfect his deposition in some circumstances of time or the like, or by correcting a sum upon view of any deed, book,

⁵ *Rowley v. Ridley*, 1 Cox, 281; 2 Dick. 687, S. C.; *Griells v. Gansell*, 2 P. Wms. 646. After publication passed and the cause set down for hearing, the deposition of a witness was allowed to be amended on examination of the witness by the Court, he being aged and very deaf, and a mistake made in taking down his testimony by the Examiner. *Denton v. Jackson*, 1 John. Ch. 526.

⁶ *Ingram v. Mitchell*, 5 Ves. 299.

⁷ *Ibid.*; *Griells v. Gansell*, 2 P. Wms. 646;

Darling v. Staniford, 1 Dick. 358; *Penderel v. Penderel*, Kel. 25.

⁸ 2 Ves. S. 100.

¹ *Lord Abergavenny v. Powell*, 1 Mer. 131; *Batt v. Birch*, 5 Mad. 66; *Asbee v. Shipley*, *ib.* 467; *Randall v. Richford*, 1 Cha. Ca. 25; but see *Kirk v. Kirk*, 13 Ves. 280; *Stanney v. Walmsley*, 1 M. & C. 361.

² *Ante*, pp. 924, 925; see also *Andrews v. Brown*, 1 Eq. Ca. Ab. 929.

or writing, to be shown to the Examiner).³ he cannot be again examined on behalf of the party producing him without an order of the Court; and it seems that such order cannot be obtained, unless upon affidavit that the witness, if he has been cross-examined, has not communicated the effect of his cross-examination to the party examining in chief.⁴ Nor will such an order be made, at least before publication, for the purpose of permitting a witness to alter or explain what he has stated upon his first examination, although he may be re-examined as to different matter.⁵

But although a witness, after he has closed his examination, cannot be re-examined, on behalf of the party producing him, without an order, he may, if he has been examined before the Examiner, be examined again by the adverse party without an order.⁶ He is, in fact, in such case, a new witness for the other party proposing to re-examine him, and may not only be examined by such party, but may be cross-examined by the party originally producing him. The same rule will also apply to examinations under a commission, where a witness who has been examined by one party may afterwards * be examined *955 by the other party, in chief, as his witness, without an order, provided such examination be upon interrogatories which have been produced before the commissioners were sworn. When it is necessary to examine him upon fresh interrogatories, an order to that effect must, as we have seen, be first obtained.¹ Thus, where a motion was made on the part of the defendant, that he might be at liberty to exhibit fresh interrogatories for the examination of the plaintiff's witnesses in the suit, on the ground that, after the witnesses had been examined, it was discovered that they were interested, Sir Thomas Plumer V. C. made the order,² which was afterwards confirmed on appeal.³

It is to be observed, also, that in the above case, a new commission was necessary for the purpose of taking the examination of the witnesses to the interrogatory. But even if no new commission had been required, it would have been necessary to have obtained an order for the exhibition of the interrogatory before the Examiner; for, as we have seen before, the rule of the Court is, that if a witness has been examined by commissioners in the country, he cannot be examined again before the Examiner, without a special order.⁴

It is to be mentioned here, that where the Court makes an order for permitting the re-examination of witnesses, it is always coupled with a direction that the other side shall have liberty to cross-examine them,⁵ and that the proceedings upon such re-examination are subject to the same rules as those upon ordinary examination. In *Bridge v. Bridge*,⁶

³ *Ante*, p. 929.

⁴ *Cockerell v. Cholmeley*, 3 Sim. 313.

⁵ *Turner v. Trelawney*, 9 Sim. 453.

⁶ *Vaughan v. Worrall*, 2 Mad. 322.

¹ *Ante*, pp. 924, 925.

² *Vaughan v. Worrall*, *ubi supra*.

³ 2 Swanst. 395; and see *Selway v. Chappell*, 12 Sim. 1052.

⁴ See *Pearson v. Rowland*, 3 Swanst. 266, n.

⁵ See order in *Cox v. Allington*, Jac. 345; *Stanley v. Walmsley*, 1 M. & C. 261.

⁶ 6 Sim. 552.

however, the V. C. of England, upon making an order for re-examination of a witness to part of an interrogatory (his deposition as to which the Examiner had omitted to take down), made it part of the order, "that publication should pass immediately after the examination or cross-examination (if any) should be concluded, and that the cause should be adjourned, with liberty to the plaintiff to apply to have it restored to the paper when publication should have passed."

SECTION XIX. — *Examination of Witnesses after Publication.*

After the depositions of witnesses have been published and read by the parties, a new witness cannot be examined without an order *956 of the Court, which will not be granted unless warranted by * special circumstances,¹ except for the purpose of proving an exhibit *vivâ voce* at the hearing, in which case, as we have seen, an order for the examination of the witness may be obtained on motion or petition of course.²

An order for the examination of a fresh witness after publication, except it be for the purpose of discrediting a witness already examined, is not obtained without great difficulty.³ Cases, however, do frequently occur, in which the Courts will allow the examination of witnesses after the depositions have been seen; and even at the hearing of the cause, leave has been given to the parties to examine witnesses to facts which have been omitted to be proved in the ordinary course. This, as we have seen, has been frequently done in the case of wills disposing of real estates,⁴ but the practice is not confined to those cases, and other cases have already been mentioned in which the Court has permitted such examinations as to different points, either by order made at the hearing, or upon petition or motion, supported by proper affidavits.⁵ In addition to which it may be stated, that an order for this purpose may be obtained, even where the same point has been examined to before.⁶

In *Newland v. Horsman*,⁷ an order was made for the examination of witnesses abroad, upon new matter stated at the hearing, and not in issue before, upon terms of not delaying an action directed to be tried at Law; and in *Gage v. Hunter*,⁸ leave was given, after publication, to

¹ *Willan v. Willan*, 19 Ves. 590-592; *Hamersley v. Lambert*, 2 John. Ch. 432. It seems that new testimony may be taken after publication, to facts and conversations, occurring after the original cause is at issue, and publication has passed. The Court may, in the exercise of a sound discretion, allow the introduction of newly-discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But it will not exercise this discretion to let in

merely corroborative testimony. *Wood v. Mann*, 2 Sumner, 316.

² *Ante*, p. 881; see *Wood v. Mann*, 2 Sumner, 316.

³ *Willan v. Willan*, *ubi supra*.

⁴ *Ante*, p. 858.

⁵ *Ante*, p. 858; *Clarke v. Jennings*, 1 Anst. 173; *Gage v. Hunter*, 1 Dick. 49; [*Mulock v. Mulock*, 1 Stew. Eq. 15.]

⁶ *Coley v. Coley*, 2 Y. & J. 44; *Greenwood v. Parsons*, 2 Sim. 229.

⁷ 2 Cha. Ca. 74.

⁸ 1 Dick. 49.

examine a witness as to a particular fact *vice versa*, the defendant being at liberty to cross-examine.⁹

It is to be observed, that, in general, if leave is given to examine a witness after publication, and before hearing, a Master is sometimes ordered to settle the interrogatories, that they may be confined to such points only as were omitted before, and as are now ordered to be examined unto.¹⁰ This, however, is not always done; and when the object is merely to prove an exhibit, and the interrogatory was before filed, it is unnecessary.

Though, by the orders of the Court, the parties are to make their proof before publication and hearing of the cause, yet after *hearing, if there be a reference to the Master for stating an account or such like matter, and he shall find any particular point or circumstance needful to ground his report upon, which were not fully proved, nor could be properly examined to before the Master, he may direct the parties to draw interrogatories to such points or circumstances only, and the witnesses are usually examined before the Master upon such interrogatories, if the witness be or reside within *twenty* miles of London, but, if further off, and the parties desire it, he may by certificate, direct a commission into the country.¹

The most usual cases in which witnesses are required to be examined after publication, are those in which their testimony is required for the purpose of showing that a witness already examined is unworthy of credit.² An examination for this purpose is not, however, a matter of course; it must have the sanction of an order, the leading step towards obtaining which, is the preparing or filing of objections, or "articles" in the Examiner's office (if the depositions impeached be taken in town), or in the Record and Writ (Clerks' office (where the depositions have been taken by commission)).³

These articles may be in the following form, viz:—

Articles exhibited by A. B., complainant in a certain cause, now depending and at issue in the High Court of Chancery, wherein the said A. B. is plaintiff, and C. D. defendant; to discredit the testimony of E. F., G. H., and J. K., three witnesses examined [before Thomas Hall Plumer, Esquire, one of the Masters of the Court],⁴ on the part and behalf of the said defendant.

1st. The said A. B. doth charge and allege, that the said E. F. hath.

⁹ See *Holles v. Carr*, 3 Swanst. 638, where a similar order appears to have been made upon consent.

¹⁰ 1 Harr. (ed. Newl.) 274.

¹ 1 Harr. (ed. Newl.) 274.

² Although the usual time for examining as to the credit of a witness, is after publication, it seems that it may be done before, provided an order for that purpose be obtained. *Mill v. Mill*, 12 Ves. 406. A witness may be examined to the mere credit of the other witnesses, whose depositions have been already taken and published in the cause, but he will not be allowed to be examined, to prove or disprove any fact, material to the

merits of the case. *Wood v. Mann*, 2 S. & P. 316; *Gresley Eq. Ev.* (Am. ed.) 139-144; *Jenkins v. Hindes*, 5 Stow. 342, 343; *Troup v. Sherwood*, 3 John Ch. 568.

³ *Hinde*, 374.

⁴ If the witnesses have been examined by commission, the following words are to be substituted for those which precede, "by virtue of a commission, issued from the said Court, to N. Y. and others, directed for the examination of witnesses in the said cause upon certain interrogatories published before them, for that purpose, and which said witnesses were examined in the said cause." *Hinde*, 375.

since his examination in the said cause, owned and acknowledged that he is to receive or be paid, and also, that he doth expect, a considerable reward, gratuity, recompense, or allowance, from the said defendant, in case the said defendant recovers in the said cause, or the said cause be determined in his favor, and that the said E. F. is to gain or lose by the event of the said cause

2d. The said A. B. doth charge and allege, that the said G. H. *958 * and J. K. are persons of bad morals, and of evil fame and character, and that they are generally reputed and esteemed so to be; and that the said G. H. and J. K. are persons who have no regard for the nature and consequences of an oath; and that they are persons whose testimony is not to be credited or believed.¹

The exhibition of these articles is rendered necessary by one of Lord Clarendon's Orders,² which directs, that the Examiner shall not examine any witnesses to invalidate the credit of other witnesses, but by *special order of the Court, which is sparingly to be granted, and upon exceptions first put into writing, and filed with the Examiner, without fee, and notice thereof given to the adverse party or his clerk, together with a true copy of the said exceptions, at the charge of the party so examining.*

The object for which these articles are required, is to give notice to the party whose witnesses are to be objected to, of the ground of the objection, in order that he may be prepared to meet it. Without some notice of this description, it would be impossible for the other party to cross-examine the witnesses to be adduced, for the purpose of discrediting the character of his witness; for as the rule of the Court is, that you cannot examine to any points not put in issue by the pleadings, and as the character of a witness could not by that means be put in issue, it would be impossible that the party should know, that the witnesses examined by his adversary were for the purpose of discrediting his own. For this reason, the Court not only requires notice to be given of an intention to discredit a witness, in the form of articles as above stated, but it considers all examinations, as to the character of witnesses, without the previous exhibition of such articles, as impertinent, and will order them, and the interrogatories upon which they are taken, to be suppressed.³

The articles having been filed, a certificate thereof must be procured from the Examiner, or from the Record and Writ Clerk with whom they are filed, and an application must be made to the Court, grounded upon the certificate, for leave to the party applying to examine witnesses thereon, and if necessary for a commission, to take their depositions in the country.⁴

Although by Lord Clarendon's Order, above referred to,⁵ an order

¹ Hinde, 376.

² Beames's Ord. 187.

³ *N ll v. Mill*, 12 Ves. 406.

⁴ Hinde, 377.

⁵ Beames's Ord. 187.

for leave to examine witnesses to credit, is termed a *special order*, it is usually granted as a matter of course;⁶ and may be obtained either by motion, or by petition at the Rolls, without *affidavit, *959 upon the certificate of articles being filed.¹ It seems, however, that if made by motion, it should be upon notice;² and that if the application is made after considerable delay, and the hearing of the cause will thereby be deferred, the Court will refuse the order, or qualify it, by directing that it shall not delay the hearing of the cause.³ There is, however, no precise time within which the application must be made.⁴

Where a commission is required, it has generally been directed to the same commissioners as were named in the former commission,⁵ but a commission will not be directed for the purpose of examining witnesses abroad, for which purpose, Ireland is considered as a foreign part, unless in case of great emergency; and where it is sworn, that no person in England can prove any thing as to the witness's credit.⁶ If a party, who has obtained a commission to examine a witness to credit, delays the execution of it till after the decree, he will be made to pay the costs.⁷ The method of proceeding under an order of this nature, whether before the Examiner or under a commission, is precisely similar to that pointed out in ordinary cases.

The order usually directs, that the party applying be at liberty to examine witnesses, "as to credit, and as to such particular facts only as are not material to what is in issue in the cause;"⁸ and under it the party is at liberty to examine witnesses, not only to the general character of the witness whose credit is impeached, but also for the purpose of contradicting particular facts sworn to by the witness, provided such facts are not material to the issue in the cause,⁹ as in *Purcell v. M'Namara*,¹⁰ where the matter to be examined to was, whether the witness had not been a woollendrapery and insolvent, which, upon his cross-examination, he had denied; or in *Chivers v. Bar*,¹¹ where the articles charged, that though the witness, in her deposition for the plaintiff, had deposed that she lived with him as his milkmaid in 1775, she did not live with him in that or any other capacity till 1786, and that she had confessed to that effect, and that she had been prevailed upon so to depose at the instigation of the plaintiff's tithing-man, who was another witness for the plaintiff, and for a reward. In *Ambrosio*

* v. *Francia*,¹ the articles charged that one of the witnesses who *960 had been examined for a defendant, to nine out of seventeen in-

⁶ *Russell v. Atkinson*, 2 Dick. 532.

¹ *Hinde*, 377; *Watmore v. Dickson*, 2 V. & B. 267.

² *Ibid.*

³ *White v. Fussell*, 19 Ves. 127.

⁴ *Piggott v. Croxhall*, 1 S. & S. 467.

⁵ *Wood v. Hammerton*, 9 Ves. 145.

⁶ *Callaghan v. Rochfort*, 3 Atk. 643.

⁷ *White v. Fussell*, 1 V. & B. 151.

⁸ *Purcell v. M'Namara*, 8 Ves. 324; *Wood v. Hammerton*, 9 Ves. 145; *Piggott v. Croxhall*, 1 S. & S. 467.

⁹ This proceeding may, ordinarily, be taken after publication and before hearing, but the interrogatories must be so shaped, as to prevent the party, under color of an examination as to credit, from procuring testimony to overcome that already taken and published in the cause. *Gass v. Stinson*, 2 Sumner, 605; *Wood v. Mann*, 2 Sumner, 316; *Troop v. Sherwood*, 3 John. Ch. 558.

¹⁰ *Ubi supra*.

¹¹ *Scacc.*; cited 8 Ves. 324.

¹ 5th of August, 1746; cited *ibid.*

terrogatories, by the description of Mary White, widow, was the wife of the defendant, and known to be such at the time of the examination, suggested that if she was not his wife, she lived with him, and an improper intimacy subsisted between them, and the order was that the plaintiff should be at liberty to examine to that fact, and also to the competence and credit of the witness.

It seems, also, that witnesses may be examined to discredit other witnesses, by proving that previously to their examination, they had made declarations contrary to their depositions.²

But, although the order permits the examination of witnesses to particular facts as well as to general credit, for the purpose of contradicting a witness previously examined, such facts must be strictly confined to those *not in issue in the cause*;³ and you can only, in examining as to the credit of the witness, put general questions, as "whether you would believe the witness upon his oath."⁴ It is not competent, even at Law, to ask the ground of that opinion, but only the general question is permitted.⁵ The regular mode of examining into general character, is to inquire of the witnesses whether they have the means of knowing the former witness's general character, and whether upon such knowledge they would believe him upon his oath.⁶

It is to be noticed, that although articles may be exhibited as to the *credit* of witnesses after publication, they are never allowed as to their *competency*, because it is said this might have been examined to and inquired into upon the examination;⁷ and it is for this purpose that a notice of the witness's name and place of abode is left with the *961 solicitor of the opposite party before examination; *and that, under the old practice, the witness himself was produced.¹

Interrogatories adapted to the inquiry intended, must be drawn and filed in the same manner as upon examination in chief, and the witnesses examined thereon, either by commission or at the Examiner's

² Piggott v. Croxhall, 4 S. & S. 477.

³ Anon., 3 V. & B. 94; see Troup v. Sherwood, 3 John. Ch. 558, and next note above; Jenkins v. Eldredge, 3 Story C. C. 312, 313; Wood v. Mann, 2 Sumner, 316.

⁴ Anon., 3 V. & B. 94. Upon such examination, the rule of evidence, as to impeaching the credit of witnesses, is the same in Equity as at Law. The inquiry must be general as to the general character of the witness for veracity. Troup v. Sherwood, 3 John. Ch. 558. The practice in reference to the extent of the inquiry that may be made respecting the character of the witness to impeach his credit, and the questions that may be put, is not uniform in the American States. See 1 Greenl. Ev. § 461; Anon., 1 Hill (S. C.), 251, 258, 259; Hume v. Scott, 3 A. K. Marsh. 261, 262; State v. Boswell, 2 Dev. Law, 209, 210; People v. Mather, 4 Wend. 257, 258; Phillips v. Kingfield, 19 Maine, 375; Gass v. Stinson, 2 Sumner, 610; Wike v. Lightner, 11 Serg. & R. 198; 1 Phil. Ev. (Cowen & Hill's ed. 1839) 291-293, notes

(530) (531); 2 *id.* (Cowen & Hill's notes) p. 763-770.

⁵ Carlos v. Brook, 10 Ves. 49, 50.

⁶ Phil. & Amos, 925. The regular mode of examining into the general reputation is to inquire of the witness, whether he knows the general reputation of the person in question, among his neighbours; and what that reputation is, whether it is good or whether it is bad. In the English Courts the course is further to inquire, whether from such knowledge, the witness would believe that person upon his oath. In the American Courts the same course has been pursued; [Ford v. Ford, 7 Humph. 92;] but its propriety has been questioned, and perhaps the weight of authority is now against permitting the witness to testify to his own opinion. 1 Greenl. Ev. § 461; Gass v. Stinson, 2 Sumner, 610; Kimmel v. Kimmel, 3 Serg. & R. 337, 338; Phillips v. Kingfield, 19 Maine, 375.

⁷ Callaghan v. Rochfort, 3 Atk. 643.

¹ Hinde, 375.

office. The other party may cross-examine those witnesses, as to their means of knowledge and the grounds of their opinion, or may attack their general character, and, by fresh evidence, support the character of his own witness.²

The rules as to passing publication, &c., are the same, *mutatis mutandis*, as those to be observed in ordinary cases.

Where an objection is established to the *competency* of a witness, his deposition cannot be read;³ but, where the objection is only to his credit, it must be read and left to the consideration of the Court on the whole evidence of the case.⁴

² Hinde, 375, 377. If the witness be impeached, evidence of his general good character has been held admissible. *Richmond v. Richmond*, 10 Yerger, 343; 1 Greenl. Ev. § 461; see *People v. Davis*, 21 Wend. 309.

³ The deposition of a disinterested person who afterwards becomes interested, may be read. *Hitchcock v. Skinner*, 1 H&C. Ch. 21.

⁴ *Dixon v. Parker*, 2 Ves. 219, 220.

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